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WEEKLY NOTES OF CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF PENNSYLVANIA, SUPERIOR COURT OF PENNSYLVANIA, THE COUNTY COURTS OF PHILADELPHIA, AND THE UNITED STATES DISTRICT AND CIRCUIT COURTS FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BY

MEMBERS OF THE BAR.

VOLUME XLIV.

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ERRATA.

SERGEANT *v.* FLECKENSTEIN, p. 115, col. 2, sentence commencing on 17th line should read, James Wiley purchased the property on November 2, 1896, at a sheriff's sale *subject to the rent.*

IN RE MELON STREET, p. 361, col. 2, line 14 from foot of page, error the *making absolute* of the rules.

HAINES *v.* FRANKLIN, p. 421, col. 1, line 10 from foot of page, for "George H. North," read *H. M. North.*

CONWAY *v.* SALTER BUILDING AND LOAN ASSOCIATION, p. 440, col. 2, lines 19 and 20, for "priority" read "*privity*"; col. 1, line 27 and 32, and col. 2, line 33 for "1879" read "*1878.*"

BOYER'S ESTATE, p. 529, col. 1, line 28, read *titled to "the entire actual income" of an au-*, in place of "titled 'Life Tenant and Remainderman,' in 34th."

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WEEKLY NOTES OF CASES.

VOL. XLIV.] *FRIDAY, APRIL 7, 1899.* [NO. 1.

Supreme Court.

Jan. '98, 161. Supreme Court. February 6, 1899.

Crawford v. Pyle.

Guaranty—Agent—Evidence—Statute of frauds.

Where a guarantor is interested in the debt guaranteed, an oral guarantee will bind him.

One who holds a mortgage with a blank assignment signed by the mortgagee, and who sells it to a third person, may make a binding guarantee of the payment of said mortgage by parol.

Where there is evidence that an employé of the defendants, in soliciting the plaintiff to purchase securities offered for sale by them, said that the defendants would guarantee such securities, that the defendants subsequently guaranteed to the plaintiff other securities of the same character, and that after default upon the first securities, the plaintiff wrote to the defendants, asserting their guaranty of them, to which assertion no reply was made, there is evidence to submit to the jury from which they may find that a guarantee was made by the defendants through their agent.

Where payment of a mortgage has been guaranteed to an assignee thereof, who is, for the purpose of foreclosure made the plaintiff in the summons, and the property is bought in in his name, the legal plaintiff being, however, the mortgagee, the assignee is not estopped from showing that she knew nothing of the foreclosure, that she did not purchase and did not authorize anyone to purchase for her, but that her only connection with the matter was that the guarantors having asked for the mortgage for the purpose of collecting the sum due upon it, she, assuming they had a right to it for that purpose, gave it to them; and if she establish this, the record of the foreclosure will not affect her rights as against the guarantors.

Appeal of Abner H. Pyle and Thomas B. Brown, trading as Pyle & Brown, from the judgment of the Common Pleas for Chester County, in an action of assumpsit in which H. Mary Crawford was plaintiff.

This was an action upon an alleged guarantee by the defendants of the payment of a certain mortgage given by J. A. and Calista Carlisle to the Southern Kansas Mortgage Company, and by it assigned to the plaintiff in this case.

On the trial, before BUTLER, J., the plaintiff gave evidence to the following effect. The defendants were dealers in Kansas bonds and mortgages. In 1889, one Sumner Whitson was in their employment and assisted them in the sale of their securities. In 1889, Whitson came to the house of the plaintiff, from Pyle & Brown, and endeavored to sell her certain Kansas mortgages. She told him she knew nothing about mortgages, whereupon he told her those offered were as good as gold, that "we," Pyle & Brown, would guarantee the mortgages. In pursuance of this interview the plaintiff wrote to Pyle & Brown, received a list of mortgages for sale, selected two and went to Pyle & Brown and paid for them; a conversation arose about other Kansas securities, which Pyle urged her to buy, and to sell other securities for the purpose of buying them, saying that the firm would guarantee them. Default was made on one of the mortgages, J. A. Carlisle and Calista Carlisle, to the Southern Kansas Mortgage Company, for $1600, No. 1860, after which the plaintiff wrote to the defendants asserting their guarantee and received no reply. Brown was president of the Southern Kansas Mortgage Company. The defendants denied that they ever guaranteed the mortgage or had given Whitson authority to guarantee for them, and gave in evidence the following receipt:

"10-12-'91.—Received from H. Mary Crawford, per Sumner Whitson, for collection loans, No. 1,097, Daniel Ellington, $1,600; No. 1,860, J. A. Carlisle, $1,600; interest on Ellington loan to be collected to 1-1-'92, but if not paid until after that time until date of payment; interest on Carlisle loan to be collected until time of payment.

"PYLE & BROWN, W."

And a certified copy of the record of a proceeding in the district Court of Kingman county, Kansas, entitled, H. Mary Crawford *v.* John A. Carlisle, Calista M. Carlisle and John P. Freeze, to foreclosure the aforesaid mortgage, which record showed a judgment in favor of plaintiff, execution, and a sale thereunder to H. Mary Crawford, for the sum of $2630, and a receipt to the sheriff signed, "H. Mary Crawford," for $2543.70, "amount credited on judgment . . . . being the amount of purchase price premises, less costs."

The plaintiff in rebuttal testified under objection, that she had never signed a receipt such as the paper in the copy of record purported to be a copy of (first assignment of error); that she never authorized such a receipt to be signed for her; that Brown sent for the mortgage papers and she gave them to enable the defendants to, as she supposed, secure themselves; that she never authorized them to proceed on her behalf.

The Court charged that, "if the defendants made the contract or guarantee alleged, the foreclosure proceedings did not bind the plaintiff as against the defendants, unless they were authorized to buy in for the plaintiff, that otherwise it was their duty to collect or to pay, and submitted

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to the jury the questions, whether a guarantee were made and whether the plaintiff authorized the defendants to cause the land to be bought in for her.

Verdict for plaintiff, $2112.06, and judgment thereon. The defendants took this appeal, and assigned as error, inter alia, the admission of the testimony of the plaintiff that she had not signed or authorized the signing of the receipt to the sheriff, and the submission of the two questions before set out.

Thomas W. Pierce and *Alfred P. Reid*, for appellants.

There was no evidence of a guarantee sufficient to submit to the jury. It was no part of Whitson's business to bind his employers by a guarantee. To hold a principal for the act of his agent, the agency and its extent must be proved, and that the act was done during the agency and within the scope.

Hays *v.* Lynn, 7 Watts, 524.
Moore's Exec'rs *v.* Patterson, 28 Pa. 505.
Hough *v.* Doyle, 4 Rawle, 291.
Seiple *v.* Irwin, 30 Pa. 513.
Hannay *v.* Stewart, 6 Watts, 487.

But even if Whitson could guarantee in the name of the defendants, the alleged guarantee would not be binding, because not in writing. The assignment of a bond is not a guarantee.

McNamara *v.* Lloyd, 19 Pa. 130.
Flynn *v.* Allen, 57 Id. 482.

A contract of guarantee must be in writing and the fact that a consideration moves to the guarantor, does not take the case out of the statute of frauds. if the original promisor remains liable, and the guarantor's only liability arises out of his promise.

Williams's Saunders, 211, note.
Nugent *v.* Wolfe, 111 Pa. 481.
Dougherty *v.* Bash, 167 Id. 429.
Maule *v.* Bucknell, 50 Id. 54.

The collection receipt was conclusive that the mortgage was given to the defendants to collect as agents for the plaintiff, and could not be contradicted by parol.

Connellogue *v.* English, 8 W. & S. 11.
Roth *v.* Miller, 15 S. & R. 100.
Miller *v.* Fichthorn, 31 Pa. 252.
Fox et al. *v.* Foster, 4 Id. 119.
Cummings *v.* Antes, 19 Id. 287.
Edelman *v.* Yakel, 27 Id. 26.
Maule *v.* Pleiss, 6 W. & S. 381.
Leebrick *v.* Lyter, 3 W. & S. 365.
Lloyd *v.* Farrell, 48 Pa. 73.

This collection receipt meant that whatever money was collected on this loan by the defendants was to be paid to the plaintiff. It meant that the defendants were, if possible, to make the money without resorting to the lands of Carlisle bound by the plaintiff's mortgage, but if they could not do this, in the absence of other instructions from the plaintiff, it was the duty of the defendants to cause this land to be sold by the sheriff on the plaintiff's judgment, and to not allow it to be knocked down at the sheriff's sale to any one else than the plaintiff, at less than her claim with interest and costs.

W. S. Harris, for appellee.

Whether Whitson had express authority to guarantee or not could make no difference.

Where a servant sells a horse, and without authority, warrants him, the master receiving the price, though ignorant of the warranty, is bound by it.

Mundorff *v.* Wickersham, 63 Pa. 87.
Benjamin *v.* Benjamin, 39 Am. Dec. 385.

The defendants below would take the fruits of the contract made by Whitson charged with the burden of the guarantee.

Keough *v.* Leslie, 92 Pa. 424.
McNeile *v.* Cridland, 168 Id. 16.
Wheeler & Wilson Mfg. Co. *v.* Aughey, 144 Id. 398.

The receipt the other side sent the plaintiff when they received her securities is not a contract.

A receipt is on the same basis as an oral admission and is open to contradiction, explanation or correction, and may be shown to have been given under a mistake of fact or law.

Russell *v.* Church, 65 Pa. 9.
Stephen's Digest of Ev., 162, note 2.

If, however, this receipt is construed to be a contract empowering the defendants to collect the money for the plaintiff, it would not, by reason thereof, empower them to buy the land and substitute it for the money without further authority.

McCulloch *v.* McKee, 16 Pa. 289.
Martin *v.* U. S., 15 Am. Dec. 129.

The receipt to the sheriff having been forged, the plaintiff being a stranger to the act in Kansas, could show that fact and the question of fraud and forgery not having been adjudicated in that action, the plaintiff is not precluded from raising them, whether she was a party to it or not.

Otterson *v.* Middleton, 102 Pa. 78.
Jackson *v.* Summerville, 13 Id. 368.
Cochran *v.* Eldridge, 49 Id. 369.

March 13, 1899. DEAN, J. The defendants, in the year 1889, carried on in West Chester the business of selling Kansas bonds and mortgages to investors. The plaintiff, Mrs. Crawford, lived at Atglen, a short distance from West Chester; she was a woman of some means, which fact was known to defendants, although they had no personal acquaintance with her; the family of their chief clerk, Sumner Whitson, also resided in Atglen, and plaintiff had an acquaintance with him. In the latter part of October, 1889, defendants

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sent Whitson, their clerk, to Mrs. Crawford, to solicit her to purchase Kansas mortgage bonds. When he called upon her, it was as the agent of defendants, to make sale of mortgages, then in their possession, and of which they were ostensibly the owners. He showed to her Kansas bonds and mortgages, and praised their merits; she sums up the interview thus: "Well, when he showed them to me, I told him I didn't know anything about a mortgage; I would have to depend upon their words for the loans or mortgages, and he was very enthusiastic over it; he told me, that they were as good as gold, and that they would guarantee them, and there was a person present who asked, if he knew what he was talking about, and he said he did, for Thomas Brown was then in Kansas. . . . . I told him I was not prepared to take at that time." About ten days after, plaintiff wrote to defendants for a list of the loans Whitson had exhibited to her, and they sent it; she selected two mortgages with accompanying coupon bonds, one on land in Kansas, Carlisle mortgagor, in sum of $1600, the other on land in same State, in which Ellington was mortgagor, in a like sum, each bearing interest at 7 per cent. They were to the Southern Kansas Mortgage Company, as mortgagee, and had endorsed on them an assignment in blank by the company. The plaintiff called upon defendants at their office in West Chester, November 7 following, paid over her money and received the securities. The money was paid to Brown, one of defendants, and he handed to her the mortgages. She also had a conversation at the same time with Pyle, the other defendant, who advised her to sell Pennsylvania Railroad bonds and other securities she had, which were bringing but a low rate of interest, and buy more Kansas mortgages, which would yield seven; but she does not seem to have acted on this last advice. In that conversation, Pyle said, "We will guarantee them," but her testimony does not clearly indicate whether this had reference to the first or to the new purchases he was advising her to make. There was a written guarantee of the mortgages endorsed on them by the mortgagee, the Kansas Mortgage Company, of which Brown was president. There was default on the first instalment of interest on the Carlisle mortgage; it was foreclosed in the Kansas Courts, the land sold at sheriff's sale, and from the record, purchased by plaintiff on a bid equalling her debt. Of all these proceedings, plaintiff denied knowledge, alleging they were wholly at the instance of defendants or of the mortgage company, and that she was in ignorance of them. Having received no money on the Carlisle mortgage, and denying that she was a purchaser at the sheriff's sale, she brought this suit against defendants as guarantors.

Defendants denied positively the oral guaranty, and this was the principal issue in the trial in the Court below. Plaintiff testified to the guaranty, and that, relying on it, she bought the Carlisle mortgage; Whitson, Brown and Pyle denied it. The Court submitted the conflicting evidence to the jury, thus:

"The first question that you will be called upon to determine is, did the defendants guarantee this loan? If they did not, that is the end of this case. If they did, then you will pass to the second question, has the plaintiff had satisfaction or discharge of her claim so as to relieve the defendants, if they did guarantee?

"You will first take up the question, did the defendants guarantee this security? The burden is upon the plaintiff to satisfy you that they did. It is not for the defendants to show you that they did not guarantee. It is for the plaintiff to satisfy you that they did guarantee this loan. I need not say that an undertaking of this kind, a guarantee of a loan of this size, is a serious and solemn contract and undertaking, that it is usually evidenced by a writing, and that where the effort is to prove that an oral contract of guarantee has been made under such circumstances it ought not to be found unless the evidence fully and entirely satisfies you that such a contract was made.

"Now, there was no such contract made, there was no guaranteeing of the loan, unless Sumner Whitson as agent for the defendants guaranteed it. I do not understand the authority of Sumner Whitson to be questioned, but did Sumner Whitson guarantee this loan? Did he pledge Pyle & Brown, the defendants, to a guarantee of this obligation?"

There was a verdict for plaintiff, and defendants appeal. The greater part of the charge is assigned for error. It, however, follows fairly and strictly the two interrogatories propounded by the Court, as we have quoted them. The answers to both depended on findings of fact from contradictory evidence. Although the only positive testimony as to the guaranty was that of plaintiff herself, and this was denied by Whitson, still there were some circumstances that lent color to her statement. She did not call upon defendants and seek to purchase; she had no acquaintance with them; her money was already invested; they sent their agent, who could reach her, to solicit her to buy their wares, exciting her cupidity by placing before her the high rate of interest Brown, one of defendants, was president of the company which furnished the West Chester partnership the mortgages for sale; when she called upon them with her money, and

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Pyle sought to induce her to sell additional securities and buy more Kansas mortgages, while he may not have expressly guaranteed the Carlisle mortgage, he did say, they would guarantee such additional purchases; after default, she wrote them, asserting their guaranty, and they made no reply. We do not see how the Court could do other than submit the evidence on this question of fact to the jury. If the verdict was against the manifest weight of it, a new trial should have been granted; but the opinion on the motion for a new trial indicates no dissatisfaction with it.

As to the point made by appellants, that no sufficient evidence of authority was given by defendants to their agent to make the guaranty, there was evidence from which the jury might have inferred such authority, and if that point had been raised at the trial it would have doubtless been fairly tried and proper instructions given; but defendants raised no such point, and asked for no instructions upon it. They rested their case in this particular on a denial of the guaranty. True, Whitson testified he had no authority from his principals to give a guaranty, but this was merely incidental, and to add probability to his statement that he had given none. When plaintiff closed her evidence, defendants moved for a non-suit, but not because authority had not been shown in the agent to guarantee the mortgage. The trial proceeded wholly on the other grounds, and that the course of defendants misled the trial Judge, is shown by this language in the charge: "I do not understand the authority of Sumner Whitson to be questioned, but did Sumner Whitson guarantee this loan?" If, in thus assuming a most important fact to be undisputed, the learned Judge was mistaken, it was the imperative duty of defendants' counsel to call his attention to it at the close of the charge. Nothing was said; we are asked now to review and pronounce on an error participated in by appellants themselves. Such irregular practice, if countenanced, would soon practically turn this Court into one of original jurisdiction.

As to the point raised, that the guaranty was of the debt of another, and therefore within the statute of frauds, this was neither pleaded of record nor raised at the trial. If it had been, there was sufficient evidence to warrant the jury in finding that defendants were interested in the debt guaranteed. Brown was president of the companv mortgagee, and partner of the firm holding and offering for sale large numbers of the mortgages. They had them in their possession, with blank assignments by the company; ostensibly, by the writings, they were the owners, as much so as the holder of a certificate of stock endorsed in blank, and who offers it for sale. As the evidence stood, they undertook to answer to a proposed purchaser for the value of their own chose in action to effect a sale of it. And this has been our construction of the statute from Malone *v.* Keener, 44 Pa. 109, to Bailey *v.* Marshall, 174 Pa. 602.

It is further argued, that the record of the Kansas Courts, showing, nominally, that plaintiff foreclosed the mortgage, bought the land at sheriff's sale, and receipted for the face of the judgment, is conclusive evidence of the discharge of the original mortgage debt by payment to her, and therefore, the obligation of the guarantors is at an end. This point gives too large a scope to the effect of a judicial record. As between the legal parties to that suit, it is conclusive, until set aside by the Court wherein the proceedings were had; the mortgagee has no further claim against the mortgagor as to the land described in the mortgage; but it conclusively settled no contention between parties to contracts collateral to the mortgage. The plaintiff testified positively, that she was not a party to the foreclosure, and did not know of it; that she did not purchase, nor did she authorize anyone to purchase for her and in her name; that she gave no receipt to the sheriff or other officer. That defendants asked her for the mortgage for purpose of collecting the money from the mortgagor; that, assuming they, as guarantors, had a right to it for that purpose, she put them in possession of it, and that was the extent of her knowledge on the subject. If this were believed by the jury, and the Court fully and fairly submitted the question to them, the record did not affect the obligation of defendants as guarantors to her of the debt. The exemplification of the record shows the real legal plaintiff to be the Southern Kansas Mortgage Company; after so stating, the præcipe directs the clerk of the Court to issue summons H. Mary Crawford, plaintiff, against John A. Carlisle and wife, defendants. The equitable assignee of the mortgage is made the legal plaintiff in the summons. In this State, the mortgagee would necessarily have been plaintiff, and the equities of the assignees would have been adjusted after judgment fixing the amount due. No adjudication of them would have been permitted in the issue between mortgagor and mortgagee. But giving the record its full legal effect, the judgment only determined that the mortgagor owed the amount for which he had pledged his land; it determined nothing between the parties to other contracts guaranteeing the payment of the money, unless they were by their own consent parties to that suit. The jury has found as a fact, that plaintiff was not really a par-

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ty to that suit, and knew nothing of it. Therefore, it cannot bar her suit on her contract of guaranty with other parties. As to any equity defendants may have, entitling them to a conveyance of the land from plaintiff, that the Court has full power to enforce by its control of execution on this judgment.

An examination of the whole case discloses no error calling for a reversal. The judgment is affirmed and appeal dismissed at costs of appellants.

H. B.

Jan. '98, 370. Supreme Court. January 23, 1899.

Pittsburgh Terra-Cotta Lumber Co. v. Sharp.

Contract—Building agreement—Mechanics' liens—Architect—Evidence—Affidavit of defence—Practice.

In an action on a mechanics' lien filed for material furnished and work done in pursuance of a building agreement which contains a provision: "It being understood that the final payment shall be made within ninety days after this contract is completely finished; provided, that in each of the said cases the architect shall certify in writing that all the work upon the performance of which the payment is to become due has been done to his satisfaction," the production of an architect's certificate is not essential to the establishment of plaintiff's case if the plaintiff shows by his evidence that his part of the conditions of the agreement were fulfilled.

If the contractor honestly performed his covenants, the provision is not intended to protect the owner from an honest payment of the price by a capricious or fraudulent withholding of the certificate.

A delay caused plaintiff by another contractor whose work was a pre-essential may be established as a fact by the production of an affidavit of defence averring that as a fact, filed by the same defendant to a claim of the other contractor.

Appeal of John M. Sharp, from the judgment of the Common Pleas No. 1, for Philadelphia County, in an action on a mechanics' lien wherein the Pittsburgh Terra-Cotta Lumber Company was plaintiff.

This was an action to recover for work done in the erection of a building for the defendant, under a contract, and for extra work thereon.

The facts of the case are set forth in the opinion of the Supreme Court.

The Court refused binding instructions for defendant, (first assignment of error); and refused to charge as a matter of law that the absence of the architect's certificate as to the completion of the work was a pre-essential to a verdict for plaintiff, (second, third and fourth assignments of error).

The Court charged the jury, inter alia:

"Now, gentlemen, there is really very little else for me to say. There is not much evidence in the case. If you can once grasp what the real question in the case is, it is not a very hard case for you to settle. It simply gets down to the fact whether, as far as the main contract was concerned, this plaintiff here has satisfied you that the certificate which he was required by the contract to produce has been withheld from him improperly, and when I say improperly, I mean for reasons of fraud or an attempt to cheat him out of his money, or for the other improper reason, and that is that the architect was really satisfied, but withheld it unreasonably, capriciously, without any exercise of judgment at all, but simply to do the man wrong. In that case, if you believe that, the non-production of the certificate does not prevent the plaintiff from recovery." (Ninth assignment of error.)

"Under the contract, extra work should not be allowed as extra work unless it was ordered in writing by Mr. Wade, the architect, and notice given by the architect ten days after the completion. . . .

"It is claimed here that orders have been produced for those two items of work—arches and patching, and I suppose there is no doubt of the fact that the orders are produced. If the other requirement of the contract has been complied with, then these would be proper charges—the requirement, I mean, of notice, because there does not appear to be any attack upon the propriety of the prices charged." (Tenth and eleventh assignments of error.)

Verdict for plaintiff, $4023.47, and judgment thereon. Defendant took this appeal, and assigned error, inter alia, as above indicated.

E. Cooper Shapley, for appellant.

Under the provisions of the contract there can be no recovery by the plaintiff in this case without the production of a certificate of the architect that the work was done to his satisfaction and within the time mentioned in the contract, or it is shown that such certificate is fraudulently withheld.

There is no evidence of such fraud. It is not proved by merely showing the refusal of the architect to so certify if such refusal is the result of the exercise of his judgment.

Under the provisions of the contract there can be no recovery by the plaintiff in this case for extra work unless the same was done in pursuance of an order from the architect, and unless written notice of such claim was made to the architect within ten days of the beginning of such extra work.

There is no item for which there was an order

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given by the architect, and for which there was also a written notice of claim given to the architect within ten days of the beginning of the work.

D. M. Lowrey, (*L. Montgomery* with him), for appellee.

It is conceded by appellant in his argument that if the architect's certificate be fraudulently withheld, plaintiff may recover without it.

The language of the authorities, however, is that in such a case as the one at bar, plaintiff may recover if the certificate be "fraudulently or capriciously" withheld. Whatever is capriciously withheld is fraudulently withheld. It is not necessary for a plaintiff to show a deep and nefarious scheme to defraud. It is sufficient for him to show circumstances which indicate that the refusal to deliver the certificate is not the result of the exercise of the architect's judgment.

Whelen *v.* Boyd, 114 Pa. 228.
Badger *v.* Kerber, 61 Ill. 328.
Singerly *v.* Thayer, 108 Pa. 291.

On June 9, in an affidavit of defence to the claim of the iron frame builders for compensation defendant averred: "The main body of the work under said contract was not finished until June 30, 1893, and was not then properly completed. All the bolts and washers were not in until September, 1893."

This circumstance seems to be amply sufficient to raise that strong doubt of the good faith of the defendant, and of his agent, the architect, which has been held sufficient to shift the burden of the proof, and put upon the person accused of fraud the onus of explaining the transaction in a manner consistent with good faith.

Clements *v.* Nicholson, 6 Wallace, 299.
Lee *v.* McMillan, 125 Pa. 74.

March 13, 1899. DEAN, J. On July 19, 1892, the plaintiff entered into a written contract with defendant, to furnish to him for the Metropole Hotel on Broad street, Philadelphia, then being built, all the fire-proofing material, roof block covering and partitions, at the price of $19,500, eighty per cent. of the monthly work to be paid monthly; one-half the retained twenty per cent. to be paid when building was completed, and remaining half within ninety days thereafter. All work to be done under the direction of Angus S. Wade, defendant's architect, and further, payments to be made on certificate in writing of the architect, that the work, upon the performance of which the payment was to become due, had been done to his satisfaction; further, that the contractor was to make no claim for additional work, unless done in pursuance of an order from the architect, and notice of all claims for such work should be made in writing within ten days from the beginning of it. The contractor was to complete his contract within five weeks of the time all metal work was in place, and if in default, was to pay $100 per day to the owner as liquidated damages. Plaintiff claimed extra work, $1271, making with the contract price, its total demand $20,771, on which payments of $17,550 were credited, leaving a balance unpaid of $3221, which, with interest from September 9, 1893, at which date it averred the contract was completed, was the amount of its claim. The defendant averred, that plaintiff had delayed for a period of thirty-five days beyond the five weeks, after all the iron work was in place, to complete his contract, which at $100 per day, made $3500; that instead of $1271, being due for extra work, it should be only $530.65, that being all that was done on the written order of the architect. This brought plaintiff in debt to defendant.

When the case came to trial, the plaintiff had not the certificate of the architect that the work had been completed to his satisfaction nor, except as to the sum of $530.65, admitted as work extra to the contract, had it any written order from the architect for additional work. The burden, then, was on plaintiff to show, by proper evidence, that which would excuse or dispense with the production of these papers, in the face of the express stipulations of the contract. Assuming this burden, 1. Plaintiff adduced evidence tending to show that it had done the work in all particulars as called for by the contract. 2. That it had completed it within five weeks of the date that the iron work was in place. 3. That it had made frequent requests to the architect for the final certificate, which he neglected and refused to give and then followed this by evidence, that the architect, in collusion with defendant, wrongfully withheld it. 4. As to the extra work claimed, evidence was adduced, that this was done on verbal orders, the contract not requiring they should be in writing, and then, that within ten days, as required by the contract, formal notice was given in writing to the architect that the work had been done.

It is unnecessary to go over in detail the testimony; it is sufficient to say, there was testimony in support of each proposition, which if believed by the jury, warranted the verdict in favor of plaintiff. The learned Judge of the Court below, in an impartial and perspicuous charge, submitted it to them. The whole grievance of appellant, as set out in his assignments of error, is based on failure of plaintiff to produce the written certificate of the architect that the work was completed to his satisfaction and within the time stipulated in the contract. We fear, appellant misapprehends the purpose of this provision;

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evidently, it was inserted to protect the owner against any unjust or unfounded claim by the contractor, and in that view of it, it was a reasonable provision; but if the contractor honestly performed its covenants, it was not intended to protect the owner from an honest payment of the price by a capricious or fraudulent withholding of the certificate. Nor would the law tolerate such a wresting from its purpose of this provision. As to the date at which the ironwork had been put in place, defendant's own affidavit of defence, in a suit by the contractors for that part of the building, that they had not completed it by September 1, was a positive corroboration of plaintiff's averment, that there was no default on its part as to time. Within five weeks of that date, it completed the fire-proofing work, and this negatived any claim of defendant for the $100 per day liquidated damages for default as to date of completion. We find nothing of merit in any of the assignments of error, and the judgment is affirmed.

W. D. N.

Jan. '98, 420. Supreme Court. January 31, 1899.

Klotz's Estate.

Decedent's Estate—Wills—Conversion—Real estate—Personalty—Widow.

Where a conversion is worked by a will, though the real estate sold be not actually conveyed to the purchaser until after the death of the legatee named in the will, the share of such deceased distributee is properly paid to his personal representatives.

Appeal of Edgar J. Klotz, Robert B. Klotz and Minnie L. Haines, from the decree of the Orphans' Court of Lehigh County, confirming the report of the auditor of the account of Edgar J. Klotz, surviving executor of Jeremiah Klotz, deceased.

Jeremiah Klotz died testate, leaving to survive him a widow, Ellen F. Klotz, and three children, viz., Edgar J. Klotz, child of his first wife, and Robert B. Klotz and Minnie L. Haines, children of his second wife. By his third wife he had no children. By his will he appointed Edgar J. Klotz, his eldest son, and his widow, Ellen F. Klotz, as his executors.

The will, after a specific bequest gave to the widow the sum of five hundred dollars and so much of his household furniture as she might choose to select, and provided: "I order and direct that all my estate, real, personal and mixed, that I may die seised or possessed of, of whatsoever nature and kind, shall be sold and converted into cash by my hereinafter named executors within two years after my death, for the best price that can be obtained for the same, and shall be divided between my widow, Ellen F. Klotz, and my children, Edgar J. Klotz, Minnie L. Haines and Robert B. Klotz, or their heirs, in such proportions and upon such terms and conditions as they would be entitled to the same under the intestate laws of this Commonwealth had I died intestate."

The widow accepted the provisions of the will and survived testator about five months.

After the sale of the real estate under the provisions of the will the debts and the specific legacy to the widow having been paid, there was a net balance for distribution of $3916.02, which was exclusively the proceeds of real estate sold, there being a deficiency of $4828 of personal property in the payment of debts and expenses and said specific legacy, and that amount thereof had to be paid out of the fund realized on the sale of the real estate.

The real estate was all sold during the lifetime of the widow, but she died before the time for the execution and delivery of the deeds for the same under the terms and conditions of sale in which she had joined.

Before the auditor it was contended on behalf of the appellee that of the net balance for distribution, to wit, $3916.02, one-third should be distributed to him, William Gernerd, executor and sole legatee of the widow, Ellen F. Klotz, while on behalf of the children it was contended that the whole thereof being proceeds of realty, and the widow having died before the final consummation of the sale, should be distributed to the three appellants in equal shares.

The auditor distributed the one-third of said balance, to wit, $1305.34, absolutely to the said William Gernerd, executor of Ellen F. Klotz.

Before the auditor, Robert B. Klotz and Minnie L. Haines, administrators of the estate of Caroline Klotz, deceased, the second wife of the testator, made claim for $701.53, alleged to have been loaned by her to the decedent. It appeared that Caroline Klotz had a separate estate consisting of $500 inherited from her grandfather and $200 from her father. It was established that she had given to her husband the $500, but the auditor found that there were not sufficient corroborating circumstances to show what became of the $200 inheritance of Caroline from her father's estate, and the presumption is that Jeremiah, as the acting administrator, paid the shares to the heirs, including his wife.

The auditor awarded to the administrators of the estate of Caroline Klotz, $552.11.

Exceptions were filed to both awards by Edgar J. Klotz, individually and as executor of the estate of Jeremiah Klotz, and by Robert B. Klotz and

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Minnie L. Haines, individually and as administrators of the estate of Caroline Klotz.

The exceptions were dismissed by the Court and the report of the auditor confirmed. The exceptants took this appeal and assigned as error the dismissal of their exceptions.

John Rupp, (with him *C. J. Erdman* and *T. F. Diefenderfer*), for appellants.

The question involved in this appeal is the proper construction of that clause in the will which provides that all the property of the testator, real, personal and mixed, shall be sold and converted into cash by his executors, within two years after his death, and the proceeds thereof shall be divided between his widow and three children, or the heirs of the children, "in such proportions and upon such terms and conditions as they would be entitled to the same under the intestate laws of this Commonwealth had I (the testator) died intestate."

The personal estate was exhausted by payments of debts and a large portion of the funds realized from the sale of the real estate had to be used for that purpose.

The question therefore is, what interest did the widow take, under this clause of the will, in the net proceeds of the balance of the real estate left for distribution?

The widow was only entitled to the interest on the one-third of the net proceeds of the real estate for life, and hence, her executor was not entitled to share in the distribution.

All mere technical rules of construction must yield to the expressed intention of a testator if the intention be lawful.

Reck's Appeal, 78 Pa. 432.

But it is also true that in construing a will it is proper to consider the testator's surrounding circumstances at the time he made his will, including the character and amount of his property and who were his family or his relatives.

Follweiler's Appeal, 102 Pa. 581.

All the surrounding circumstances of a testator, his family, the amount and character of his property may and ought to be taken into consideration in giving a construction to the provisions of his will.

Postlethwaite's Appeal, 68 Pa. 477.
Stambaugh's Estate, 135 Id. 585.
Jacobs's Estate, 140 Id. 268.
MacConnell *v.* Wright, 150 Id. 275.

J. K. Bowen, for appellee.

The decedent's will contained a positive direction to sell, therefore, there was a conversion.

Hunt's Appeal, 105 Pa. 128.

The provision for the sale of his whole estate was not to empower his executors to sell real estate to pay debts, but for distribution purposes, and this in the form of personalty.

The provision in the will that the division of the estate should take place "in such proportions and upon such terms and conditions as they would be entitled to the same under the intestate laws of this Commonwealth had I died intestate" is in harmony with the purpose of the testator as shown in the will, to give the widow more than the intestate laws alone would give her.

Stineman's Appeal, 34 Pa. 394.
Drenkle's Estate, 3 Id. 377.
Grider *v.* M'Clay, 11 S. & R. 223.
Evans's Appeal, 63 Pa. 183.

The distribution of the estate as personalty was proper.

February 27, 1899. STERRETT, C. J. This appeal challenges the correctness of the construction given by the Court below to the fourth paragraph of Jeremiah Klotz's will, wherein—after having previously bequeathed to his wife, Ellen F. Klotz, five hundred dollars, etc.,—he declares: "I order and direct that all my estate, real, personal and mixed, that I may die seised or possessed of, of whatsoever nature and kind, shall be sold and converted into cash, by my hereinafter named executors within two years after my death for the best price that can be obtained for the same, and shall be divided between my widow, Ellen F. Klotz and my children, Edgar J. Klotz, Minnie L. Haines and Robert B. Klotz or their heirs, in such proportions and upon such terms, and conditions as they would be entitled to the same under the intestate laws of this Commonwealth had I died intestate."

The language thus employed by the testator is so positive and unequivocal that his intention to convert into "cash" all the estate, real, personal and mixed, of which he was seised or possessed at the time of his death, cannot be doubted. By the terms of the will, an out and out conversion of the blended estates into "cash," for the purpose of division, as such, among the four legatees therein named was affected, and took place at the time of the testator's death: Parkinson's Appeal, 32 Pa. 455; Thomman's Estate, 161 Pa. 444. In the first cited case, the testator's direction to sell his residuary estate, for the purpose of division, was held to work a conversion of his children's shares in the real estate, and that, for the purposes of the will, the proceeds of the real estate should "be treated as if it had been personal estate at the death of the testator."

It is not the real and personal estate, of which the testator died seised or possessed, that he says, "shall be divided between" his widow and

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three children, "or their heirs," but the "cash," or net proceeds of the sale of his estate, "real, personal and mixed," which he directed his executors to make: and in effect, he provides that the share or proportion of said fund, to which each legatee shall be entitled, shall be the same as they, respectively, would be entitled to under the intestate laws, in case he had died possessed of the fund and intestate. This, in substance, is the construction given to the clause in question by the learned auditor and Court below; and we think it is correct.

In obedience to the testator's express direction, the property was sold within the time specified and during the lifetime of his widow, but the real estate was not formally conveyed to the purchaser until after her decease. The only effect that this fact could possibly have on the distribution was the necessity of awarding her distributive share of the fund to her personal representative instead of to herself.

After the payment of debts, expenses of administration, and legacy of $500 to the widow's personal representative, the net balance for distribution among the four legatees was $3916.02. Treating this as personalty, one-third thereof was awarded to the personal representative of the widow and one-third of the residue to each of the three children. We think this was in strict accordance with the testator's intention as shown by the provision of his will.

It follows that neither of the specifications of error should be sustained.

Decree affirmed and appeal dismissed at appellants' costs.

W. D. N.

Superior Court.

Oct. '98, 59. Superior Court. October, 19, 1898.

In re Opening of Orkney Street.

Municipal improvements in Philadelphia—Benefits—Not assessable against non-abutting property—Extension of partly opened street—Dedication—Assessments of benefits for opening street in same class as assessments for sewers and for grading, paving and curbing streets—Act May 16, 1891—Act April 1, 1864.

Properties abutting on the first-opened part of a street which had but one outlet at the only cross street, cannot be assessed benefits for converting the cul-de-sac into a through street extended to meet another cross street and outlet.

Decisions in Morewood Ave., 159 Pa. 20, and later cases of assessment of benefits for grading, paving and curbing, and for sewers, under the Act of May 16, 1891, P. L. 75, applied to assessment of benefits for opening streets in Philadelphia under the Act of April 1, 1864, P. L. 206.

Appeal of the City of Philadelphia, from the judgment of the Quarter Sessions of Philadelphia County, sustaining exceptions to the report of viewers as to benefits assessed by them.

Long prior to October 10, 1896, Orkney street, southward from Ontario street, to a point 147 feet 7¾ inches north, on the west line, and 96 feet 5⅝ inches north, on the east line, from Westmoreland street, had been opened by dedication of the landowners and acceptance by the city. It was improved by paving and curbing, but had no sewer. The only access to the houses on Orkney street was from Ontario street.

By ordinance of October 10, 1896, "the opening of the unopened portion of Orkney street, from Ontario to Westmoreland street," was authorized.

On May 8, 1897, Harry Brocklehurst and William Ewing filed their petition in the Court of Quarter Sessions, averring their ownership of the land on Westmoreland street extending northward, of which a portion would be taken by the opening of Orkney street southward through to Westmoreland street. Viewers were appointed, according to the prayer of the petition, and they, on October 25, 1897, reported, inter alia, as follows:

"By the opening of Orkney street, through the property of Brocklehurst and Ewing, which is the only unopened portion of Orkney street, between the points named, Harry Brocklehurst and William Ewing have been damaged to the extent of $4400, for which amount the jury hereby awards them damages.

"The jury having made a preliminary award of damages, then proceeded to consider the question of benefits accruing to properties in the neighborhood, which benefits, they are of opinion, do not extend further on Orkney street than Ontario street, commencing at the land of Brocklehurst and Ewing.

"Before the opening, Orkney street, from Ontario street down to Brocklehurst and Ewing's land, was a blind street, but between these points was paved and curbed. By this opening it becomes a thoroughfare. The grade from Ontario street to Westmoreland street falls gradually from nothing at Ontario street to at least five feet at Brocklehurst and Ewing's land, which is two or three feet higher than that, making that but a barrier at that point. The result of this physical condition was to make a pond of water on Orkney street, immediately opposite the houses registered in the name of J. Clark Moore. This water backed up on the opened and improved

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part of Orkney street, and the jury find that it rendered the four houses of J. Clark Moore practically uninhabitable, and Orkney street, at that point, a nuisance prejudicial to public health. Since the street has been opened, under the ordinance of October 10, 1896, (page 220, ordinances) and a sewer been put in, this has been remedied."

The jury determined that of the sum of $4400 awarded as damages, $1333.24 should be paid by the city, and the balance, $2906.76, should be paid by the owners of property on Orkney street, between land of Brocklehurst and Ewing, and Ontario street, for benefits accruing to them by reason of the opening.

These property owners filed exceptions to the assessment of benefits.

These exceptions were sustained and the report set aside.

The city took this appeal, assigning as error this action of the Court.

James Alcorn, assistant city solicitor, (*Norris S. Barratt*, assistant city solicitor, and *John L. Kinsey*, city solicitor, with him), for appellant.

The Act of April 1, 1864, sec. 1, Pepper & Lewis Dig., p. 4203, under which the jury assessed the benefits, provides:

> When any street in the city of Philadelphia is ordered to be opened in accordance with law, the jury appointed to assess the damages for said opening, after having determined the amount of said damages, and to whom they shall be paid, *shall* also make inquiry as to the advantages of opening said street to property in the *immediate vicinity of the same*, and the said jury shall determine what amount of the damages, if any, shall be paid by the city of Philadelphia, and what amount, if any, shall be paid by the property owners benefited.

This Act is mandatory.

In re Moyer Street, 6 Phila. 81.

A statute is not unconstitutional because it authorizes assessments upon property not bordering on the street to be improved, if the property is near to and specially benefited by the improvement.

Ray *v.* Jeffersonville, 90 Ind. 567.
Little Rock *v.* Katzenstein, 52 Ark. 107.
Guild *v.* Chicago, 82 Ill. 472.
Louisville & R. Co. *v.* East St. Louis, 134 Ill. 656.
Lansing *v.* Lincoln, 32 Neb. 457.

The question what is just and what is arbitrary in special assessment for benefits depends for solution upon the nature of the case. The principle is always the same, viz., whether in point of fact special benefit has been conferred.

1. Sometimes it is considered impracticable to fix upon any special benefit except where the property abuts upon the improvement.

2. And even where the property abuts, the Courts refuse to entertain the idea of special benefit, by reason of the fact that the work is repair, or in substitution of an original improvement; this Court holding to the doctrine that maintenance of public works once constructed is in no sense a private benefit, but purely public, and to be paid for entirely by general taxation.

3. There is yet a third class of cases, comprising those cases where the improvement confers a special benefit far beyond those properties which do physically abut on the same. Among these are cases of Court houses, great bridges, extensions of streets.

Kirby *v.* Shaw, 19 Pa. 258.
Philadelphia *v.* Field, 58 Id. 320.
Norwich *v.* Commissioners, 13 Pick. 60.
Bridge Corp. *v.* Norfolk, 6 Allen 353.

It certainly can not be claimed that the property assessed as specially benefited is not in "the immediate vicinity" when it is in the same block as the part opened between Ontario street and Westmoreland street.

Extension of Hancock St., 18 Pa. 26.
McMasters *v.* Com'th, 3 Watts 292.
Fenelon's Petition, 7 Pa. 173.
Com'th *v.* Woods, 44 Id. 113.
Chestnut Ave., 68 Id. 81.
Main St., 137 Id. 590.
Powelton Ave., 3 Leg. Gaz. 13; 1 Camp. 112.

These cases must be overruled if Morewood Avenue, 159 Pa. 20, and later similar cases, relied on by the Court below and by appellees, are taken from their proper class and applied to a case like this, arising under the general road law of 1836, and dependent on the Act of 1864.

Hansberry St., 55 Leg. Int. 327.

Morewood avenue was a case of grading, curbing and paving. Expense of this nature has long been regarded in Pennsylvania as peculiarly chargeable to the abutting property. The general benefit is not to be compared to the local benefit to the fronting lots. Their character is radically changed by the improvements. They become a different thing from what they were before. Accordingly, by each lot bearing the burden of the improvement to its front, the whole expense is met. To charge neighboring properties would be unjust. The expense is placed on the lot peculiarly benefited.

But when we come to a case of opening of a street, the peculiar benefit is more widely extended. Very especial benefit is conferred along quite a line of territory; and hence the different treatment accorded to such cases, already alluded to in class 3, and only lately exemplified in the case of Main Street, 137 Pa. 590. The two cases are in different classes, and the Legislature and the Courts have so regarded them.

Similar observations may be made with respect to the sewer cases. Although there is beyond question benefit of a general, public nature conferred by sewers, the private benefit to the indi-

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vidual lots is so marked as to make these fairly subject to the entire cost so far as relates to them.

Orphans' Asylum's Appeal, 111 Pa. 135.

How different all these cases are from the improvement conferred by giving a second means of communication by highway. Convenience, dignity, beauty, value—all these are bestowed by the extension of the street; and they are bestowed within the square concerned to a degree so far exceeding the general public benefit as to mark them as special and private benefits. The Quarter Sessions may be relied on safely to check abuses in the assessment.

If, when Orkney street was laid out originally, it had been run full to Westmoreland street, instead of stopping midway, the benefits at that time assessed against the properties would have been quite differently estimated from what they were as the street was actually run. The benefits are conferred in part at the original opening and in part at the extension. As they are thus divided in time of enjoyment, it is proper to divide the time of their payment. The Ontario street outlet no more abutted on the property concerned than does the Westmoreland street outlet. Had the street been opened all the way to Westmoreland street at the first, the property would then have been considered as an "abutting" property with respect both to Ontario and to Westmoreland street, and would have been so assessed for benefits. How can it abut any the less on the Westmoreland street end of the block simply because that end is opened up now?

Charles Knittel, (with him *Sheldon Potter* and *H. B. Gill*), for appellees.

This case is ruled absolutely by—

Verona Borough, 4 Pa. Super. Ct. 608.

It is true that that case was a case arising under the Act of 1891, and that it has been said that the language of that Act did not in itself authorize the assessment of benefits upon non-abutting property. It is true, also, that this proceeding is under the Act of 1864, which, it may be conceded, is not repealed as to Philadelphia by the Act of 1891, and that the Act of 1864 contains specific authority, if such authority can be given by the Legislature, to assess benefits upon property in "the immediate vicinity."

The difficulty is, however, that the Legislature had no power to authorize the assessing of benefits upon non-abutting property. It was upon the lack of constitutional power to impose such benefits that Morewood Avenue was decided; and see

Park Avenue Sewers, 169 Pa. 433.

It is true that Hancock Street, 18 Pa. 26; Chestnut Ave., 68 Pa. 81; and the other cases cited by the appellant, did affirm the right to impose benefits upon other property upon the same street, but not abutting directly upon the improvement, and admitted or allowed that question to pass unchallenged; but these must all be considered as overruled by Morewood Avenue, 159 Pa. 20; Beechwood Ave. Sewer, 179 Pa. 494; Park Avenue Sewers, 169 Pa. 433; in which the cases cited by appellant are discussed and their doctrine disapproved. It must be considered as settled by the decisions of this Court and of the Supreme Court that no power exists anywhere to impose benefits for a local improvement upon property not abutting upon the line of the improvement, in spite of the words "immediate vicinity" contained in the Act of 1864, the same word "vicinity" having been used in the overruled case of Hancock Street, supra, and its effect considered in Morewood Avenue, supra.

Some distinction is attempted to be made between the case of opening a street and the case of paving, grading and curbing the same, or the case of a sewer. Verona Borough's Appeal was a case of opening a street, and it was there expressly held that there was no difference between these different classes of cases. This is apparent upon principle. The right to assess benefits at all for the opening of the street is founded only upon the exercise of the power of taxation; and the right to impose the tax in one case has the same source as the right in the other, and in both the limitation of the right to impose the cost of the improvement on the property benefited is marked by the cases where the benefit is different in kind, and not merely different in degree.

Alcorn, in reply:

Morewood Avenue, 159 Pa. 20; Fifty-fourth Street, 165 Pa. 8; Park Avenue, 169 Pa. 433; Beechwood Avenue, 179 Pa. 494, relied on by the Court below and by the appellees, were assessments for grading, paving, or the construction of sewers. Verona Borough, 4 Pa. Super. Ct. Rep. 608, was the only case of the opening of a street. All of these cases were under the Act of 1891. They do not decide that the Legislature had no power to authorize the assessment of benefits against non-abutting property.

The Act of 1864 refers only to the opening of streets.

The system provided by the Act of 1891 for making assessments for paving, construction of sewers, laying of water-pipe, etc., does not exist in the city of Philadelphia. In that city such assessments are made by the municipal authorities and not by a jury of view, and in making them the property is assessed with the cost of the improvement, or a fixed sum as in sewers and water-pipe, and the matter of damages is not considered. The Act of February 2, 1854, sec. 40, P. L. 43, authorizes the paving of streets, and the

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laying of water-pipes at the expense of the owners of the ground in front whereof such work should be done, and authorizes liens to be filed therefor. The Act of April 8, 1864, P. L. 324, authorizes the construction of sewers at the expense of the property owners. The Act of March 30, 1866, P. L. 354, empowered councils to fix the charge for paving, sewers and water-pipes. Whether the pavement or sewer is beneficial to the property or not, cannot be inquired into by the Court.

Stroud *v.* City, 61 Pa. 255.
Michener *v.* Philadelphia, 118 Id. 535.

It is very clear that the opinion in Morewood Avenue must be restricted to a construction of the Act of 1891 only.

Assessments of benefits under the Act of 1864 and the Acts to which it is a supplement have been sustained.

Powelton Ave., 1 Camp. 112.
Sedgeley Ave., 88 Pa. 509.
Howard St., 142 Id. 601.
Melon St., 182 Id. 397.
Berks St., 12 WEEKLY NOTES, 10; 15 Phila. 381.
Chestnut St., 11 Phila. 411.
Walnut St., 28 WEEKLY NOTES, 51
Hansberry St., 55 Leg. Int. 327.
Main St., 137 Pa. 590.
25 Am. & Eng. Ency. Law, 501.
Elliott on Roads and Streets, p. 369.
Trickett's Road Law, p. 444.
L. & N. R. Co. *v.* East St. Louis, 134 Ill. 656.
McCormick *v.* Omaha, 56 N. W. 626.

The dedication of a street does not exempt the property from liability for benefits for the opening of the street.

State *v.* City of Hudson, 34 N. J. Rep. 25.

The proposition for which the appellant contends is the converse of that determined in Melon Street, 182 Pa. 397. The Supreme Court held that the property, though it did not abut on the portion of the street vacated, was specially damaged because one means of access was taken away. If this be the law, then the converse must be true. If a property is specially iniured by losing one means of access, it must necessarily be specially benefited by having an additional means of access given to it.

The appellees do not attempt to dispute the finding of the jury that their property is specially benefited by the opening of Orkney street. That is a question of fact, and having been found by the jury, it determines the limit of the taxing power.

In Hammett *v.* Philadelphia, 65 Pa. 146; Washington Avenue, 69 Pa. 352; Saw Mill Run Bridge, 85 Pa. 163; Orphan Asylum of Pittsburgh, 111 Pa. 135, and other cases cited in Morewood Avenue, the Supreme Court determined as a matter of law, that the properties against which the benefits were assessed did not receive any special benefit from the improvement. This was also the case in Morewood Avenue, and Park Avenue.

March 23, 1899. RICE, P. J. Prior to these proceedings, Orkney street was laid out upon the confirmed plan of the city of Philadelphia, and, according to the plan, extended from Ontario to Westmoreland; but a portion of it, running through land of Brocklehurst and Ewing, had not been opened. The result was that the properties of these exceptants were upon a cul-de-sac. It does not affirmatively appear that they had been assessed for the cost of the opening of the street to Brocklehurst's and Ewing's land; but we are left to infer from what is stated in the opinion of the Court below and at bar, that the owners had dedicated the land over which that portion of the street extends. At all events, it was a paved and curbed street, and open to public travel from Ontario street to the point above mentioned long before the adoption of the ordinance about it before referred to. An ordinance was adopted opening the street through its entire length to Westmoreland, and viewers were appointed to assess the damages of Brocklehurst and Ewing. They reported that these were $4400, and that of this sum the sum of $1333.24 should be paid by the city, and the balance should be paid by the property owners on the previously opened portion of the street, for benefits. The question is as to the validity of these assessments for benefits.

If this had been an open street throughout its entire length from Ontario to Westmoreland and one end had been closed by vacation proceedings, these exceptants would have had a right in law to claim damages. Why? Because by reason of the closing of the street they would have sustained an injury in their property rights, peculiar to themselves, and different in kind from the injury which would have been sustained by those who used the street for travel only. "The injury is not of the same kind, differing in degree only; it is an additional injury, caused by the impairment of an entirely distinct right, the special right of ingress and egress." In re Melon Street, 182 Pa. 397. This being so, it is argued that the converse of the proposition must be true, namely, that the conversion of the cul-de-sac into an open street, thus giving two modes of access to their properties where only one existed before, was, or at least may have been, a peculiar benefit differing in kind and not merely in degree, from that accruing to properties fronting on another street or on another block of the same street. But before pursuing this line of argument further it will be well to consider whether or not the liability of properties, situated as these are, to special assessment to pay the cost of public improve-

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ments, is an open one, and whether another principle does not enter into the case.

In Morewood Avenue, 159 Pa. 20, Mr. Justice GREEN, after an exhaustive review of the earlier cases, including Extension of Hancock Street, 18 Pa. 26, which is much relied on here, states the doctrine established by them in this way: "As we have repeatedly decided, the doctrine of assessment for benefits to pay for public improvements, can only be defended upon the ground that the benefits are local and essentially peculiar to the very property assessed, and then it can only be done once. This can only be the case where the property assessed abuts directly upon the line of the improvement. Having their own burdens to bear in this respect, the owners cannot be subjected to the discharge of similar burdens upon other properties, whether situate on the same street or in the same neighborhood." The rule, as thus stated, was reiterated in Fifty-fourth Street, Pittsburgh's Appeal, 165 Pa. 8, a case of grading, paving and curbing where the property assessed abutted on the same street, but not on the part improved. It is to be noticed, also, that it was alleged on the argument of that case that the only outlet for the property was over part of the improvement; but this allegation was not referred to in the opinion, as it doubtless would have been if the Supreme Court had deemed it sufficient to distinguish the case from Morewood Avenue. The order sustaining the exception to the assessment was affirmed upon the ground, that, as the property did not abut directly upon the line of the improvement, it was not subject to an assessment for benefits. Morewood Avenue has been followed, and the principle upon which it was decided applied to sewer assessments, notwithstanding the argument that a public sewer is a special benefit to all the properties situated in the same "water-shed": Park Avenue Sewers, Parker's Appeal, 169 Pa. 433; Witman *v.* Reading, 169 Pa. 375; Beechwood Avenue Sewer, 179 Pa. 490. We may also refer in passing to the case of Speer *v.* Pittsburgh, 166 Pa. 86, where it was held that the words "majority in interest and number of owners of property abutting on the line of the proposed improvement" (Act of May 16, 1891, sec. 9, P. L. 75), mean the majority on the portion of the street to be opened, and not the majority on the whole street. "Any other construction," said the Court, "would be contrary to the letter as well as the manifest spirit of the act." In Verona Borough, 4 Pa. Super. Ct. 608, we followed the ruling in Morewood Avenue and applied it to a case precisely like the present.

It is vain to argue that Morewood Avenue can only be regarded as a binding authority where the proceedings are under the Act of 1891. It not only construes that Act, but it also lays down a general rule, based upon a consideration of the nature of local assessments for public improvements and of the limitations of the power of the legislature in that regard, which, although the Act were as broad in terms as the Act of April 1, 1864, P. L. 206, would defeat any assessment of non-abutting property for paving or sewering, or other improvement of the same kind. If these cases are to be distinguished from the present it must be on some other ground than that the Act of 1864 authorizes such assessments and the Act of 1891 does not.

It is argued that assessments for street openings are in a different class from assessments for sewers, and, for grading, paving and curbing, and that in laying down the rule quoted at the outset of this opinion the Supreme Court had no thought of including assessments of the former class. We do not think we would be warranted in denying application of the rule to the present case upon such assumption. The ruling was made, said Mr. Justice GREEN, "after much deliberation and the most mature consideration" (Fifty-fourth Street, supra), and whilst it is true that all of the street opening cases were not referred to in the opinion, yet it is also true that the leading case upon that subject was critically examined and reviewed. Speaking of that case (Extension of Hancock Street, supra), the Court said, that the constitutional question whether the Act was void as to lots located away from the line of the improvement, was neither discussed nor decided, and even if the case had decided that such lots could be assessed for benefits it would have to be regarded as practically overruled by the later case of Washington Avenue, in which the question was met and decided the other way. Chestnut Avenue, 68 Pa. 81, and Main Street, Big Run Borough, 137 Pa. 590, were not referred to, but judging from the reports of those cases the remark, that the constitutional question under consideration was neither discussed nor decided, would apply as well to them as to the Hancock Street case.

It may be said that the constitutional question did not necessarily arise in the Morewood Avenue case. Possibly not. But it was raised by counsel, and after a thorough consideration of it the Court decided it. When liability of non-abutting property to assessment is defended against upon constitutional as well as statutory grounds, and both grounds of defence are held to be good by the Court of last resort, and neither of those questions arises in a later case, will any other State Court be justified in holding that the precedent is not of binding authority in that case, because, forsooth, the decision might have been

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based on the other ground exclusively? We think it more in accordance with sound principle to say that the general rule upon the subject laid down by the Supreme Court in such a case ought to be followed by all the other Courts of the State until it is modified or qualified, unless it can be shown that the particular case for decision differs in essential facts, is clearly not within the reason of the rule, and therefore, presumably, was not intended to be embraced within the rule itself.

Is this such a case? Granting for the sake of the argument, that it is not within the reason of the first branch of the rule what is to be said of the application of the second branch? It may well be that the properties of the exceptants are enhanced in value by the opening of the street through to Westmoreland street, and in view of the decision in the Melon Street case it would seem inconsistent to declare as a matter of law that the additional mode of ingress and egress that is to be given is in no sense a special benefit; but there remains the objection that, by dedication or otherwise, these properties were made to bear their full share of the cost of the original improvement. Can they be assessed again to pay the cost of extending that improvement through other properties? Can a street be opened piecemeal, and the properties abutting on the part first opened be assessed for benefits to pay the cost of extending the improvement a second or a third time? The repaving of a street is in a sense a special benefit to the properties abutting on it, but it is settled beyond all controversy that it cannot be done at their expense: Hammett *v.* Philadelphia, 65 Pa. 146; Williamsport *v.* Beck, 128 Pa. 147. The same is true of the extension of a pavement? What is the distinction? We are unable to answer these questions in accordance with the appellant's contention and at the same time reconcile the decision with the rule laid down in Mcrewood Avenue and followed by us in Verona Borough. If that rule is to be modified, we do not think that it will be done upon the ground that an assessment according to benefits in a grading and paving case is so different in essential particulars from a similar assessment in a street opening case that in the former case a property abutting on the street can be assessed but once for the improvement, whilst in the latter case it may be assessed and reassessed as often as the street is extended. It seems to us that the rule is a general one, and, ordinarily, is as applicable in one case as in the other.

Whilst the decision in the Melon Street case does suggest a possible distinction, yet it does not distinguish the two classes of cases in every particular. If for this, or any other reason, the rule is to be modified and exceptions recognized, our duty to wait until it is done by the Supreme Court is plain. An opposite course, even if we were disposed to adopt it, would simply lead to confusion. We conclude, therefore, that the learned Judge of the Court below was right in holding that the cases above cited were of binding authority and were applicable to the present case notwithstanding the fact that the proceedings were under the Act of 1864, and not the Act of 1891.

This conclusion renders it unnecessary to express any opinion upon the question as to the authority of the jury to go on with the proceedings after the next term succeeding their appointment without a formal continuance of the order made during that term.

Order affirmed. A. R. H.

Oct. '98, 90. Superior Court. December 6, 1898.

Kunsman v. Lehigh Valley Railroad Company.

Negligence— Railroads —Act April 4, 1868, P. L. 58—Fellow servants—Modification of rule by custom.

Two railroads used the same track in a yard. The plaintiff, a car inspector of one company, went under a car for the purpose of inspection and placed in a proper place on the track the proper signal that he was at work under the car; the train of another (the defendant) company, without any notice to plaintiff, ran over the signal and struck the car, injuring the plaintiff:

***Held*, (1) that the defendant was liable for the negligence of those in charge of its train; (2) that the Act of April 4, 1868, P. L. 58, did not apply.**

Vanatta *v.* Central R. R. of N. J., 154 Pa. 262, followed.

Where a rule requires a flag to be placed in a certain position as a signal, and a custom has long prevailed to make the same signal by placing the flag in a different position, then if a flag is placed in the second position it is as effectual in giving notice as if it were placed where required by the rule; one who disregards it when so placed is guilty of negligence.

Appeal of the Lehigh Valley Railroad Company, from the judgment of the Common Pleas for Northampton County, in an action of trespass in which Elmer J. Kunsman was plaintiff, and the Lehigh Valley Railroad Company and Joseph Harris, Edward M. Paxson and John Lowber Welsh, receivers of the Philadelphia & Reading Railroad Company were defendants.

This was an action to recover damages suffered through the negligence of the defendants' servants.

On the trial, before SCHUYLER, P. J., the plaintiff proved the following case:

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The injury complained of was received in the North Penn yards at South Bethlehem, on February 20, 1896.

At South Bethlehem the tracks of the Lehigh Valley Railroad Company and of the Philadelphia & Reading Railroad Company connected, the connection being by means of switches. The tracks of the Central Railroad Company of New Jersey and of the Philadelphia & Reading Railroad Company also connected at the same place —the connection being by means of switches, but by means of other switches than those which connected the tracks of the Lehigh Valley Railroad Company and those of the Philadelphia & Reading Railroad Company. The connecting roads habitually used each other's tracks in the yard. All three roads adopted in substance the same rule for the protection of their car inspectors, viz.:

"A blue flag by day, and a blue light by night, placed on the end of a car, denote that car inspectors are at work under or about the car or train. The car or train thus protected must not be coupled to, or moved, until the blue signal is removed by the car inspectors.

"When a car or train standing on a siding is protected by a blue signal, other cars must not be placed in front of it so that the blue signal will be obscured, without first notifying the car inspector, that he may protect himself."

The yard master of the Philadelphia & Reading Railroad Company testified that for nearly eleven years the practice of the inspectors of all three companies had been to place the blue flag on the track between the rails in front of the car. The plaintiff was a car inspector employed by the Central Railroad of New Jersey, and for about a year and four months had worked in the yards at South Bethlehem. On February 20, 1896, there were on a track known as track No. 6 of the Philadelphia & Reading Railroad Company three cars of the Central Railroad.

Plaintiff went to work on said cars at about 12.30 in the afternoon of that day, immediately after a co-workman, Werst, had put up the blue signal flag between the rails of said track No. 6 siding at a point distant east from the cars under which plaintiff was at work about sixty yards and distant west from Brodhead avenue, a distance of about thirty feet. The day was clear, cold and somewhat windy. At about two o'clock, and while there was nothing on said tracks except said three Central cars, a Lehigh Valley train consisting of an engine and thirteen large coal gondola cars, under charge of conductor Rupel of the Lehigh Valley Railroad, backed up through said track No. 6 siding from the eastward, having entered through a switch distant east 650 feet from the nearest of said Central company's cars and about 430 feet east from the blue signal flag put up by Werst, and ran over the flag which had been set up in an iron knuckle and broke off the pole or staff of it, so that the short broken end of it still stuck in the knuckle and crashed into the Central company's cars while the plaintiff was working under them, in consequence of which he was rolled under the car, had his right ankle broken and was bruised all the way up the leg and squeezed about the hip, and on account of which he was sick and disabled for a period of 148 days.

The defendant offered no evidence, but asked for binding instructions in its favor. These were refused. (First, second and third assignments of error.)

Verdict and judgment for plaintiff, $450 against the Lehigh Valley Railroad.

The defendant took this appeal and filed assignments of error as above indicated.

William Fackenthall, for appellant.

There was no evidence that the plaintiff was rightfully on the tracks of the Philadelphia & Reading R. R. Company, and not being rightfully there he cannot recover.

P. & R. R. R. Co. *v.* Hummell, 44 Pa. 375.
Cauley *v.* Pitts., Cin. & St. Louis Ry. Co., 95 Id. 398.

The plaintiff was guilty of contributory negligence in placing the flag on the track and not on the car.

If he was properly on the track then he can recover only such damage as an employé of the Philadelphia & Reading R. R. Company could recover.

Mulherrin *v.* D. L. & W. R. R. Co., 81 Pa. 366.
Spisak *v.* R. R., 152 Id. 281.

John D. Hoffman, for appellee.

The evidence showed that the three companies were in the habit of receiving cars on each other's tracks. The plaintiff was not guilty of contributory negligence as he followed the custom as to signalling by flag which had prevailed for eleven years.

Vanatta *v.* R. R. Co., 154 Pa. 262.

The case is not within the Act of April 4, 1868, P. L. 58.

Id.

March 23, 1899. ORLADY, J. The plaintiff, a car inspector in the employ of the Central Railroad of New Jersey, received injuries while at work repairing a car of his employer at the North Penn yards at South Bethlehem, at which place three other railroad companies had junction and connecting tracks that were used for making up trains, and the transfer and repair of cars. On the day of the accident the plaintiff

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and a fellow-workman were engaged in raising the draw-head of a car which was standing on track No. 6, which can be entered only by means of a switch connection with the Philadelphia & Reading Railroad. The character of his work required that the plaintiff and his associate should be under the broken car, and, before they began their work, one of them secured, in an upright position, a blue flag between the rails of track No. 6, about sixty yards from the end of the car, and in the direction of the switch connecting that track with those of the Philadelphia & Reading Railroad Company. The Central Railroad of New Jersey, the Philadelphia & Reading Railroad, and the defendant company had adopted, and had in use at the time, a rule prescribing the significance and manner of use of the blue flag, as follows: "A blue flag by day and a blue light by night placed on the end of the car denote that car inspectors are at work under or about the car or train. The car or train thus protected must not be coupled to, or moved, until the blue signal is removed by the car inspectors. When a car or train standing on a siding is protected by a blue signal, other cars must not be placed in front of it so that the blue signal will be obscured, without first notifying the car inspector that he may protect himself."

Joseph D. Ruple, a witness in behalf of the plaintiff, testified that he was a freight train conductor of the defendant company, and had moved a train of thirteen large gondola cars of the defendant on to track No. 6, and forced them against the cars of the Central company under which the plaintiff was working, and this act was the immediate cause of plaintiff's injuries. The yard master of the Philadelphia & Reading Railroad Company testified, in substance, that the cars about which the plaintiff was working were rightly on track No. 6, and that the blue-flag rule had been so modified by the employés of all the railroads using the yard—with the assent of their superiors—"That the general practice at that time with all the car inspectors was to place it on the track between the rails in front of the cars, at no special distance," and that this practice had continued for over a period of ten years, and was as effective a use of the flag as by placing it on the end of a car. The defendant offered no testimony, and moved for a non-suit, which was refused, and a verdict was returned in favor of the plaintiff for $450. On this appeal the single question is raised as to whether, under the evidence, the Court should have directed a verdict for the defendant. The whole evidence shows, with reasonable clearness and certainty, that the tracks in the North Penn yards were used by the several contracting roads with a full knowledge of the meaning of the blue-flag signal, and that the cars of the Central Railroad of New Jersey were at an authorized location. The blue flag had the same meaning, whether it was on the end of a car, or, in accordance with the custom of the car inspectors, placed between the rails in front of it. It indicated that car inspectors were at work under or about the car or train, and it was a direction that the car or train thus protected must not be coupled to or moved until the blue signal had been removed by the car inspectors. In defiance to this notice the train of thirteen gondola cars, under the control of the Lehigh Valley Railroad crew, entered upon this track in broad daylight, ran over the well-known signal, broke it to the ground and drove the train against the Central Railroad car,—sixty yards distant from the signal—so as to cause the plaintiff's injuries.

The trial Judge fairly submitted the whole case to the jury, viz: "If the defendant had notice, I care not in what form or in what wav, at the time the defendant's employés backed in the car, if they did back in the car, that the car ran into was being inspected and the defendant disregarded this notice, such conduct would amount to negligence. If the flag placed where it was, was as effectual in giving notice to the incoming train of the Lehigh Valley R. R. Co. as it would have been if it had been placed on the end of the car, and if the flag thus placed was in accordance with the custom of the yard, and if in accordance with the flag being placed where the Lehigh Valley Railroad Co., or the crew that was in charge of that train had knowledge that an inspection was going on in the car or under the car which the train ran into, then that would be notice to the Lehigh Valley R. R. Co., and if they disregarded the notice they would be guilty of negligence." Under the authority of Vanatta *v.* Cent. R. R. of N. J., 154 Pa. 262, the Act of April 4, 1868, P. L. 58, does not apply to this plaintiff, and the judgment is affirmed.

H. B.

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WEEKLY NOTES OF CASES.

VOL. XLIV.] *FRIDAY, APRIL 14, 1899.* [NO. 2.

Supreme Court.

Oct. '98, 22. Supreme Court. Argued Nov. 2, 1898.
Re-argued Feb. 24, 1899.

Estate of George T. Jacoby.
Appeal of Safe Deposit and Trust Co.

Wills—What constitutes—Construction of—Revocation.

A. died, leaving a carefully prepared formal will in writing, which was admitted to probate; subsequently there was offered for probate as A.'s last will two tin boxes and their contents. Upon one of the boxes was affixed the following writing: "In case of my death I want this box given to my attorney, A. K. Stevenson, 439 Grant street, G. T. Jacoby." No date was affixed to this writing; inside of this box were sixteen envelopes containing certificates of stock, deeds, receipts, etc., constituting the bulk of A.'s estate. No. 1 was endorsed "G. T. Jacoby," and contained the securities of the greatest value. No. 2 was endorsed "Tax receipts from 1866 to 1887, Geo. T. Jacoby," and contained receipts only. No. 3 was endorsed in A.'s writing, "This goes to Miss Mary Gross, 223 42nd street, Pittsburg, Pa., Twenty Tarentum Bonds," and contained twenty bonds of $500 each, payable to bearer. No. 4 was endorsed, "Roselia Maternity Hospital, Pittsburgh," and contained 854 shares of mining stock and the transfer on back of same was signed by G. T. Jacoby. No. 5 was endorsed, "Home for the Friendless, Allegheny City," and contained mining shares with blank transfer signed by G. T. Jacoby. No. 7 was endorsed, "This is to go to Mrs. Mary Downs and her family, Greenville, Mercer county, Pa.," and contained certificates for large amounts of stock. No. 9 was endorsed the same as No. 7, and contained securities. The other envelopes had endorsements of a name or a description of the contents:

Held, that the box and contents together with the signed direction to deliver the same to his attorney did not constitute a testamentary act.

Semble, that the direction on the other box, viz.: "This box belongs to Mrs. Mary Downs—must be opened only by her, children this is my will, Dr. G. T. Jacoby," together with the paper inside containing the written words: "Mary, I want you to divide the contents of this box between your children that is just living when it falls into your hands. I hope you will carry it out to the letter, Dr. J. T. Jacoby," is not his will "because the box contains nothing but a few old daguerreotypes, some silverware and a very little jewelry."

Appeal of the Safe Deposit and Trust Company, from a decree of the Orphans' Court of Allegheny County, dismissing an appeal from the decree of the register of wills, probating certain boxes and their contents as the will of George T. Jacoby, deceased.

The facts of the case are fully set out in the opinion of the Supreme Court, infra.

The register admitted the boxes and their contents to probate, and the Court, HAWKINS, J., dismissed the appeal from the decision of the register, whereupon this appeal was taken, assigning for error this action of the Court.

J. McF. Carpenter, for appellant.

The writings on and in the tin boxes taken together or separately are not testamentary.

Plumstead's Appeal, 4 S. & R. 545.
Barnet's Appeal, 3 Rawle, 20.
Grant *v.* Levan, 4 Pa. 424.
Campbell's Estate, 7 Id. 102.
Crawford's Appeal, 61 Id. 54.

The writings in question do not revoke the formal will which has been duly probated and recorded, and cannot be treated as parts of the original will, for they make no testamentary disposition of property and testator's intention cannot be made to appear by extrinsic proof.

Baker's Appeal, 107 Pa. 381.
Magoohan's Appeal, 117 Id. 238.

Even should the writings be declared testamentary, they were prepared and written prior to the formal will, and there can be no parol republication of these endorsements as a will.

Fransen's Will, 26 Pa. 202.
Heise *v.* Heise, 31 Pa. 246.

A testamentary writing once perfect can only be repealed or annulled in the manner prescribed by the Act of 1833. See—

Secs. 13 and 14, Act of 1833.
Schultz's Appeal, 80 Pa. 402.
Fox *v.* Fox, 88 Id. 19.
Porter's Appeal, 94 Id. 332.

S. S. Mehard and *Q. A. Gordon*, (*C. H. McKee* and *W. C. Bates* with them), for appellee.

The writings in question constituted a will.

Williams on Executors, 141.
Scott's Estate, 147 Pa. 89.
Sunday's Estate, 167 Id. 37.

The writings have been proved as a will by competent evidence.

Sec. 5, Act May 23, 1887, P. L. 158-160.

The formal will has been probated in connection with the writings and it does not, therefore, prevent the operation of the latter as a testamentary disposition.

Fosselman *v.* Elder, 98 Pa. 159.
Cook *v.* Lambert, L. J. 32 N. S. Prob. 93.
Goods of Gansden, 31 N. S. L. J. 53.
Goods of Horsford, 3 P. & D. 211.

The formal will and writings in suit are to be taken together as the will of decedent.

Denny *v.* Barton, 2 Phillimore, 575.
Gladstone *v.* Tempest, 2 Cur. 650.
Jenner *v.* Finch, 5 P. D. 106.
Williams on Executors, 201.

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The writings in question should be admitted to probate because they were published by Dr. Jacoby as testamentary after the date of the formal will and adhered to by him to the time of his death.

Havard v. Davis, 2 Bin. 415.
Jones v. Hartley, 2 Wh. 103.
Campbell v. Jamison, 8 Pa. 498.
Wallace v. Blair, 1 Grant, 75.
Jack v. Shoenberger, 22 Pa. 416.

March 27, 1899. GREEN, J. This case is of a highly exceptional character. In all ordinary cases of this kind the contest arises upon the question whether an informal or irregular paper, or collection of papers, constitute the last will and testament of a deceased person. It is then a question of testament by the papers presented as such, or of no testament at all, and the contest is necessarily conducted upon the manifest theory that the deceased, at least, tried to make a will, and deserved assistance from the Court or jury if it was reasonably practicable to give it to him. But in this case there is no such condition of things. This decedent had made and executed a formal, carefully prepared and undoubted last will and testament. It was written and rewritten several times after numerous interviews and consultations with his attorney, Mr. Stevenson. To him the testator explained with the utmost minuteness and detail just what he wanted to go into the will. Mr. Stevenson testified: "I think I wrote it three or four times before I got it the way he wanted it. Q. Did he take away the documents as you prepared them and study them over and mark them? A. Yes, sir; he took them away and he had it marked, and he would say that will not do, put that in, and I would put that in and he would take it away, and he would bring it back again, and have something else marked, and say that will not do and put it in, until finally he got the will such as it is." The witness had previously explained that Dr. Jacoby wrote the will himself in the first instance, but that he was not a good scholar, and could not spell very well, and he brought it to the witness for final preparation. But at last it was completed to the satisfaction of the testator, and then he executed it formally in the presence of two subscribing witnesses. This occurred on January 22, 1894. But on February 3, 1894, only twelve days later he executed a codicil also formally prepared, and signed in the presence of two witnesses, in which he made a change in an important provision of the will? After Jacoby's death this will and codicil were duly proved and letters testamentary issued thereon to the executors named therein. As to that will it remains undisputed and unchallenged to this day. The final decree of the Orphans' Court sustains it and it is not now a subject of contention. Thus we have absolute knowledge, and a judicial decree as to what the real, actual will of the testator was, up to, and on, February 3, 1894. All his wishes were plainly written down, a number of legacies were given to different persons, and the residue of the estate which was by far the greater part of it, was directed to be invested in interest-bearing securities, and thereupon one-half of the income altered by the codicil to one-fourth, arising from the invested funds was to be paid to the children of Mary Downs, the petitioner in this case, one-eighth to Ethel Jacoby, and the remainder, to be known as the G. T. Jacoby Protestant Orphans' Relief Fund, to the various Protestant orphan asylums and institutions within the county of Allegheny. This charity would take nearly three-fourths of his entire residuary estate. The estate was large, amounting, according to the inventory, to over $235,000 of personal estate, and several parcels of real estate also.

Immediately after the death of the testator two tin boxes which were in the vault of the Metropolitan National Bank were delivered to the executors, and were opened by them and an inventory of the contents was made. The larger box contained bonds, certificates of various stocks, receipts and some other papers constituting practically the whole of the decedent's personal estate. The smaller box contained some silverware and daguerreotypes of small value. On the outside of the larger box there was pasted a small paper containing the following words: "In case of my death, I want this box given to my attorney, A. K. Stevenson, 439 Grant street.

"G. T. JACOBY."

Within this box there was a variety of papers. Sixteen of them were envelopes containing numerous individual papers of different characters, but chiefly certificates of mining stocks. There were also receipts given by Geo. B. Hill & Co., for certain traction stocks and air brake stocks standing in their name on the books, but being the property of Dr. G. T. Jacoby. There were also other receipts and a mortgage for $10,000 and some promissory notes. In addition to the foregoing there were deeds, agreements, an old mortgage and a Lawrence Bank pass book. Some of the envelopes had upon their outside certain written words, and others had no words of any kind written upon them. The envelope which contained by far the largest number of shares, receipts and the mortgage for $10,000 and was marked No. 1, had written upon its outside face the words, "Dr. G. T. Jacoby," and no other words whatever. In this were certificates for five shares stock Emmons Zinc Co.; 5000 shares

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stock Mayflower Gold Co.; 6410 shares stock East Mayflower Gold Co.; ten shares stock Gold Trust and Development Co.; 2932 shares stock Eclipse Gold Mining Co.; 1000 shares stock The Chicago Gold Mining Syndicate; mortgage, Stephen H. Emmons, $10,000; receipt for loan of $500 to East Mayflower Gold Co.; receipt signed by Geo. B. Hill & Co., certifying that 378 shares Citizens' Traction stock, 70 shares of Citizens' Pass. Ry. Co., 20 shares Ewalt St. Bridge Co. stock, 770 shares Westinghouse Air Brake stock, all standing on the books of said company in the name of Geo. B. Hill & Co., are the property of Dr. G. T. Jacoby. Receipt signed by Geo. B. Hill, certifying that 833 shares Westinghouse Air Brake Co., Ltd., of London, England, standing on the books of said company in the same firm name, and 7150 shares La Noria Mining Co., standing in the same name are the property of George T. Jacoby.

The envelope marked "No. 2," had in it a quantity of old tax receipts from 1866 to 1887, and the words written on the outside were, "Tax receipts from 1866 to 1887," and "Geo. T. Jacoby, 439 Butler street, Pittsburgh, Pa."

The envelope marked "No. 3," had on it the printed words, "Baxter, Thompson & Co., 161 Fourth avenue, corner Grant street, Pittsburgh, Pa.," and written in ink the words, "This goes to Miss Mary Gross, 223 42nd. street, Pittsburgh, Pa.," and also in the corner the written words, "Twenty Tarentum Bonds." Inside the envelope were twenty bonds of the borough of Tarentum, each in the sum of $500, payable to bearer with interest at five per cent.

The envelope marked "No. 4," had on it the written words, "Roselia Maternity Hospital, Pittsburgh," and on the inside were certificates amounting to 854 shares of Mayflower Gold Mining Co. of the par value of $10 each, and in the name of G. T. Jacoby, and the transfer on the back signed "G. T. Jacoby," and duly witnessed.

The envelope "No. 5," had on it the written words, "Home for the Friendless, Allegheny City," and on the inside were certificates for 634 shares of the Mayflower Gold Mining Co., in the name of G. T. Jacoby, with the blank transfer signed by Geo. T. Jacoby and duly witnessed.

The envelope "No. 6," had on the outside the written words, "This is to go to Geo. B. Hill & Co., 1400 shares. To Frederick Sherman, 150 shares. To Geo. H. Henderson, 150 shares," and in lead pencil the words, "1700 Emmons Metal shares." On the inside were certificates for 1700 shares of the Emmons Metal Co., of the par value of $10 each, all issued to G. T. Jacoby.

The envelope "No. 7," had on the ouside the business card of Geo. B. Hill & Co., printed on the corner, and the written words, "This is to go to Mrs. Mary Downs and her family, Greenville, Mercer county, Pa." On the inside there were certificates, No. A, 370 of the Citizens' Traction Co. for ninety shares of the par value of $50 each, issued to Geo. B. Hill & Co., with the blank transfer on the back executed by Geo. B. Hill & Co., also certificates No. 541, for 58 shares of the Citizens' Traction Co., of the par value of $50 each, issued to Geo. B. Hill & Co., with the transfer duly executed by Geo. B. Hill & Co. Also certificate No. 645, of the Citizens' Traction Co., for 100 shares of the par value of $50 each, issued to Geo. B. Hill & Co., with transfer duly signed by that firm. Also certificate No. 646 for 100 shares of the same stock and same par value, issued to Geo. B. Hill & Co., with transfer duly executed. Also certificate No. A, 1310, for thirty shares of the same stock, same par value, issued to Geo. B. Hill & Co., and transfer duly executed. Also certificate No. 197, for twenty shares of the capital stock of the Ewalt Street Bridge Co., of the par value of $50 each, issued to Geo. B. Hill & Co., and transfer duly signed. Also trustee scrip certificate for seventy shares in certain real estate remaining in the hands of Charles M. Gormley.

The envelope "No. 8," had on the outside the written words, "Frederick Seebick, Pittsburgh," and on the upper corner in lead pencil the words, "Mayflower." On the inside were certificates for 626 shares of the Mayflower Gold Mining Co., par value $10 each, issued to Geo. T. Jacoby.

The envelope "No. 9," had on the outside the printed words, "The Metropolitan National Bank, Pittsburgh, Pa.," and the written words, "This goes to Mrs. Mary Downs, Greenville, Mercer county, Pa.," and below the words enclosed with a bracket, "or her family." And in lead pencil were the words, "770 W. A. B. American." On the inside were found certificates for 770 shares of the capital stock of the Westinghouse Air Brake Company, par value $50 each, issued to Geo. B. Hill & Co., with transfers duly executed by that firm.

The envelope "No. 10," had on the outside the written words, "A. K. Stevenson, Sr., or Jr., No. 439 Grant street, Pittsburgh." On the inside were certificates for 726 shares of the Mayflower Gold Mining Co., par value $1 each, issued to Geo. T. Jacoby, and transfers duly signed by him.

The envelope "No. 11," had on the outside the words, "This to go to the G. T. Jacoby Protestant Orphan and Relief Fund, the net income arising therefrom," and in pencil the words, "883 W. A. B. C." On the inside were contained certifi-

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cates for 883 shares of the Westinghouse Air Brake Company, Limited, of the par value of ten pounds each, issued to George Burton Hill, with transfer duly signed.

The envelope "No. 12," had on the outside the written words, "Mrs. E. Murray's will—Copy." And on the inside was a copy of the will of Mrs. Murray.

The envelope "No. 13," had in it some fire insurance policies.

The envelope "No. 14," had on the outside the written words, "Aughenbaugh notes." On the inside were found a package of notes, some stubs of check books, letters and copies of old papers of no value.

The envelope "No. 15," had on the outside the printed words, "City Treasurer's Office, Pittsburgh, Pa.," and was addressed to Dr. G. T. Jacoby, having apparently gone through the mail. It had also the written words, "Standard Underground Cable." On the inside were found two certificates of fifty shares each of the Standard Underground Cable Co. stock, par value $100 each, issued to Geo. B. Hill & Co., and transfers duly signed. There was also found in this envelope the collateral note of George B. Hill & Co., for $5000, for fifty shares of the stock of that company, and it was testified that this note had been paid and the collateral redeemed. A receipted bill of Geo. B. Hill & Co., dated April 6, 1896, was found in this envelope. The envelope "No. 16," had written thereon the words, "La Noria," and in pencil, "7300 shares." These certificates were of the par value of $25 each and were issued to Geo. B. Hill & Co., with transfers duly signed by them.

There were also in this box a number of old deeds, mortgages, agreements, and a bank book of the Lawrence Bank of Pittsburgh, also some memorandum documents, but all seemingly of no value.

The foregoing is a statement of the contents of the larger box, marked "Exhibit No. 2."

The smaller box, marked, "Exhibit No. 1," which contained some silverware, daguerreotypes, and a few articles of jewelry, had pasted on its outside a small piece of paper on which were the following written words, "This box belongs to Mrs. Mary Downs—musn't be opened, only by her children, this is my will, G. T. Jacoby." On the inside of this box was found another paper, which contained the following words, "Mary, I want you to divide the contents of this box between your children which is just living when it falls in your hands. I hope you will carry it out to the letter, G. T. Jacoby."

On the hearing before the register, that officer made a decree declaring that the two boxes with the writings appearing thereon, the writing found in the smaller box marked, "Exhibit No. 1," and all the contents of both boxes were testamentary in their character, and together constituted the last will and testament of George T. Jacoby. He made this decree upon the distinct ground that, "the above recited testamentary writings were executed by the said George T. Jacoby, deceased, as and for his last will and testament at a date subsequent to the date of the execution of the will and codicil heretofore probated, to wit, subsequent to the date of February 3, 1894, and on or about February 13." By the regularly executed will of the testator the Safe Deposit and Trust Co. of Pittsburgh, and A. K. Stevenson, were appointed executors. By the decree of the register, A. K. Stevenson was appointed sole executor. The decree of the register without containing any formal revocation of the probate of the first will did in point of fact set it entirely aside by force of the adjudication that the boxes, papers and contents of the boxes, constituted and were the last will and testament of the decedent. The learned Court below made a different decree which included the regularly written and executed will and codicil, and adjudged that they together with the boxes, papers and contents of the boxes constituted the last will and testament of the deceased. It is not distinctly ruled that the latter are to be regarded as a codicil to the will. On the contrary as we understand the final decree, it includes both and directs that they must be probated together. Thus at the end of the opinion the learned Judge of the Orphans' Court says: "Both wills must, therefore, be probated, but as there can be only one probate they must be treated as forming parts of the will and proven together." And in the concluding sentence of the decree it is said, "And it is further ordered, adjudged and decreed that the instrument of writing embraced in the probate decree of May 5, A. D. 1896, and the writings embraced in the probate decree of March 29, A. D. 1897, are together the last will and testament of George T. Jacoby, deceased."

We have considered the contention involved in this cause with great care with much patience and with the closest attention. We have heard two full arguments made by experienced and able counsel, and we have examined all the adjudicated cases which are supposed to sustain or justify the ruling of the Court below, as well as those to the contrary effect. Having as we do a positive statute which declares expressly, that, "every will shall be in writing and unless the person making the same shall be prevented by the extremity of his last sickness shall be signed by him at the end thereof," and appreciating the

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enormous consequences which may flow from a disregard of this most wise and judicious enactment, we feel constrained to say that we cannot but regard the decision of the learned Court below as a most grave and serious departure, not only from the letter and the substance of our statute, but also from the adjudications we have heretofore made upon this subject. Entertaining as we do the greatest respect for the learning and ability of the distinguished jurist who ruled this case in the Court below, we proceed to set forth our reasons for reaching a conclusion in hostility with that expressed in the final decree of the Orphans' Court.

In the first place we fail to discover any compliance with the requirement that the alleged testamentary writing shall be signed by the testator at the end thereof. It is claimed that the signature, "G. T. Jacoby" appended to the words written on the piece of paper pasted on the larger of the two boxes in evidence, is a compliance with the statutory requirement. If this writing contained words of a testamentary character there would be plausibility, and might be controlling force, in this contention. But to us it is entirely clear that there are no words of that character in the writing. It must be remembered that the box contained numerous papers and evidences of property interests belonging to the decedent. They have all been described in the enumeration hereinbefore set forth. They constituted practically the entire evidences of the ownership of the testator's personal estate. It must be also borne in mind that Mr. A. K. Stevenson was and had been for some years the confidential attorney of the deceased. He had written Mr. Jacoby's will after numerous consultations. He was appointed one of the executors of the will and would therefore be the proper custodian of the box and its contents after the testator's death. It was necessary that some person should be entrusted with such custody at once upon the death of the testator. Now the written words appearing on the box were these: "In case of my death I want this box given to my attorney, A. K. Stevenson, 439 Grant street, Pittsburgh, Pa., G. T. Jacoby." Upon the legal meaning of these words depends the entire ruling of the Court below. If they constitute the execution of a testament they could be treated as a necessary part of a will. But if not of that character the whole fabric of the decision of the Court below falls to the ground. There is nothing else upon which it can stand, or upon which it is claimed it can stand. There is no other signature of the deceased anywhere upon any paper or other substance, which has the least connection with the testamentary disposition of the contents of this box except the formal will of January 22, 1894, and its codicil of February 3, 1894, duly executed by the testator and properly attested. The absolute fate of the controversy depends upon the meaning to be attached to the few written words we are now considering. What then is their meaning? Literally they are a direction that the box shall be delivered to A. K. Stevenson after the death of G. T. Jacoby. That is not only their literal meaning, but it is their whole meaning. They are not in the least degree doubtful. They mean precisely what they say. There is no hidden meaning in them, and therefore there is no room for an implication of a meaning other than that which is expressed in plain and simple words? "In case of my death I want this box given to my attorney, A. K. Stevenson." There is but the one idea that is possible to be extracted from the words and that is the delivery of the box after his death to the person named. But the delivery of the box is a mere corporal act which relates only to its custody. Not a word containing any testamentary intent or purpose, express or implied, appears in the writing. There is not the least reference to the contents of the box or to any paper or thing therein contained. That it is to be delivered to Stevenson after the death of Jacoby imports nothing but a physical and necessary change of the custody of the box. Jacoby being dead some one must have the custody which Jacoby held until the moment of his death. This and this alone is the full and absolute import of the words.

Can it be necessary to argue that these words do not, and cannot make a will? Of course they do not. It is too plain for argument. Had there been any words which directed Stevenson to do anything with the contents such as to deliver the envelopes which had names on them to the persons named, or to see that the contents were properly distributed or words of a similar import it might be that a testamentary intent might be attributed to them. But there is absolutely nothing of the kind.

On the contrary there is a most momentous, vital fact in absolute hostility with any inference of even a possible testamentary intent being contained in these words, and that is, the fact that Jacoby had already executed a full, complete, carefully prepared and properly executed written will in which his whole testamentary purpose was most fully and circumstantially declared. And not only that but it was also the fact that that will was prepared by the very person to whom the custody of the box was committed, and not only that, but it was the further fact that that person was appointed an executor of the will. How is it possible in view of this con-

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sideration, to derive an inference that when such a person in such circumstances was merely appointed by the words in question to take the physical custody of the box, the whole testamentary scheme of the testator as expressed in his written will was to be absolutely destroyed, and another one set up without express words of any kind, without the least degree of implication from doubtful words, with not a solitary word indicating any intention to change, or alter, much less to strike down, any of his carefully expressed, fully written out testamentary dispositions previously made? And especially how can it possibly be inferred that there was an intent by the use of words merely directing a necessary change of the custody of the box, to set up in the place of his formal written will a mere mass of absurdities, as will be shown later on, impossible of reconciliation either with the written will or with any real conceivable, intelligent disposition of his estate? For it must again be borne in mind that the testator had carefully preserved his regularly executed formal written will up to the moment of his death. He had caused it to be deposited in a secure place with the Safe Deposit and Trust Company of Pittsburgh, and that company was named in the will as the other executor. And it must be presumed from all this that this will thus carefully prepared and carefully preserved by the testator until the moment of his death was in fact and was intended to be the final determinate and conclusive expression of his full and complete testamentary intent and purpose. With no destruction, no cancellation, no change or alteration of any kind, no codicil other than the formal and carefully prepared and executed codicil of February 3, 1894, how can it possibly be said that this will was, or was intended to be, abandoned, changed, altered in any manner whatever? There is not a solitary fact or feature to be found in the case indicative of any such purpose. In this respect there is not a solitary case cited for the appellee that is applicable to the present question. All of them are destitute of any such fact as this. We therefore conclude that the words relied upon to sustain this alleged last will of George T. Jacoby are not words of a testamentary character, and hence they are totally inoperative to effect such a purpose.

But in the next place there is not a particle of proof that the signature "G. T. Jacoby," appended to the words in question was placed there at any time after the formal will was executed on January 22, 1894.

There was but one witness examined on this subject. That person was George Foebick, who was the cashier of the Metropolitan Bank, at which place the two tin boxes were deposited. The relations between him and the testator seem to have been quite intimate, and they extended back for several years prior to the testator's death. He was familiar with the boxes, had often seen them, and had a number of conversations with the testator respecting them. He testified, "I knew he had that direction on the outside of that box. Q. How did you know that? A. I saw that box many a time; I brought it out many a time." On cross-examination he was asked: "Q. When was the endorsement that you speak of there on the tin box, directing its delivery to Mr. Stevenson made? A. That was there several years. At first that box was wrapped up in another paper; it had another paper on it; he had the box with us six or seven years and along after a while that paper came off and I saw the instruction on the box, and he told me that if anything should happen to him that this box was to go to his attorney. Q. You mean that after the old paper that was around the box came off, then it was that you discovered this written instruction to deliver it to Mr. Stevenson? A. Yes, sir, if I remember right; there was some sort of address similar on the other wrapper. Q. That was a good many years before his death? A. Yes, sir, a long while. Q. Have you any idea how many years? A. I think he started his account with us in about 1889 or 1890, somewhere along there. Q. It was probably about that time, was it? A. Yes, sir. He very often opened the box in my presence. Q. After that? A. Yes, sir. Q. After he first left it there? A. Yes, sir. Q. Of course as to the box in which he had the securities he took them out and put them in as he pleased? A. Yes, sir." After saying he did not remember whether the writing was in ink or lead pencil, and that this box was kept on the inside of their safe, he was asked: "Q. Do you remember whether the writing which you refer to as having been on several years was in ink or lead pencil? A. I could not tell you. Q. Do you know whether it was signed when you first saw it or not? A. I could not remember that. Q. Do you know whether it was simply instructions without any signature to it, or whether it was signed when you saw it? A. I could not remember that. I know when he took this trip around the world, then this writing was brought to my attention specially, that is on there now. . . . . Q. Did you ever notice until after the death of Dr. Jacoby whether or not the writing on this box was signed by him? A. This big box you mean? Q. Yes, sir. Can you recollect at any time that you noticed it, whether or not the signature was to it, or whether it was simply a label in his handwriting? A. It was about the delivery of the box; more than that I don't re-

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member. Q. Have you any recollection whatever on the subject whether the writing on the box was signed by him or was not signed? A. I can't say that the signature was on there. Q. Do you remember when it was you noticed this signature on the box, and if so, state the time? A. I don't remember of seeing the signature, I could not state positively whether there was or there was not a signature on the box . . . . Q. You are not able to state whether there was a signature to it or was not a signature to it? A. I never paid any attention to that. Q. You simply don't know? A. The directions were put into my mind about this conversation about that box more especially. I know he had written on this box, 'This goes to A. K. Stevenson.' Q. That was away back, years and years ago? A. A good while ago, yes, sir."

There was no other testimony than the foregoing as to the making of the signature. There is no proof whatever that in point of fact the signature was made at any time after the execution of the will? On this subject the learned Judge of the Court below said in his opinion: "It will be seen that neither endorsement on the box nor the envelopes has a date. The proof shows that the direction on the top of the box had been there long before the date of the will already admitted to probate, but it does not appear when the signature was attached. The presumption arising from the use of pen and pencil is that they were written at different times; and the signature being at the end must be presumed to have been made last; but whether before or after the date of the will already probated, does not satisfactorily appear." There is, therefore, no finding and no proof that in point of fact the signature was made after the execution of the will. But the will has a date which is precise and definite. If it is to be defeated by any paper subsequently executed it is manifest that the fact of such subsequent execution must be affirmatively established. It will not do to show a state of facts from which it may be inferred that the execution was subsequent. This paper has no date. It may have been signed long before the execution of the will, and in the present case all the probabilities are that it was so signed. But the question is one that can not be settled either by probabilities or possibilities. An adequate testamentary paper having a specific date had been actually established and probated. That paper is in itself completely efficacious, and it is incapable of destruction by any other testamentary writing unless the latter was executed at a subsequent date. It is not enough that such might have been the case, it must actually have been the case. If there is doubt about the fact of the subsequent execution, the doubt decides the case against the allegation of the subsequent execution. The finding of the register on this subject is of no consequence because it is founded upon an inference and not upon actual proof. For this reason therefore it should have been held by the Court below that there was no sufficient proof that the signature was made after the execution, and because of the want of such proof the writing on the box was not established as a subsequent testamentary act and it must therefore fail. To our minds it seems clear that the signature must have been placed there long before the date of the will. The affirmative testimony produced by the appellee shows that the writing itself which directed the delivery of the box was placed there several years before the date of the will, and as it is the meaning of those words that is in controversy it is entirely plain that they could not have been intended to defeat a will duly executed long after. It is not the fact of the signature, but the meaning of the words, that has controlling force in this point of view. If they were never intended to defeat a subsequently executed will, they cannot have that effect if it were affirmatively shown that the signature was appended after the execution of the will. This consideration also is fatal to the proposition that the written words are of a testamentary character sufficient to defeat, or alter, or in any manner affect the prior will. If they were not testamentary to this effect before they were signed, they could not possibly become so merely by force of the signature. In other words the signature does not change the meaning of the written words on the box. As they then imported only a direction to deliver the box, that is still their meaning. If they then imported a testamentary purpose that purpose was defeated by the subsequently executed will.

The argument that the signature was made after the will was executed because some of the papers contained in the box bore dates later than the will, is entirely untenable. It was fully proved that the testator had constant access to the box and continued to take out and put in any papers he chose up to the time of his death. There were quite a number of such papers. The certificate for thirty shares of Citizens' Traction stock was dated February 13, 1894. The certificate for twenty shares of stock of the Ewalt Street Bridge Company was dated March 11, 1894. The two certificates of fifty shares each of Standard Underground Cable Company were dated July 3, 1894. These were found in envelope No. 15, on which the only words written were, "Standard Underground Cable." In the same envelope was found a receipted bill of Geo. B. Hill & Co., dated April 6, 1896. In the envelope No. 1 was

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found a receipt signed by Geo. B. Hill & Co., dated February 13, 1894, certifying to the ownership by Geo. T. Jacoby of a large number of valuable shares of stock which stood in the name of Geo. B. Hill & Co. There was also another receipt for other stock certifying that 833 shares of Westinghouse Air Brake Company, Limited, of London, England, standing in the name of Geo. B. Hill & Co. and 7150 shares of La Noria Mining Company in the same name were the property of Geo. T. Jacoby, and this receipt is dated February 13, 1894, just ten days after the formal written codicil was executed. On this envelope the only written words were: "Dr. Geo. T. Jacoby." In the envelope No. 1, there were also certificates for 933 shares of East Mayflower Gold Mining Company, all issued in the name of G. T. Jacoby, one of them dated January 13, 1894, only ten days before the date of the will, one dated February 3, 1894, the very day on which the codicil was executed, by which codicil the legacy to Mary Downs's children was cut down from one-half to one-fourth of the income of the residue of the estate. And the other certificate was dated February 9, 1894, only six days after the date of the codicil.

In view of these facts it is absolutely certain that the dates found upon the papers contained in the box had no relation whatever to the time of affixing the signature. They prove nothing but the fact that the testator was in the habit of putting in papers at any and all times up to the time of his death. They do not justify any kind of inference that the signature was made after rather than before the date of the will and codicil. For all the effect they can possibly have the signature might just as well have been appended years before the date of the will. What conceivable premise can be stated which would require, or even justify, a conclusion that the signature was written after the date of the will? None whatever. And how is it possible to conceive that on the very day when the testator executed a codicil depriving Mary Downs's children of one-half of the large legacy which they took under his will, he was doing an act which would indicate a purpose to increase their interest in his estate several times over. And on February 9, only six days later, the same act was repeated, and if anything were needed to increase the force of the inference that he had no such intent, it is the fact that it is now contended and was so ruled in the Court below that the signature was appended at some time between the third and the thirteenth of February. In our judgment these very acts of the third, the ninth and the thirteenth of February, are proofs of the most persuasive character that he could not possibly have had an intent at these times so near to the date of his will, to set aside and defeat not only the particular items, but the whole scheme of his most clearly expressed testamentary purpose. It is not of the slightest use, but a waste of time only, to argue from parol testimonv as to declarations and other acts done, that the testator desired or intended to make a disposition of his property other than that contained in his will. The question at issue is, did he make a lawful will expressing such an intention, in other words, did he make such a writing signed by him at the end thereof? To illustrate the folly of such methods of making a will it is only necessary to recur to the testimony of A. K. Stevenson. He was asked: "Q. Did he tell you that you had any personal interest or right to anything in the box? A. Yes, sir, he said after I got the box to open it and help myself. Q. Did he say there was provision made for you? A. He said when I got the box just to put my hand in and take whatever I wanted to. Q. Did he say there was ample there, that you might help yourself? A. He said there was plenty there, he said not to be stingy with myself."

Will it be admitted on behalf of the appellee that Mr. Stevenson has thus acquired a testamentary right to take to himself such of the contents of the box as he might please? Certainly not.

The technical question still remains, is there a written will signed at the end thereof to be found in the testimony in this case other than the one regularly executed. The only pretence of such a will is the box and its contents with the direction to deliver the box to Stevenson, signed by the testator. For the reasons already set forth we are most clearly of opinion that there is no such writing as the law requires.

But there is another and most convincing line of reasoning that leads to the same result. The ruling of the Court below was that the two boxes and all their contents were of a testamentary character. The inclusion of the contents was a necessary consequence of the ruling that the written direction to deliver the box to Stevenson was the lawful execution of a testament. If it was lawful as to some of the contents it was lawful as to all. And hence the decree specifically included all the contents. The circumstance most relied on was the endorsements made upon the envelopes. An examination of these endorsements will develop some curious results. Thus the envelope No. 1 contained the certificates for about fifteen thousand shares of stock, a mortgage for ten thousand dollars, a certificate that 378 shares of Citizens' Traction stock, 70 shares of Citizens' Pass. Ry. stock, 20 shares of Ewalt St. Bridge

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stock, 770 shares of Westinghouse Air Brake stock, standing in the name of George B. Hill & Co., were the property of George T. Jacoby, and a similar certificate as to 833 shares of Westinghouse Air Brake Co., Ltd., of London, and 7150 shares of La Noria Mining Co. stock.

Under the ruling of the Court below to whom does all this property belong under this alleged will? The only name, and, indeed, the only writing on the envelope which contains all these papers is, "Dr. G. T. Jacoby." The reasoning of the Court is that the contents of the envelope belong to the persons whose names are written upon the envelopes. If this is correct the entire contents of envelope No. 1 belong under this peculiar will to Dr. G. T. Jacoby. But that person is himself the testator and it is his own alleged testamentary act that we are considering. Moreover the envelope contains the written evidences of nearly the whole of his estate. Of course these contents cannot go to him, and as there is no direction on the envelope that they shall go to anybody and as his name is the only one that appears on the envelope, there can be no testamentary effect attributed to the envelope or its contents, and the necessary inference follows that as to this part of his estate he had no testamentary intent through the medium of the box and the envelopes.

The contents of envelope No. 2 were a large quantity of old tax receipts. There was no name and no direction on the envelope and the nature of the contents precludes the possibility of a testamentary intent as to them.

The contents of envelope No. 12 were a copy of the will of Mrs. E. Murray. On the outside were written the words, "Mrs. E. Murray's will—Copy." As a matter of course the testator could not possibly have had a testamentary intent as to this envelope.

The contents of envelope No. 13 were some fire insurance policies. There was nothing in the testimony to show whether they were living or dead policies, but as the envelope had neither name nor direction on it there could not have been any testamentary intent as to it.

The envelope No. 14 had on it the words, "Aughenbaugh Notes," and it was addressed to Dr. G. T. Jacoby, as if it had gone through the mail. The contents were a package of notes, some stub check books and letters and copies of old papers seemingly of no value. There was no name or direction on the envelope, and hence it is not possible that the testator could have had any testamentary intent as to it. The contents of envelope No. 15 were two certificates of 50 shares each of Standard Underground Cable Co., of the par value of $100 each, a collateral note of Geo. B. Hill & Co. for $5000 on fifty shares of the same stock as collateral, and a receipted bill of Geo. B. Hill & Co., dated April 6, 1896, which was about twenty-two days before the death of the testator. This envelope had an endorsement in writing upon it, to wit, "Standard Underground Cable," and upon the reasoning upon which the decree is founded the contents would belong to that company. But as this conclusion would be perfectly absurd there is no such contention made and we are shut up to the conclusion that, as to these evidences of property rights, there was no testamentary intent to be found in the box or its direction.

The envelope No. 16 had nothing on the outside except the written words, "La Noria," and in pencil the figures and word, "7200 shares." The contents were certificates for 7200 shares of La Noria Gold Mining stock. There is no evidence to show that there was any living person named La Noria, and as it would be absurd to suppose that the testator intended to give the shares to the company of that name, we must conclude that as to this envelope and its contents the testator had no testamentary intent through the medium of the box and its written direction. There was also found in this box a lot of old deeds, mortgages, agreements, and a bank book of Lawrence Bank, of Pittsburgh, also some memorandum documents of old dates and without value. They were adjudged testamentary by the decree because they were in the box, but as it is simply absurd to regard them in any such light we can only reach the conclusion that the testator exercised no testamentary intent as to them, by enclosing them in the box, and directing it to be delivered to Stevenson.

We are clearly of opinion that what has thus far been said demonstrates the error of the adjudication that the box and its contents, together with the direction to deliver it to Stevenson, constituted a testamentary act, or furnished any evidence of a testamentary intent as to a very large part of the testator's estate. But the facts upon which that adjudication was founded are precisely the same as to the entire contents. That is to say the indispensable writing and signature, and the enclosure are all the same. If an inspection of the contents conclusively shows that as to a large portion of them there could not possibly have been a testamentary intent, either in using the box as a receptacle of the papers, or in writing and signing the direction to deliver it to Stevenson there can be no logical or legal conclusion from those circumstances, that there was any testamentary intent as to any of the contents. In order to make out a legitimate testamentary intent as to a portion of the contents it would

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be necessary to find a testamentary purpose lawfully expressed and executed, on that portion of the contents as to which it is claimed there was such an intent. But there is no signature of the testator upon any of the envelopes or annexed to any direction contained on any of them, and hence this vital element is lacking as to all of them.

As to some of the envelopes there is nothing on them but a name without any direction whatever as to the contents. Thus on envelope No. 4 the words, "Roselia Maternity Hospital, Pittsburgh," alone are written. Upon envelope No. 5 there is nothing written but the words, "Home for the Friendless, Allegheny City." Envelope No. 6 had on it only the words, "Frederick Seebick, Pittsburgh." Upon envelope No. 10 there were only the words, "A. K. Stevenson, Sr., or Jr., No. 439 Grant street, Pittsburgh." Upon envelope No. 15 were the words, "Standard Underground Cable," and on envelope No. 16, the only words were, "La Noria," and "7200 shares." As to none of these envelopes or their contents is there the least expression of a testamentary intent, on the box or on the envelopes or any where else, and it is simply impossible to believe that as to the last two there could have been in the mind of the testator any testamentary thought or purpose, yet all of them have been adjudged as such. It is almost equally impossible to believe that the testator meant to give the contents of envelope No. 8 to "Frederick Seebick, Pittsburgh," or of envelope No. 10, to "A. K. Stevenson," as neither of them was named as a legatee in the will, nor is there any extrinsic proof of such a purpose except the ridiculous facts appearing in the testimony of Stevenson as to helping himself. There are but five envelopes out of the whole sixteen as to which it can be contended that there was any actual expression of a possible testamentary purpose written upon the backs of them. These are No. 3, on which were written the words, "This goes to Miss Mary Gross, 228 Forty-second street, Pittsburgh, Pa."; No. 6, on which were written the words, "This is to go to Geo. B. Hill & Co., 1400 shares; to Frederick Sherman, 150 shares; to George H. Henderson, 150 shares"; No. 7, on which were written the words, "This is to go to Mary Downs and her family, Greenville, Mercer county, Pa."; No. 9, which had on it the words, "This goes to Mrs. Mary Downs, Greenville, Mercer county, Pa., or her family"; No. 11, on which were written the words, "This to go to the G. T. Jacoby Protestant Orphan and Relief Fund, the net income arising therefrom," and in pencil the words, "833 W. A. B. C."

It cannot be known at this time whether it is, or will be claimed that the words written on the envelope No. 6 were intended to operate as a bequest to Geo. B. Hill & Co., of 1400 shares of Emmons Metal Co. stock; to Frederick Sherman, 150 shares, and to George H. Henderson of 150 shares each of the same stock. They are not named at all in the will, they were evidently business persons with whom he had business relations, and it is entirely probable that at the time the endorsement was written upon the envelope he had some reason for directing the delivery of the certificates to them. Geo. B. Hill & Co. were his brokers and he had many transactions with them in relation to his shares of stock. But it is not a matter of any serious consequence because as to all of the endorsements on these envelopes it is a fact common to the whole of them that the testator did not sign any of them and they are therefore fatally defective as testamentary writings.

There is, however, a very ready explanation as to all the envelopes and their contents. It was fully proved and not contradicted that Mr. Jacoby had a firmly fixed purpose to deprive his wife of any share of his property. He expressed this purpose in his will, and disclosed to Mr. Stevenson his desire to make a gift of his property during his life, but apparently not to take effect till after his death. Mr. Stevenson advised him that it was very dangerous to make a gift unless he made a complete delivery, and explained to him the law upon that subject, and went so far as to read to him some decisions in relation to the matter. After saying that he had read from 199 Pa. and 201 Pa., he was asked: "Q. Did you read some other Supreme Court opinions to him? A. Yes, sir; his intention was to make a gift."

He then stated that he had had a conversation with Jacoby some time before about the box and its contents, that Jacoby had told him "how he had arranged matters inside the box and that there were envelopes inside the box," and that he, Stevenson, should deliver them at his death. Whether this conversation occurred before or after the will was executed, the witness did not state, and did not remember. He said it was some weeks before Jacoby went on his journey which was between the fourth and eighth of March. If it occurred before the will was made of course it was not of the slightest consequence what was said as the will took the place of all previous declarations, even if they were ever of any efficacy. If it occurred after the will was made it was nothing but a futile attempt to dispose of his property by a parol gift, not to take effect until after his death, which was of course entirely illegal and of no effect. All the probabilities are that the conversation occurred before

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the will was made, and that he had simply neglected to remove the envelopes. This conclusion is sustained by the consideration that the will was carefully and deliberately prepared and executed. Stevenson testified that the consultations in regard to the preparation of the will commenced in December and continued through January until the will was finally completed in exact accordance with Jacoby's wishes and it was then duly executed and attested on January 22, following.

In addition to this the provisions of the will are in such absolute hostility with the delivery of the contents of the envelopes to the persons named on them, that it precludes the possibility of their being parts of the same testamentary purpose. They are incapable of being carried into effect together.

Thus the will after giving a few special legacies directs the sale of all his property, real and personal and the conversion of his entire estate into money, and gives the whole of the proceeds to his executors to be securely invested "in first-class mortgages." He then gives his library to the Young Men's Christian Association of Pittsburgh, and the sum of one thousand dollars to his namesake George T. J. Folk. He then directs his executors to pay over all the rest of the estate to the Safe Deposit and Trust Co. of Pittsburgh, in trust, to invest it in first-class mortgages and pay out the income, one-half to the children of Mary Downs, naming the children, and as each child reaches the age of 21 years, his or her proportion of the principal is to be paid over absolutely to the legatee. The next clause of the will gives one-eighth of the whole residuary estate to the trustee to be held for Ethel Jacoby, a niece, on the same terms as to interest and principal as in the case of the preceding bequest to the children of Mary Downs. The remainder of the estate is to be invested in mortgages and to be known as "G. T. Jacoby Protestant Orphans' Relief Fund," and the income arising therefrom to be paid to "the various Protestant orphan asylums and institutions wherein orphans are cared for within the county of Allegheny," and also to "The Concordia Home of Butler county, share and share alike." These gifts are only of income and are evidently intended to be perpetual. Under this will Mary Downs gets nothing of either principal or income except that she is to draw the income of such of her children as are under the age of 21 years, provided she uses the money for their education.

By the codicil executed on February 3, following, about twelve days later, the legacy of one-half the income of the residuary estate to the children of Mary Downs is reduced to one-fourth, the testator saying he believed that one-fourth would be sufficient.

It will thus be seen that the real testamentary purpose of this decedent carefully expressed in a written will was to give the great bulk of his estate to charitable uses, and only one-fourth to the children of Mary Downs, and one-eighth to his niece, Ethel Jacoby. If the tin box and the envelopes were to be treated as his will or as a part of it, a large part of the estate given by the written will to the charities would be altogether diverted and would go to Mary Downs directly. These two purposes cannot be executed together. The one almost entirely frustrates and destroys the other. Under the written will Mary Downs gets nothing of the principal and only part of the income to be used for the education of the children. If she takes the envelopes and their contents, she takes a large part of the estate and thereby greatly impairs the charities. It is not possible to believe that Dr. Jacoby intended to do any such thing, and if he did he would have done it in plain writing, duly executed as he did in the case of the codicil. But whether he intended to do so or not he has not expressed any such purpose in a way that accords with the requirements of the law. Our statute of wills of April 8, 1833, contains the following most salutary and wise provision as to the manner in which written wills once made must be altered, viz.: "Sec. 14. No will in writing concerning any personal estate shall be repealed nor shall any bequest or direction therein be altered otherwise than as is hereinbefore provided in the case of real estate, except by a nuncuputive will, made under circumstances aforesaid, and also committed to writing in the lifetime of the testator and after the writing thereof read to or by him, and allowed by him and proved to be so done by two or more witnesses." And the preceding section 13, provides: "No will in writing concerning any real estate shall be repealed nor shall any devise or direction therein be altered, otherwise than by some other will or codicil in writing, or other writing declaring the same, executed and proved in the same manner as is hereinbefore provided, or by burning, cancelling or obliterating or destroying the same by the testator himself, or by some one in his presence and by his express direction."

As there is not the slightest pretence that any of the requirements of these two sections of our wills Act were followed in this case, it results inevitably that the written will of the decedent dated January 22, 1894, and the codicil also in writing and duly executed, dated February 3, 1894, are his only lawful will and codicil and must

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be so declared and adjudged. The manifest consequences which would necessarily flow from disregarding the plain and positive provisions of our statute of wills are so dangerous, so appalling in their character, that they cannot possibly receive the sanction of the judicial mind. The very moment that we tolerate the establishment of testamentary acts by dubious acts, by loose declarations, by mere verbal utterances proved by the testimony of witnesses whose memories, whose habits of attention, whose defective hearing, whose interested motives, whose imperfect and heedless conception of the meaning of words, may utterly fail to correctly express the testamentary intent of the testator, we enter upon a boundless sea of uncertainties and a vast mass of litigations, endangering titles and impairing the security of property rights to a most alarming extent.

Such a policy is but the substitution of the verdicts of juries who are controlled by mere passing whims or caprices, by prejudices, by passions, or by mere sympathies for the deliberate and carefully guarded written expressions of testamentary intent which our positive statute law now requires, and which all the experience of all civilized peoples proves to be the only safeguard for the testamentary succession of estates. We have gone far enough in tolerating departures from strict statutory requirements, and it is to be hoped that we will take no further step in that direction. A most remarkable instance of the uncertainty and the folly of permitting such loose methods to prevail occurs in this very case. There were two tin boxes belonging to the testator which were found in the same custody after his death. One of them was the one heretofore described. The other had on it a paper with the following words written on it: "This box belongs to Mrs. Mary Downs—must be opened only by her, children, this is my will, Dr. G. T. Jacoby." On the inside of this box was another paper containing the written words, "Mary, I want you to divide the contents of this box between your children that is just living when it falls in your hands. I hope you will carry it out to the letter, Dr. G. T. Jacoby." The first of these writings does contain a testamentary declaration. It says, "Children, this is my will," and it is signed by the testator. But when the contents are examined it is at once apparent that it is not his will, because the box contains nothing but a few old daguerreotypes, some silverware and a very little jewelry. It contained none of his securities nor any valuable assets of his estate. Yet he solemnly declared in writing that it was his will. If that were really so his estate would have to be distributed under the intestate law notwithstanding his tin-box testament. As between the two tin boxes this one would have to be declared to be his will, because he positively says so, and he says nothing of the kind and nothing of a testamentary character, on the other. As between the tin boxes and the written will there can be no comparison as to their legal efficacy.

Turning now to the authorities cited it will be found upon examination that they are entirely insufficient to support the contention of the appellee. The decision chiefly relied upon to sustain the ruling of the learned Court below is Fosselman *v.* Elder, 98 Pa. 159. In that case the testator had executed a formal will in which she gave several legacies to her niece, Isabella Fosselman, who lived with her. She afterwards died suddenly in January, 1880. Among her papers was found a sealed envelope endorsed in her handwriting thus: "Dear Bella, this is for you to open." There were contained within the envelope a promissory note for $2000, made by the trustees of a church to the order of the testatrix payable one year after date, and also a paper of which the following is a copy:

"Lewiston, Oct. 2, 1879.

"My wish is for you to draw this $2000 for your own use should I die sudden.

"ELIZABETH FOSSELMAN."

The whole of this paper, including the signature, was in the handwriting of the testatrix. It was held both by the Court below and by this Court that the paper was undoubtedly testamentary in its character, intended to take effect after the death of the testatrix, that it was signed by her at the end thereof, and that it clearly designated the accompanying note as the subject of the bequest. The only question was whether the testatrix had sufficiently indicated the person who was the object of her bounty in the paper which was claimed to operate as a codicil to her will. The Court below held that she had not, but this Court held that she had, and sustained the papers consisting of the note, the written and signed paper found within the envelope, and the envelope with the words written upon the outside as a valid codicil.

It will be observed that there was no question as to the fact of there being an actual testamentary paper, dated, written and signed by the executrix. The writing on the envelope was simply resorted to in order to ascertain who was the legatee. As it indicated without any doubt who the legatee was, and was written by the testatrix on the very envelope which contained the note and the testamentary writing we held it could properly be reverted to for that purpose. But the importance of this connection was clearly ex-

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pressed in the opinion by the present Chief Justice, who said: "It is true the testamentary paper does not designate the plaintiff by name, and if we had no written evidence to show who was meant by the pronoun 'you' the bequest of the note would be void for uncertainty, but it is a settled fact that the note is addressed to the plaintiff, and why should not that endorsement in the handwriting of the testatrix be taken as part of the testamentary disposition."

It thus appears that all the controlling facts upon which the Fosselman case was decided are entirely absent from this one. In that case there was an absolute testamentary paper actually written and signed by the testatrix. In this case there is nothing of the kind. There the writing on the envelope distinctly designated the person who was to open the envelope and who was to be the recipient of the legacy. Here the writing on the box was a mere direction to deliver the box to a third person and did not contain the slightest reference to the appellee. In the present case there is no signature of any kind appearing on the envelopes, while there it was a conclusive fact that the genuine signature of the testatrix was affixed to the very testamentary writing which gave the legacy. And in that case there was no conflict between the gift of the legacy and the provisions of the will, because the will excluded notes and bonds from the devise and bequest in favor of the niece; and the codicil gave her one of the notes which she could not have taken under the will? So far from this case supporting the contention of the appellee it makes against her when the facts and the reason for the decision are considered.

In Knox's Estate, 131 Pa. 220, cited for the appellee, the writing was clearly testamentary and the only question was whether the signature of the testatrix, being only her Christian name, was a sufficient signature under our statute. We held that it was, but it does not help the case of the present appellee because here there is no signature whatever to any testamentary paper. The same is true of Wilson *v.* Van Leer, 103 Pa. 600, also cited for appellee. The paper was clearly testamentary and was properly signed. Frew *v.* Clarke, 80 Pa. 170, is of the same character and therein differs entirely from the present case. Rose *v.* Quick, 30 Pa. 225; Turner *v.* Scott, 51 Pa. 126, and Tozer *v.* Jackson, 164 Pa. 373, were all cases of the same kind. In all of them the signature of the testator was directly affixed to the paper in question and the only controversy was whether the papers could be considered as testamentary. Porter *v.* Turner, 3 S. & R. 108; Ginder *v.* Farnum, 10 Pa. 98, and Wikoff's Appeal, 15 Pa. 281 are also in the same category. Not one of these cases affords the least assistance to the contention of the appellee. They are not relevant because they are founded upon testamentary facts which have no existence in the present case.

On the other hand there are a number of decisions which are in clear antagonism with the claim of the plaintiff, and much more analogous in their facts. Thus in Plumstead's Appeal, 4 S. & R. 545, the decedent left among her papers certain envelopes containing securities, such as bonds and certificates of bank stock, and endorsements upon the envelopes, as follows: Upon one of them containing a number of bonds and a certificate of bank stock, the words, "For Rebecca Hutton," who was her own daughter, were written by the decedent. And on the other were the words, "For the heirs of George Plumstead," also written by her. These papers were deposited by the decedent in a mahogany box and were kept by her until her death. It was held by this Court that as the words on the envelopes were not signed by the decedent they could not be proved as a will. We see no reason why this case is not analogous to the one we are now considering. The endorsements are of the same general character as are found on the five envelopes which contain directions or names as to who are the persons indicated as the recipients of the contents. But in both cases they are not signed, and in the reported case that circumstance was held to vitiate them as wills.

In Patterson *v.* English, 71 Pa. 454, there were certain writings made by the decedent in a memorandum book, and there was a signature of the decedent attached at the end of the entries. These writings were of this character; one of them in the words: "January 12, 1871—Ann Freeburn, daughter of Clinton Freeburn, $1000 to be paid unto Clinton Freeburn, her father for education of his daughter." Another of the writings was in the following words: "Fanny Smith, formerly Fanny Mock, $500 to be paid into the hands of her brother Clinton Freeburn, for the use of daughter, and in case she, Fanny Smith, formerly Fanny Mock, may come to need, to see that she is made comfortable, the interest being all yearly, the daughter may want."

There were four more writings of a similar character, but in favor of other persons, and at the end was affixed the decedent's name. There was some little conflict of testimony as to whether the signature of the decedent was genuine, though it was admitted that the body of the writing was his. There was also a quantity of parol testimony as is usual in such cases to prove that the decedent had verbally declared his intent to make the gifts indicated by the writings that he had made, a will that he had his things all fixed,

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and other expressions of a smilar character. The question was whether these writings could be probated as a will. The Court below held that the jury might find them to be a will. We held this was error and reversed the judgment without a venire, holding that the words were not of sufficient testamentary character. In the course of the opinion it was said, "But how does it appear that the incomplete memoranda in this case were intended to operate as a will? There is nothing on the face of the paper or in the words themselves to indicate such intent, nor is there anything from which it can be inferred that any gift was intended except the words, 'to be paid,' in the first, second and fourth items. But when were the amounts specified in these items to be paid? In the lifetime of the writer or after his decease? There is nothing in the language to show when they were to be paid. These items may have been intended as instructions for his will, or as memoranda of gifts he intended to make in his lifetime. The mere words, 'to be paid' do not amount to a testamentary bequest of the sums mentioned, nor show that they were to be paid after his death." There is much more to the same effect in the opinion, and it is all quite applicable to the facts of the present case.

There is a still stronger ruling in the case of Zimmerman *v.* Streeper, 75 Pa. 147. Streeper held a bond against Zimmerman; he endorsed on it, "I request my executors to give this bond to Anna for her great kindness she has shown to me and her grandmother." This was signed and sealed. After it was written, "This is not to interfere with what I will to her, this she is to have beside that." Anna was the granddaughter of the obligee and the wife of the obligor. The bond was not delivered to Anna, but remained in the obligee's possession with his other securities till his death. We held that the bond did not pass to Anna. We said, "We can discover in this case nothing more than an intent on the part of George Streeper to authorize his executors to deliver the bond in question to the wife of the debtor in the bond, after his death. There was no delivery; and no intention to deliver by George Streeper himself, in his lifetime. . . . . The writing is not a trust nor an assignment, but simply an intended or prospective gift, to be carried into effect by his executors." This ruling covers every aspect of the writings on the envelopes which specially indicate Mary Downs and her family, Frederick Seebick, A. H. Stevenson, Mary Gross, Roselia Maternity Hospital, "Home for the Friendless," George B. Hill & Co., and the Protestant Relief Fund. As to none of them is it said that the executors are to deliver them to the persons named, and thus it lacks the strong element appearing in the Zimmerman case. In none of them is it said when they were to be delivered. In none of them is there a solitary word of a testamentary character. There is nothing to indicate anything more than an intended or prospective gift never followed by any delivery. The words in the Zimmerman case are infinitely stronger than any that are to be found in this.

Without prolonging the discussion it is only necessary to say in conclusion that we are most clearly of opinion that only the original will of the decedent, dated January 22, 1894, and the codicil dated February 3, 1894, can be admitted to probate as the last will and testament of the testator. We hold that neither the tin boxes, nor either of them, nor any of the contents of either of them, can be treated as testamentary writings of any kind whatever.

The decree of the Court below is reversed at the cost of the appellee and the record is remitted for further proceedings.

W. M. S., Jr.

[NOTE.—The reporter has no desire to criticise the conclusion reached in the foregoing opinion, which is sustained by the following reasons, viz.:

1st. That the words on the box No. 2 do not show a testamentary intent.

2d. That even if testamentary in character they were written prior to the date of the formal will.

3d. The facts do not show that the requirements of the Act of 1833 as to revoking a formal will were complied with; and

4th. That there was not sufficient competent evidence to prove the republication of this alleged will after the date of the written will.

Certain statements are made in the course of the opinion, however, that would seem to be misleading. Thus, in speaking of the writings on and in the box No. 1, the learned Justice seems to hold that because the testator called the endorsement on that box his will, it would have to be construed as his *whole* will, which would lead to an intestacy as to all of his estate except some family relics contained therein, and the Court would not permit such construction in view of the formal written will. As this box was probated by the Orphans' Court of Allegheny County along with and as parts of the written will, it is difficult to understand this line of reasoning. If this was a valid testamentary writing, later in date than the will, why should it not operate as a codicil to the same, for it does not appear to conflict with any of the provisions of the formal will, and even if it did it could be carried out with the will. The learned Justice's reasons for disregarding these writings as a will is "because the box contains nothing but a few old daguerreotypes, some silverware and a very little jewelry." It might very well be that these particular family relics were especially intended for this favorite niece, who would probably value them highly.

The learned Justice in his opinion also referred to two well-known cases of the Supreme Court in a way that is slightly misleading. The first of these is Plumstead's Appeal, 4 S. & R. 545, in which, he says: "It was held by this Court that as the words

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on the envelope were not signed by the decedent they could not be proved as a will." An examination of that case shows that it was decided prior to the wills Act of 1833, requiring the will to be signed at the end thereof, and there was no question raised as to the signature. The whole decision turned on the fact that the words, "For Rebecca Hutton," were not testamentary in character.

Later, in his discussion of the case of Zimmerman *v.* Streeper, 75 Pa. 149, it is not made to appear that the writing there construed was admitted in the case stated to have been written some weeks *before* the formal will, and that it was not contended that the same was testamentary, but it was claimed that the endorsements operated as a gift inter vivos.]

W. M. S., Jr.

Jan. '98, 310, 311 & 312. Supreme Court. Feb. 13, 1899.

Appeals of Roland and Halberstadt.

Decedent's estate—Bill of review—Dismissal of trustee—Commissions—Act June 3, 1893.

Where the language of a petition for the dismissal of a trustee follows the Act of June 3, 1893, preceded by a preliminary request for a detailed statement of the nature and character of the securities as required by the Act, and contains an averment that the trust fund was in part "badly invested so as to be likely to result in a loss to the trust," the exact words of the Act, the Court commits no error in treating the petition as having been filed under the Act of June 3, 1893, P. L. 273.

Where the cestui que trust, on reaching the age at which he becomes entitled to a share in the estate absolutely and to the income of another share for life, receives from the trustee, for examination, the account to be filed, together with a copy for his own use, and retains the said account for some days, returning it with a declaration of his approval endorsed thereon, he being of an age to understand the account and familiar with business matters, and nothing being concealed from him, an application for the review of said account five years thereafter is without merit.

Where an allowance in excess of the usual commission of 5 per cent. is made to the trustee as compensation, after a full investigation of all the accounts and of the conduct of the trustee from the time of his appointment, and is based on the nature of his services and the manner in which they are performed, which appear to be exceptional, the Supreme Court will not hold the compensation to be too large.

Appeals of Walter G. Roland and Lewis V. Halberstadt, from decrees of the Orphans' Court of Schuylkill County, dismissing their petition for the dismissal of Henry C. Russel, trustee, also their petition for a review of the third account of Henry C. Russel, trustee, and also the exceptions to the adjudication of the fourth account of Henry C. Russel, trustee.

The facts of this case are stated in the opinion of the Supreme Court, infra.

Robert P. Shick, (*George H. Gerber* with him), for appellants.

George M. Roads, for appellee.

March 27, 1899. FELL, J. The decrees from which these appeals are taken are separate, but they were entered in the same estate and relate to the same subject, the management of a trust, and the appeals may be considered together. The first appeal is from a decree dismissing the petition of the appellants for the removal of Henry C. Russel as trustee of the estate of Lewis Vastine; the second is from a decree dismissing the petition of the same parties for a review of the third account of the trustee, and the third is from a decree confirming the adjudication of the fourth account of the trustee.

By the will of Lewis Vastine, who died in 1876, a part of his estate was left in trust, the income to be accumulated until his grandson, Lewis V. Halberstadt, should attain the age of twenty-three, when he was to receive one-half of the trust fund and its accumulations. The remaining half was to be held in trust and the income thereof to be paid to his grandson for life, with remainder to his children. The trustee was invested with the fullest power in regard to the management of the estate and the investment and reinvestment of moneys which should come into his possession.

The trustee appointed by the will refused to act and in 1878 Henry C. Russel was appointed trustee. He received from the executor $30,321.-54, all the income of which was invested until 1892, when Lewis V. Halberstadt having reached the age of twenty-three, one-half of the whole estate then in the hands of the trustee was paid to him. The trustee filed two accounts during the minority of Lewis V. Halberstadt, which were confirmed, one in 1882 and the other in 1887. The third account was filed December 6, 1892, and confirmed absolutely May 4, 1893. A fourth account was filed June 4, 1897.

On April 5, 1897, Lewis V. Halberstadt assigned all of his interest in the estate to Walter G. Roland, to secure an indebtedness due him.

The proceedings to remove the trustee and to review the third account were instituted by Roland, and at the audit of the fourth account he sought to surcharge the trustee. Practically the whole contest related to the commissions charged by the trustee. There was no allegation of fraud, of incompetency or of mismanagement, except in the failure promptly to collect interest on some mortgages. The trustee had not kept, as he should have done, a separate bank account, and in the accounts filed there had been a blending of principal and income; but every dollar

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received had been accounted for, and during the whole administration of the trust, extending over a period of nineteen years, there had been no loss of principal or income.

The petition for the removal of the trustee was treated by the Court as having been filed under the first section of the Act of June 3, 1893, and in considering it the inquiry was limited to the causes for removal named in that section; and all other matters alleged in the petition were left to be considered upon the audit of the fourth account, to which exceptions had been filed. It is now argued that the Court erred in so restricting its inquiry and that grounds for removal not mentioned in the Act should have been considered. As no ground for the removal of the trustee under any Act of Assembly was shown, this objection is wholly without force; but the Court was right in treating the petition as having been filed under the Act of 1893. The language of the petition followed closely that of the Act; it was preceded by a preliminary request for a detailed statement of the nature and character of the securities, as required by the Act, and it contains an averment that the trust funds are in part "badly invested, so as to be likely to result in a loss to the trust," the exact words of the Act. But it is conclusive of the subject that the counsel for the petitioner distinctly stated to the Court that the proceeding was under the Act of 1893.

The third account was prepared November 18, 1892, three days after Lewis V. Halberstadt had reached the age of twenty-three and had become entitled to one-half of the estate absolutely and to the income of the other half for life. It was given to him by the trustee for examination, and a copy was furnished him for his own use. He retained the account some days, and returned it with a declaration of his approval endorsed thereon, in which it was stated that he had examined and approved the account. The account was filed December 6, 1892, and confirmed absolutely May 4, 1893. At this time Lewis V. Halberstadt was twenty-three years old, the secretary of a manufacturing company, familiar with business matters and fully competent to understand the account and to take measures for the protection of his rights. Nothing was concealed from him. All the charges now objected to appeared on the face of the account or on those of prior accounts to which this one referred. He received the principal due him and was paid the income annually for five years thereafter without objection. The first objection was made by the assignee of his interest, with whom he joined, and the only ground of the objections was the charge of excessive commissions. In Priestley's Estate, 127 Pa. 420, where a review was asked because a trustee had charged commissions on moneys which had not come into his possession at all, it was said: "This was an objection which could as well have been taken when the account was filed. . . . . The Act of 1840 was never intended to open accounts for retrial of questions of fact, years after they had been passed upon by a competent tribunal."

Upon the audit of the fourth account the Court allowed the trustee as compensation for his services $200 per year. This allowance was made after a full investigation of all the accounts and of the conduct of the trustee from the time of his appointment, and is based on the nature of his services and the manner in which they were performed. While this allowance is in excess of the usual commission of 5 per cent. of the income received, it does not appear under the circumstances of this case, which are exceptional, to exceed the limits of just compensation. The principal of the trust fund, which now amounts to $31,789.50, is invested in fifty-seven different bonds and mortgage securities, many of which are small as one hundred dollars and all of which are good and bear 6 per cent. interest. This division of the fund has been made by the trustee in order to secure the highest rate of interest, and it has increased his care and responsibility. All the investments and reinvestments have been made by him without any loss or expense to the estate. The income has always been paid promptly to the cestui que trust, and at times advanced by the trustee. While there has been a lack of technical precision in keeping the accounts, in all substantial matters the management of the estate has been exceptionally careful and skillful and yet it has produced an excess of annual income over the usual rate of interest larger than the whole allowance to the trustee. This has not been accomplished without unusual care and vigilance on the part of the trustee; and while we do not favor the allowance of commissions in excess of the customary 5 per cent., we cannot say that in this case the allowance made by the Orprans' Court is too large.

The decrees are affirmed at the cost of the appellants.

W. C. S.

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Oct. '98, 197. Supreme Court. October 22, 1898.

East End Oil Co. v. Pennsylvania Torpedo Co.

Negligence—Evidence—Res ipsa loquitur.

The exception to the general rule that negligence is not to be inferred, but to be affirmatively proved, is in general limited to case of an absolute duty, or an obligation practically amounting to that of an insurer.

Cases not coming under one or both of these heads must be those in which the circumstances are free from dispute and show not only that they were under the exclusive control of the defendant, but that in the ordinary course of experience no such result follows, as that complained of.

The mere fact that an oil well becomes inoperative and valueless after an attempt is made to "shoot" it by means of a torpedo, which was misplaced, is not evidence per se of negligence.

Where the cause of an accident is conjectural and could have been other than defendant's negligence, a non-suit is properly entered.

Appeal of M. L. Zahniser et al., partners, doing business as the East End Oil Company, and J. C. Russell et al., from the judgment of the Common Pleas of Butler County.

On the trial, before GREER, P, J., the following facts appeared from the evidence: The plaintiffs were the owners of a leasehold for oil and gas purposes on a farm in Butler county, Pennsylvania. The defendant was a limited partnership in business of "shooting," that is to say, opening by means of torpedoes, oil or gas wells, and was employed to shoot a well of the plaintiffs. Accordingly an agent of the defendant, after certain preparations, exploded a torpedo with the effect of loosening the sides of the well and filling it with shale, stones and loosened earth. A second explosion to remedy this defect was productive of no good result and the well was useless.

The plaintiffs showed their contract with defendant company, that they had given to defendant all the information necessary in order to the proper performance of its work, and a well free from obstruction or defect; the wrong manner in which defendant company had performed the work, shooting the well two hundred feet above the place designated, and plaintiffs subsequent damage, and rested. The Court granted a compulsory non-suit, on the ground that no negligence on the part of defendant had been shown.

The Court subsequently refused to take off the non-suit.

The plaintiffs took this appeal, and assigned as error the refusal to take off the non-suit.

J. M. Galbreath, (with him *J. M.* and *W. C. Thompson* and *J. B. McJunkin*), for appellants.

This case belongs to a class of cases in which the presumption of negligence arises out of the happening of the event causing the injury or damage. The maxim, res ipsa loquitur applies. A familiar instance is that of a passenger injured in a railway accident.

Shafer *v.* Lacock et al., 168 Pa. 498.

T. C. Campbell, (with him *J. W. Lee* and *J. B. Chapman*), for appellee.

Negligence is not presumed from the mere happening of an accident.

Long *v.* Penna. R. R. 147 Pa. 343.
Fleming *v.* R. R., 158 Id. 130.
Buck *v.* Penna. R. R., 150 Id. 170.

Even where the case comes within the maxim, res ipsa loquitur, the defendant is not bound satisfactorily to account for the happening of the accident. He is merely required to show that he used due care.

Stearns *v.* Spinning Co., 184 Pa. 519.

Negligence is a question for the jury, if there be reasonable doubt as to the facts tending to prove it, or as to the just inferences to be drawn therefrom; but if the facts be admitted or ascertained, it is the duty of the Court to declare the law thereon.

Baker *v.* Fehr, 97 Pa. 70.

The Judge must say whether any facts have been established by evidence from which negligence may reasonably be inferred.

Phila. & Reading R. R. *v.* Heil, 5 WEEKLY NOTES, 91.

March 20, 1899. MITCHELL, J. The learned Judge below entered a non-suit on the ground that no negligence had been shown on the part of defendant, and it is conceded here by the appellants that no affirmative evidence was given of any negligent act either of omission or commission. But the argument is that the result showed that the torpedo had not been lowered to the proper place, but had been shot at a point some two hundred feet too far up above the bottom of the well and that that could only have happened by the negligence of defendant's workman, Brown. In other words appellants claim that under the circumstances they were entitled to have the jury draw the inference of negligence from the happening of the injury alone.

That such inference may sometimes be drawn is true, but the cases are exceptional. The maxim res ipsa loquitur is itself the expression of an exception to the general rule that negligence is not to be inferred but to be affirmatively proved. The ordinary application of the maxim is limited to cases of an absolute duty, or an obligation practically amounting to that of an insurer. Cases not coming under one or both of these

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heads must be those in which the circumstances are free from dispute and show not only that they were under the exclusive control of the defendant, but that in the ordinary course of experience no such result follows, as that complained of. It is sometimes said that the mere happening of an accident in this class of cases raises a presumption of negligence, but this is hardly accurate. Negligence is never presumed. If it were, it would be the duty of the Court in the absence of exculpatory evidence by the defendant, to direct a verdict for the plaintiffs, whereas in these cases the question is for the jury. The accurate statement of the law is not that negligence is presumed, but that the circumstances amount to evidence from which it may be inferred by the jury.

In cases where the duty is not absolute like that of a common carrier to exercise the highest care and skill in regard to the safety of a passenger who has committed himself to its charge, but arises in the ordinary course of business, it is essential that it shall appear that the transaction in which the accident occurred was in the exclusive management of the defendant, and all the elements of the occurrence within his control, and that the result was so far out of the usual course that there is no fair inference that it could have been produced by any other cause than negligence. If there is any other cause apparent to which the injury may with equal fairness be attributed, the inference of negligence cannot be drawn. In the case chiefly relied on by the appellants: Shafer *v.* Lacock et al., 168 Pa. 497, there was evidence not only that the fire arose from the use of a fire pot by the roofers but of declarations by the roofers themselves that it was caused by their act.

Tried by the foregoing tests the plaintiffs' case failed in several particulars. There was no evidence that the result complained of was so uncommon as to be of itself evidence of negligence. It may be conceded as appellants argue, that the blocking up of a well by the falling in of loosened materials along its sides is not the usual result of shooting it with a torpedo or the practice would soon cease. But it might be far from usual and yet not so entirely unusual as to be evidence per se of negligence. The inference was not one to be drawn by jurymen from their experience in the ordinary walks of life, but to be founded on evidence from persons familiar with that particular business. There was no such evidence in the case.

So far as any specific act of negligence is charged, it is the failure of Brown, the defendant's employé to run the measuring line down to the torpedo after it was lowered into the well, and make sure of its exact position before firing it. There was no evidence that it was customary or proper to do so. The business is intrinsically dangerous. Brown himself was killed in the prosecution of it shortly after this occurrence. So far as there is any evidence as to what he did, it shows care on his part. He ran the bailer down to the bottom and found the well clear; he then put in the shell, loaded it and lowered it till it stopped; plaintiffs' own witness, Russell, says that if the hole was all right the shell should have gone to the bottom; the operation had reached the critical point of danger from the firing, and all the parties present retired from the derrick except Brown; there was no evidence that it was customary or proper for him to prolong the danger period by running the line down to see if anything had fallen in and clogged the hole in the brief interval between testing it with the bailer and lowering the shell. But an even more conclusive point is made by the learned Judge below, that there is no evidence that Brown did not make this additional test with the measuring line. The cause of the accident was largely conjectural, and it may as well have arisen from the loose and crumbling nature of the well walls, as from defendant's negligence. If the evidence had been submitted to the jury they could only have guessed at a verdict. It was not a case where the circumstances made the happening of the accident itself sufficient evidence of negligence.

Judgment affirmed.

W. D. N.

Superior Court.

Feb. '99, 8. Superior Court. February 16, 1899.

In re Donovan's License.

License—Practice—Evidence.

Upon an appeal from a decree of the Court of Quarter Sessions granting a liquor license, the evidence given at the hearing in support, in denial or in rebuttal of an allegation of fact contained in a remonstrance, is not a part of the record and cannot be considered.

If the record is free from irregularity and there appears to be no abuse of the discretion vested in the lower Court in granting a license, it will be sustained.

Appeal by Elizabeth D. Kane, from an order of the Quarter Sessions of McKean County, granting a license to Rick Donovan.

After the hearing upon the application and remonstrance, the Court, MORRISON, J., filed the following opinion:

"May 24, 1898. The petition and bond are in

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due form and properly signed and executed. The petition is supported by a supplemental petition signed by a large number of residents of the borough of Kane. The applicant is a man of temperate habits and of good moral character. He has rented and is in control of a suitable, well located room for a wholesale liquor store. He has been in the hotel business and held a license for the sale of intoxicating liquors in the counties of Warren and McKean for many years. We are satisfied that he is competent to manage a wholesale liquor store in a lawful manner, and that he can command sufficient capital to stock and carry on such a business in accordance with the provisions of the law.

"Kane borough is a flourishing business place with three railroads, one of which is the Philadelphia & Erie, passing through it. Upon the question of public necessity there is as much reason for wholesale liquor stores in Kane as in any place of its size. It has a population of nearly seven thousand.

"A very large number of men and women, residents of Kane borough, have remonstrated against the granting of this license, on the ground that there is no public necessity for it. We have not the slightest doubt but these good people would remonstrate just as vigorously if Kane borough had a population of one hundred thousand. And with our knowledge of the man, the place, the business opportunity, and our acquaintance with the people of Kane, and giving due weight to the petitions and remonstrances, it seems to us that this license should be granted.

"But we are met with another objection which rises as follows: The building for which the license is asked is erected upon a lot of land, upon the principal street of the borough, which was conveyed by Elizabeth D. Kane to one Leonard, by deed February 2, 1886, recorded in deed book, Vol. 32, page 333. This deed contains the following: 'Reserving also and conferring upon the party of the first part, her heirs and assigns, the right to enter and tear down any house or building upon the said lot used for the sale of spirituous or fermented beverages, or for the promotion or convenience of illicit sexual intercourse, or indecent or immoral practices, the party of the second part, his heirs and assigns, assuming hereby all liability for damage or injury to persons or property of themselves or others resulting from the exercise of the said right.'

"The applicant rents his rooms from persons who hold under the above deed from Elizabeth D. Kane.

"It is argued that the above reservation requires the Court to refuse the applicant's license.

"Covenants and conditions contained in deed prohibiting the grantee and those holding under him from using the premises, or any portion thereof, for the sale of intoxicants, are not uncommon and have been sustained and enforced by the Courts of the United States and the Courts of Pennsylvania.

"In Cowell *v.* Colorado Springs Co., 100 U. S. Reports, 55, the deed contained the following: 'That intoxicating liquors shall never be manufactured, sold, or otherwise disposed of, as a beverage, in any place of public resort on the premises and if this condition be broken by the grantee, his assigns or legal representatives, this deed shall become null and void, and the title of the premises shall revert to the grantor.'

"This condition was broken by the sale of intoxicants and the grantor brought an action to recover the property; held, that the condition was not contrary to public policy, and the grantor could recover.

" 'A condition in a deed declaring that the sale upon the premises of intoxicating liquors shall render the deed void and that the estate granted, shall revert to the grantor, is valid': Lehigh Coal and Navigation Co. *v.* Gluck, 5 C. C. 662.

" 'Where real estate is conveyed, and by the deed the grantee agrees not to sell liquors on the premises, the covenant is one which runs with the title, and extends to later owners, although not so stated in express words. The Court will refuse a license to a building erected on land where such a provision is in the line of the title': Snyder's License, 2 Dist. Rep. 785.

"We can agree with the doctrine of the last case as to the grantee who agreed not to sell liquors on the premises, but that this covenant runs with the title and extends to later owners is doubted.

"The acceptance by a grantee of a deed with a lawful condition, is in law a covenant that he will not violate: Blood *v.* Crew Levick Co., 177 Pa. 606.

"It has been decided that even when restrictions are not the subject of what can be strictly called a covenant, compliance with them may be enforced in equity in order to carry out the full intent of the original conveyance.

"But now turning to the Elizabeth D. Kane deed, is the so-called reservation a lawful one? Suppose liquors were sold in the building thereon would any Court of equity decree that the building should be torn down, or tie up the hands of the owner by an injunction so as to permit the grantor to tear down the building and thus enforce this remarkable provision?

"We think this clause is contrary to public policy and that the Courts will not enforce it. It should be noticed that it was not framed with any

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idea of appealing to the Courts for its enforcement. But the grantor undertook to reserve to herself the right to enter upon the grantee's real estate and tear down any house or building upon the said lot used for the sale of spirituous or fermented beverages. Now, this lot was sold for about a thousand dollars and let us suppose that the grantee has erected thereon a brick block of the value of, say $20,000, then suppose that the owner has procured a license and established a wholesale liquor store in said building, would the law permit the grantor to enter upon the premises and tear down the building? We think not upon the reservation contained in this deed. The right of a grantor to insert in his deed of land a condition or covenant that the land shall not be used for the sale of intoxicating liquors cannot be doubted, but the reservation in this deed is not a covenant or condition on the part of the grantee or his legal representatives that they will not sell intoxicating beverages in any house or building upon the lot. But on the contrary, it is an attempt to reserve to the grantor the right to tear down the grantee's house or building, it seems to us that the grantee and those holding under him had a right to assume that the Courts would not enforce this singular provision. The law recognizes the wholesaling of spirituous liquors, under a license, as a lawful business, and we do not think the clause in this deed will justify the Court in refusing a license to a man who desires to engage in this business and is otherwise qualified, and where there appears to be a public necessity for the business, within the meaning of the law.

"The bond will be approved and the license granted as prayed for in the petition."

Elizabeth D. Kane took this appeal and assigned as error the action of the Court in granting the license.

R. L. Edgett, (*Berry* with him), for appellant.

The Court has power to enforce covenants in a deed prohibiting a grantee and his assigns from using the premises granted for the sale of intoxicating liquors.

Cowell *v.* Colorado Springs Co., 100 U. S. 55.
Lehigh C. & N. Co. *v.* Gluck, 5 Co. Ct. 662.
Snyder's License, 2 Dist. Rep. 785.
Blood *v.* Crew Levick Co., 177 Pa. 606.

If the intention of the grantor is clear, the Court will construe the language as a covenant, although in strict phraseology it may not be a covenant.

Paschall *v.* Passmore, 15 Pa. 303.
2 Parsons' Contracts, 510.
Duke of Bedford *v.* British Museum, 2 My. & K. 552.
Electric Co. *v.* Coal Co., 187 Pa. 500.

The covenant ran with the land.

Herbaugh *v.* Zentmyer, 2 Rawle, 159.
Hannen *v.* Ewalt, 18 Pa. 9.
Church's App., 67 Id. 512.

No counsel, contra.

March 23, 1899. RICE, P. J. We are not to be understood as holding that the Court of Quarter Sessions may not under any circumstances refuse to grant a license to a person upon the ground that the sale of liquors by him on the premises would be a breach of a covenant in his deed or running with the land which a Court of equity would enjoin. Nor are we required to construe the clause in the deed from the remonstrator to John D. Leonard, and to declare whether it has or has not the effect of such covenant and is enforceable against the licensee. Without expressing an opinion upon these questions we base our decision affirming the order upon the narrower ground that the law has furnished no mode by which evidence given on the hearing of a liquor license application, in support, in denial, or in rebuttal of an allegation of fact contained in a remonstrance can be brought upon the record. So that even if it were a fact that the deed under which the licensee holds contains a covenant or condition that no liquor shall be sold on the premises still it would not necessarily follow that the Court committed error or was guilty of an abuse of discretion in granting the license. There might be other facts which would make it inequitable to enforce the covenant or condition specifically. We have no right to take their nonexistence for granted, because thev are not mentioned in the Judge's opinion. To hold otherwise would be to say that an opinion filed in a license case is equivalent to and is given all the effect of a case stated or a special verdict where facts not stated are presumed not to exist. Whether or not such facts existed in the present case could only be determined by an examination of the evidence. But the evidence is not before us and could not be considered even if it were sent up and printed in the paper book because it is not part of the record: Carlson's License, 127 Pa. 330. The record is free from irregularity and if we were to go outside of it in search of reasons for holding that the court committed error granting the license we would become involved as Chief Justice WOODWARD said in Mauch Chunk *v.* Nescopeck, 21 Pa. 46, in an abortive attempt to administer justice to the parties without the assurance that we have their whole case before us. Finding no error in the record and it not being clear that there was any abuse of discretion the order is affirmed.

W. M. S., Jr.

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Aug. '98, 62. Superior Court. November 18, 1898.

Hastings v. Sproul.

Vendor and vendee—Delivery.

Where goods capable of delivery are allowed by a vendee to remain in the possession of the vendor, no lease being executed and the vendor not being in the relation of agent or servant of the vendee, the mere fact that the vendee has a power to assume control of the property, which power she does not exercise, will not make the sale a valid one as against the creditors of the vendor.

Appeal of Rebecca M. Hastings, from the judgment of the Common Pleas for Lancaster County, upon a feigned issue in which Rebecca M. Hastings and Hannah May Ferguson, were plaintiffs, and Sproul & Hastings, defendants.

Sproul & Hastings having a judgment containing a waiver of exemption against N. B. Ferguson, made a levy under their said judgment upon certain property, horses, harness, pigs, heifers, wagons, agricultural and creamery implements and wheat and straw, which were claimed by Rebecca M. Hastings, and a red cow and a dark cow claimed by Hannah May Ferguson. The Court granted an interpleader.

On the trial, before BRUBAKER, J., the facts appeared as follows:

Nathaniel B. Ferguson, a farmer, and wife, residing in Colerain township, southern Lancaster county, made an assignment for the benefit of his creditors, in February, 1898. In the same month, personal property to the value of $184.45, which included the property claimed by Rebecca M. Hastings, was appraised and set apart to him under his reservation in the deed of assignment, and by the appraisers appointed by the Court. On the same day, February 12, 1898, after the property was so appraised and set apart to him, Mr. Ferguson, being indebted to Rebecca M. Hastings, who was his wife's sister, to an amount greatly in excess of the value of the property assigned and transferred it to her by a written assignment under his hand and seal, attested by two witnesses, and in presence of other witnesses and neighbors.

This assignment was at once delivered to her. Rebecca M. Hastings was a member of Mr. Ferguson's family. She had resided with him some eighteen years or more, performing services, and had no other home for the past eighteen years, or place where she could remove the property. She did not desire to sell it, for the reason that her brother-in-law, the assignor, was permitted to remain on the assigned premises for a year or more, and she desired him to use it in farming, in order to preserve, as long as possible, a home for herself and her sister's family.

Under the direction of the Court a verdict was given in favor of the defendants, against Rebecca M. Hastings, for the following articles—one bay horse, one gray horse, one bay mare, six sets of harness, three shoats, two heifers, field roller, spring harrow, top buggy, carriage and pole, one plow, forks, rakes, eleven creamery boxes, scales, tin cans, scales and contents of creamery. And in favor of the plaintiff, Rebecca M. Hastings, for the item, wheat and straw, three acres, being wheat on the ground at the time of the levy, and for the plaintiff, Hannah M. Ferguson, for one red cow.

Judgment was entered on the verdict. Rebecca M. Hastings took this appeal, and filed, inter alia, the following assignment of error:

1. The Court erred in withdrawing the case from the jury.

James M. Walker, for appellant.

Miss Hastings was a member of assignor's family, being his wife's sister, and having lived and had her home on the same farm with him for eighteen years, the transfer of possession corresponded with the sale, the nature of the property sold, and the relations of the parties.

Hill *v.* Manufacturing Co., 3 Pa. Super. Ct. 398.

It was for the jury to say whether there had been such change of possession as was practicable under the circumstances, since actual apparent change of possession was impossible unless either the vendor or vendee removed from the premises.

Evans *v.* Scott, 89 Pa. 136.
Weller *v.* Meeder, 2 Pa. Super. Ct. 496.
Crawford *v.* Davis, 99 Pa. 576.
Renninger *v.* Spatz, 128 Id. 524.

George Nauman, for appellee, cited—

McGuire *v.* James, 143 Pa. 521.
Weller *v.* Meeder, supra.

March 23, 1899. W. D. PORTER, J. The defendants held a judgment against N. B. Ferguson, upon which they caused execution to issue, and a levy was made, May 5, 1898, upon the stock and farming implements in the possession of the judgment debtor, on a farm of which he was lessee and where he lived with his family. Rebecca M. Hastings, who was a sister of Ferguson's wife, claimed the chattels levied upon and an issue was framed to try the question of her title. Upon the trial of the feigned issue the Court gave binding instructions for the defendant, whereupon, the plaintiff took this appeal.

There are a number of assignments of error, but they all relate to the charge of the Court, and are covered by the first, namely, that the Court erred in withdrawing the case from the jury. If in that the Court was right, it is not necessary to examine in detail the answers of the

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Court to the points presented by the parties. The plaintiff had for years lived with the family of Ferguson, assisting with the work, for which he paid her wages. She had loaned him money, and, on February 5, 1898, he executed and delivered to her a bill of sale, or, as the parties call it, a transfer of the chattels in question. The testimony as to what was done at the time of the alleged sale, and custody and control of the property subsequently involved no contradictions and there was no dispute whatever as to the facts. Ferguson had made an assignment for the benefit of creditors and among other things the property in question had been appraised and set aside to him under his reservation of the right of exemption. He was a farmer and then had possession of his farm which he leased from his assignee. The property involved in this controversy consisted of the stock upon the farm and the implements which he used in carrying on his farming operations. The bill of sale executed and delivered to Rebecca M. Hastings by Ferguson, on February 12, 1898, recites his title to the property and his indebtedness to her and then provides as follows: "Now, therefore, I do, by these presents, grant, bargain, sell assign and set over unto the said Rebecca M. Hastings, all the said property reserved, as aforesaid, and set apart to me this day by appraisers, and I hereby deliver possession of the same to Rebecca M. Hastings, in payment of said indebtedness." The property remained in the actual possession and control of Ferguson and was used by him in his operations, just as it had been before the alleged sale. Ferguson was the lessee of the farm, and it was operated by him for himself; in so doing, he used the stock and implements as if they were his own property. There is no evidence that Rebecca M. Hastings ever exercised or attempted to exercise any control over the property; nor of any act of either of the parties intended to transfer the possession as well as the title. Ferguson testifies, "I would say, I had entire control of it for farming purposes." Rebecca M. Hastings says, in reply to the question, "He (Ferguson) has possession of it?" Answer, "Yes, sir. I gave him permission to use it." In March, 1898, the plaintiff secured employment at Atlantic City, N. J., and went there and remained until after May 5, 1898, when the levy was made upon the goods. During all the time, from prior to the execution of the bill of sale down until the making of the levy, the goods had been in the possession of Ferguson and were used by him in his work, which he carried on for his own profit. In all this was there any fact from which the jury would be permitted to find such a delivery, actual or constructive, as the law required to make the sale valid as against creditors? If there was not, then it was incumbent upon the Court to give a binding instruction in favor of the defendant. Where the subject of the sale is capable of an actual delivery, it must accompany and follow the sale to render it valid against creditors of the vendor. Where the property is not reasonably susceptible of actual delivery a constructive delivery is sufficient, in which case it is necessary that the vendee should assume such control of it as to reasonably indicate to all concerned the fact of the change of ownership. When the vendee has assumed control, the question whether the sale is bona fide is usually one of fact. The question in such case is, did the vendee do all that he might reasonably be expected to do in the case of a real and honest sale? This is to be determined in view of the relation of the parties, and the nature, use and situation of the property. The evidence which might be sufficient to require submission to the jury in the case of a sale of household furniture of the home common to both vendor and vendee, might be wholly insufficient where the character of the property and the relations of the parties were different: Evans *v.* Scott, 89 Pa. 136. There was in the present case no such suggestion that the possession of the vendor, after the sale, was in the character of agent or servant of the vendee, as to bring it within the operation of the exceptions to the general rule laid down in Clow *v.* Woods, 5 S. & R. 275; as explained in the later cases of which Billingsley *v.* White, 59 Pa. 464; McKibbin *v.* Martin, 64 Pa. 352; Renninger *v.* Spatz, 128 Pa. 524, and Goddard, Hill & Co. *v.* Weil & Co., 165 Pa. 419, are examples.

The continued possession of the vendor was not under a lease from his vendee, so that the appellant did not have even the standing of the vendee in the case of Weller *v.* Meeder, 2 Pa. Super. Ct. 488. In that case the vendor executed a bill of sale and the vendee immediately executed a lease of the property to his vendor. Possession continued in the vendor and this Court held the transaction fraudulent as to creditors.

In this case there was no evidence of a delivery, actual or constructive, there was no control of the property by the vendee and the possession of the vendor remained exclusive. The learned counsel for appellant argues that the vendee controlled the property, because she could have taken it from her vendor, whom she simply permitted to retain it. If the contention were sound, no sale could be held fraudulent in law, for such sales hold good between the vendor and vendee. The appellant simply had a power to assume control over the property, which she never exercised. It follows that the learned Judge of the

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Court below committed no error in withdrawing the case from the consideration of the jury.

Judgment affirmed.

H. B.

Feb. '99, 5. Superior Court. February 15, 1899.

Farley v. Kline.

Vendor and purchaser—Sale— Fraud—Receipts of goods—Negligence.

A. agreed to purchase from B. a show case, and upon B.'s asking for a financial reference, A. replied that he was dealing with C., and directed B. to ship the case to C., or in his care. B., without further inquiry, shipped the case to C., and when the carrier refused to deliver to A., the latter secured from C. a writing directed to the agent of the carrier as follows: "Upon A.'s paying all charges you may have on one show case from Rochester, N. Y., and signing receipt for same, you can deliver the case to him." Signed, C. In a suit by B. against C. for the price of said case:

***Held*, (1) that B. was negligent in failing to inform C. of the arrangement prior to the shipping, if he intended to hold the latter responsible; (2) that under the circumstances the giving of the writing to A. was not such negligence, nor did it constitute such a receipt of the case, as to render C. liable for the price of the same.**

Appeal by Porter Farley, plaintiff, from a judgment of the Common Pleas of Lycoming County, in an action of assumpsit in which James N. Kline, trading as Kline & Co., was defendant.

This was an action brought to recover the price of a show case.

The facts are stated in the opinion of the Superior Court, infra.

Counsel for plaintiff requested the Court to charge the jury, inter alia, as follows:

"1. Kline & Co., the consignees, by their order dated April 8, 1895, directed to W. L. Fry, the freight agent of the Pennsylvania Railroad Company, to deliver one show case from Rochester, N. Y., to C. W. Wheeland, it being the show case now in question, became the receivers and acceptors of the said show case." Answer—"I cannot so charge, for the reasons already given in the general charge. We refuse this point. We cannot see how a man could become the receiver or acceptor of a thing which he knew nothing at all about, if it is true that he did not. If Mr. Kline supposed when he signed that order that it was an accommodation simply, and that the goods were not intended for him, and he did not know the real facts of the case, that they were shipped in that way for the purpose of getting security for the plaintiff, but was wholly in ignorance, and relied upon the representations of C. W. Wheeland, how could he be the receiver and acceptor of these goods?"

"3. Under all the evidence the verdict must be for the plaintiff, for $45, with interest from April 4, 1895." Answer—"Refused."

Counsel for defendant requested the Court to charge, inter alia, as follows:

"4. If the jury find that the plaintiff sold the show case to C. W. Wheeland, and by any arrangement between them, charged and shipped the case to the defendant without his knowledge and consent, and that the defendant believed, or had reason to believe, the show case was the property of the said C. W. Wheeland, then the giving of the order to the railroad company to deliver the show case to C. W. Wheeland was not an exercise of ownership by the defendant in said show case, and the plaintiff cannot recover." Answer—"We so instruct you."

The Court, METZGER, P. J., charged the jury, inter alia, as follows:

"The question is whether, when Kline & Co. gave that order, he had any right to suppose for a moment, or did suppose, what the true facts in the case were? Did he know when he gave that order that these goods were shipped in his care or to him, with a view to enable Porter Farley to get the money? Did he know that? If he had known that fact, then Mr. Kine would have had a duty to perform, and that would have been to have refused to sign the order. But did he know that fact? If he did not know it, then he was imposed upon, and imposed upon by whom? By the very man who purchased the goods, and whom Mr. Farley must have known purchased them for himself. Therefore, Porter Farley put it in the power of this man to perpetrate a wrong on Mr. Kline, and should not be helped now to take advantage of it, if Mr. Kline was in ignorance of the facts in the case when he signed that order."

Verdict for defendant and judgment thereon.

Plaintiff appealed, assigning for error the answers to the points as above noted and the portions of the charge quoted.

Thomas A. Davies, for appellant.

Even where goods are not ordered, but are voluntarily sent to one, his receipt of them and exercise of ownership over them constitutes an acceptance and precludes him from denying his liability for the price.

Fink *v.* Knauss, 4 WEEKLY NOTES, 356.
Stephenson *v.* Grim, 11 WEEKLY NOTES, 425; 100 Pa. 70.
Wellauer *v.* Fellows, 48 Wis. 105.

The order of delivery had the effect of and was an actual receipt. The order was given by the consignee and acted similarly to a bill of lading. The title was in the consignor until the delivery, the order was a symbol of property and operated as a delivery of the goods themselves, investing the maker of the order with constructive cus-

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tody, which serves all the purposes of actual possession by the consignee. When the consignee gave the order he assumed the risk.

Railroad Co. *v.* Stern & Speigel, 119 Pa. 24-29.

The giving of the order was an act of ownership, and the consignee exercised ownership over them. He deprived the seller of the lien upon the goods. This constitutes an acceptance, especially where the act causes a delivery of possession of the goods.

21 Am. & Eng. Ency. of Law, 556.

It was the duty of Kline & Co. before giving an order as to the disposition and delivery of goods shipped in their name, to inquire into the facts.

Slaughter *v.* Gerson, 13 Wallace, 379.

James B. Krause, for appellee.

The case was charged to Wheeland and the right of possession was in him.

Bacharach *v.* Freight Line, 133 Pa. 414.

Delivery of goods to a carrier addressed to a third person without his consent, is not such delivery as will found an action for goods sold and delivered.

Hague *v.* Porter, 3 Hill, 141.

The case never came into possession of defendant and he is therefore not liable.

Stephenson *v.* Grim, 100 Pa. 70.

March 23, 1899. RICE, P. J. This case, viewed in the light of the facts established by the verdict of the jury, may be briefly stated as follows: The plaintiff, doing business in Rochester, N. Y., bargained with one, Wheeland, doing business in Williamsport, to sell the latter a show case. The plaintiff not being satisfied as to Wheeland's financial responsibility, asked him for references. The latter replied that he was dealing with the defendant—a fact of which there is no evidence in the case—and directed the plaintiff to ship the show case to the defendant, or in his care. This the plaintiff did; but when the defendant, who knew nothing of the transaction, was notified by the railroad company of the arrival of the show case, he refused to accept it. Wheeland then informed him that it belonged to him, Wheeland, and that he had ordered it shipped in his, the defendant's, name or care. Acting upon this representation, which, as far as it went, was strictly true (although it appears not to have been the whole truth), the defendant complied with Wheeland's request and gave him a paper directed to the freight agent, authorizing him to deliver the show case to Wheeland upon his receipting for the same and paying all charges. The show case was delivered to, and receipted for by Wheeland, and subsequently the plaintiff brought this action, in which he declared upon a book account for merchandise sold and delivered to the defendant.

As we have shown, the show case was not sold to the defendant; but it is argued that he is liable upon the principle, that even where goods are not ordered, but are voluntarily sent to one, his receipt of them and exercise of ownership over them may constitute an acceptance which will preclude him from denying liability for the price. See Indiana Mfg. Co. *v.* Hayes, 155 Pa. 160. Here, however, the defendant did not actually receive the merchandise, and did nothing concerning it except to authorize the carrier to deliver it to Wheeland, the real purchaser. There was no misdelivery, and we see no reason, moral, equitable or legal, why the seller should not be compelled to look to the real purchaser for the price agreed upon. The case is in many respects like Stephenson *v.* Grim, 100 Pa. 70, where Justice TRUNKEY said: "But when a man sells goods to another for his own use, and they agree upon a device to make a third person pay for them, the mere fact that the buyer obtains possession because of his employment by such person is not enough to render him liable. Charging the goods to the defendant and shipping them to his address, without his consent, was a fraudulent act, and if the jury found from the evidence that the plaintiff knew or had reason to believe that J. W. Stephenson was buying them for himself, the defendant was not responsible, unless he actually received them." It would seem from the plaintiff's evidence that a similar device was resorted to in the present case to make the defendant surety for Wheeland. All that is needed to make it effectual is to hold; (1) that the plaintiff owed no duty to the defendant to inform him of the arrangement, and (2) that the defendant was negligent because he confided too implicitly in the representations of one of the parties to it. This we decline to do. If the letter alleged to have been sent the defendant on April 4, 1895, had been received, an entirely different aspect would have been put on the case. But that question was submitted to the jury and decided adversely to the plaintiff. We must assume, therefore, that the only knowledge which the defendant had of the arrangement between the plaintiff and Wheeland was that which he derived from what the latter told him. This was not sufficient to effect him with notice that if he delivered the show case to Wheeland or enable him to obtain possession of it from the carrier, he would be held for the price.

We find no error in the charge or in the answers to the points. The assignments of error are overruled and the judgment is affirmed.

W. M. S., JR.

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WEEKLY NOTES OF CASES.

VOL. XLIV.] *FRIDAY, APRIL 21, 1899.* [No. 3.

Supreme Court.

Jan.'98, 375. Supreme Court. January 23, 1899.

Equitable Trust Co. v. Garis.

Equity — Stock — Committee of lunatic — Bill against husband of lunatic—Application of principal of estate to support of lunatic to be made by the Court itself.

A bill will lie, in appropriate circumstances, for discovery and delivery of deeds and other muniments of title, certificates of stock, negotiable securities, and other personalty having special and peculiar value, which is not adequately represented by market price.

The committee of a lunatic is the proper party to proceed in equity for the recovery of possession of the lunatic's personalty, and may maintain such bill against the lunatic's husband, where he denies her title or there is reason to apprehend that he will deal with the property adversely to her interest.

A trust company, under the Act of May 9, 1889, P. L. 159, has, in the absence of specific restriction in its charter, corporate capacity to act as committee of a lunatic.

A committee of a lunatic may file a bill on behalf of the lunatic's estate, although the record of the lunacy proceedings has been removed to the Supreme Court, and this notwithstanding the bill is entitled of the same term and number and is in the same Court as the lunacy proceedings, as the proceedings are really distinct, notwithstanding the rule of the Courts of Common Pleas requiring them to be entitled as of the same case.

When it appears that the husband of a lunatic has in a box at a safe deposit company, securities of his wife, and also property of his own, a preliminary injunction, on the prayer of the committee, that the husband and the company be enjoined from opening the box, that the company discover and exhibit the contents to the committee, that the husband make and present a detailed inventory of said contents, and make discovery of all moneys received or deposited by him in behalf of his wife, and deliver to the committee all the personal property of the lunatic wherever situated, including a note from the husband to the wife, is too broad in requiring the delivery of property whose title and even whose existence have not been ascertained.

The proper decree in such case is for discovery and inspection of the contents of the box, in the presence of both parties; the immediate delivery of the contents admitted to be the property of the lunatic; an injunction until further order against selling, assigning, removing or otherwise interfering with such contents as are claimed by both sides, with leave to the husband to apply for leave to resume possession thereof on giving security that the same or their value shall be forthcoming to abide the result of the case; that the husband be at liberty to remove the property not claimed as the property of the lunatic and thereafter that the husband be not allowed access to the box except in the presence of the representative of the committee.

It is error to make a general order allowing a committee to apply not only the income of a lunatic's estate, but "so much of the principal as may be necessary after the income is exhausted," to the support of the principal; the Court has no right to delegate its discretion to any other tribunal and especially not to the committee by a general order; the necessity of applying the principal must be determined in each specific instance by the Court itself.

Appeal of David V. Garis, defendant, from a decree of the Common Pleas No. 3, for the County of Philadelphia, in a proceeding in equity by the Equitable Trust Company, committee of the estate of Katharine S. Garis, a lunatic, against David V. Garis and the Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company.

The plaintiff filed a bill setting out that it was the committee of the estate of Katharine S. Garis, a lunatic, that her husband, David V. Garis, had received and deposited certain money for her; that he had in his possession a note for $300, made by him to the order of his wife; that the bonds and mortgages, shares of stock, of the lunatic, moneys, furniture, and the note above mentioned, had been, since the appointment of plaintiff as committee, in the possession of David V. Garis; that plaintiff had demanded that the said Garis deliver to it all of the said securities, moneys, goods and chattels mentioned, but the said Garis had refused to deliver the same, or any part thereof, and still retained the said securities, moneys, goods and chattels mentioned in his possession or under his control; that plaintiff was informed, and believed that the said Garis had a deposit-box or deposit-boxes in the vaults of the Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company; and that in said box or boxes the said Garis had a portion or all the said bonds and mortgages, shares of stock, and probably other personal property belonging to said lunatic's estate, the character and detail of the contents of said box or boxes being unknown to your orator; and further, that the said Garis had control of the key to the said box or boxes, and was the only person who has access to the same; that plaintiff had notified the Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company to refuse the said Garis access to his said box or boxes; but the said plaintiff had refused to comply with said notice; that plaintiff believed that the said Garis had demanded of the said the Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company access to his said box

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or boxes, and plaintiff believed was about to permit said Garis to have access to said box or boxes and to remove the contents; that Garis had fled to New Jersey and intended to remove the securities and personal property beyond the jurisdiction of the Court; that Garis had himself appropriated the moneys heretofore mentioned and deposited by him in bank to the credit of his wife, and has failed to turn over the said moneys to plaintiff, or account therefor. The bill prayed an injunction and discovery. An answer was filed, setting up, inter alia, that the records in the case were by virtue of a writ of certiorari in the Supreme Court upon an appeal upon proceedings as for contempt, (see In re Garis, ante, Vol. 42, 130). A cross-bill was filed, to which there was an answer. A preliminary injunction having issued, the following statement of facts was filed by the co-defendants:

"First. November 15, 1894. David V. Garis, in his own name, deposited with the Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company one tin box, in which were silverware, jewelry and other valuables.

"Second. April 17, 1896. David V. Garis, in his own name, rented a small safe in the vaults of the Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company, and on the same day placed therein a number of things.

"Third. That the right of possession and the right of access to the said box and safe in the vaults of the Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company, are both the property of David V. Garis.

"Fourth. That the Equitable Trust Company, on June 7, 1897, notified the Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company, in writing, not to permit David V. Garis to have access to his said box and safe in the vaults of said Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company.

"Fifth. That because of the said notice, and an injunction served, on July 15, 1897, the Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company refused and still refuses to permit David V. Garis to have access to the said box or safe aforesaid.

"Sixth. That the said Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company will continue to refuse to permit David V. Garis to have access to the said box or safe in its vaults until it is ordered to do otherwise by a decree of a Court of competent jurisdiction."

The defendant Garis, moved to set aside the injunction, whereupon the Court made the following decree:

"And now, November 15, 1898, having considered the bill in equity filed by the Equitable Trust Company, committee of the estate of Katharine S. Garis, a lunatic; the answer of David V. Garis, the cross-bill of David V. Garis, and the agreement of facts submitted, and having heard the argument of counsel in the matter, it is ordered and decreed:

"That the said David V. Garis and the Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company be enjoined and restrained until the further order of this Court from opening the box or boxes mentioned and described in the said bill in equity, and answers thereto, and from removing therefrom any of the contents of the same.

"That the said Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company is directed to discover and exhibit in the presence of one of the officers of the Equitable Trust Company, committee, the contents of the deposit-box or deposit-boxes described in the bill in equity and answers thereto.

"And further, that the defendant shall make a detailed inventory of the property and assets which the said boxes contained and present the same to this Court.

"That David V. Garis make discovery of the moneys received or deposited by him in behalf of his wife, who has been adjudged a lunatic, and that the said David V. Garis further make discovery, produce and deliver to the Equitable Trust Company, committee of the estate of Katharine S. Garis, all the bonds, mortgages, shares of stock, money and furniture, and notes of said David V. Garis, as for $300, and other personal property of the said lunatic's estate, of whatever kind the same may be, or wheresoever the same is situated."

In July, 1898, the committee presented a petition for the allowance of certain expenses and for leave to apply the principal of the lunatic's estate to her support.

The Court made the following decree:

"And now, July 18, 1898, on consideration of the foregoing petition, it is ordered that the Equitable Trust Company, the committee of the estate of Katharine S. Garis, a lunatic, do make payments of the items in the foregoing petition mentioned, out of the principal of said lunatic's estate, in so far as the amount on hand is insufficient to meet the same, and that until the further order, the balance of the income of said estate, if any, and so much of the principal as may be necessary, after the income is exhausted, be applied by the said committee for her support, board, nursing, medical attendance, clothing and other necessaries of the said lunatic."

David V. Garis took this appeal and assigned as error, inter alia, the refusal to set aside the

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injunction, and making the order of July 18, 1898, without giving the appellant opportunity to be heard thereon.

Samuel M. Roberts, of the New Jersey bar, (with him *Allen H. Gangewer*), for appellant.

The right of the plaintiff to act as committee was suspended by the appeal in the contempt proceedings.

King *v.* Battams, 1 East, 298.
Patchin *v.* Mayor, 13 Wend. 664.
Ewing *v.* Thompson, 43 Pa. 372.

A bill in equity will not lie against a husband or wife to discover matters occurring between husband and wife. The law is, matters between a husband and his wife are privileged, and not subject to an action for discovery.

Le Texier *v.* Margrave, 5 Ves. Jr. 322.
Barron *v.* Grillard, 3 V. & B. 164.

There was no right to make the order of July 18, (1) because the Equitable Company had no right to act as committee, and (2) because the said order could not be legally made without first notifying all persons interested in Katharine S. Garis or her estate of the motion, and affording them an opportunity to appear and be heard on the motion.

Dwight M. Lowrey, (with him *Alfred R. Haig*, *Henry C. Thompson, Jr.*, and *William F. Harrity*), for appellee.

The committee had a right to file the bill. A committee is under the law of Pennsylvania a guardian and trustee.

Act of June 13, 1836, P. L. 589, secs. 14, 23, 41, 43.
Earp's Estate, 2 Pars. Eq. 178.

The appellee was organized under Act of May 9, 1889, P. L. 159, and was authorized to act as a trustee and guardian, hence it can act as committee, especially as the Act allows it "to execute trusts of every description."

A bill will lie to compel the delivery of deeds and other muniments of title, because they have a peculiar value, and their loss cannot be compensated in damages; and to compel the delivery of choses in action, notes of hand, and certificates of stock in private corporations, because there is no certain or convenient measure of damages for their loss.

McGowin *v.* Remington, 12 Pa. 56.
Odd Fellows Savings Bank's Appeal, 123 Id. 356.
Simes *v.* Everson, 46 Id. 304.
Goodwin Gas Stove & Meter Co.'s Appeal, 117 Id. 514.
Gough *v.* Crane, 3 Md. Ch. 119.
Pattison *v.* Skillman, 34 N. J. Eq. 344.

The order of July 18, 1898, was not erroneous.

April 3, 1899. MITCHELL, J. This case has been unfortunately conducted from the outset. The extravagance of the appellant's contentions has led to efforts to put a summary end to them by irregular proceedings which cannot be sustained. For this reason a commitment for contempt was reversed: In re Garis, 185 Pa. 497.

Substantially, it is a contest between the committee of a lunatic wife, and the husband, for certain property claimed by both, and in the form in which it is now before us it is a bill filed by the committee against the husband setting forth on information and belief that certain muniments of title, negotiable securities and personal property, belonging to the lunatic's estate, were in the possession of the husband, and that part of them at least had by him been deposited in a private box in the Columbia Avenue Trust Company. The latter was also made a formal defendant. The bill prayed for discovery, delivery of the said property, and an injunction against the husband from opening the said box, and against the trust company from permitting him to have access to it.

The husband filed an answer, denying the essential averments as to his possession of the property. The denial, however, was purely formal, and as to matters which if true must be within his personal knowledge, as for example the averments of the fourth, seventh, tenth, eleventh and twelfth items of the bill the answer was clearly evasive and insufficient. The appellant and his co-defendant, the Columbia Avenue Trust Company then put on record an agreed statement of facts, setting forth the connection of the company with the matter, and the appellant filed a cross-bill against the Equitable Trust Company denying its capacity to act as committee, its right to bring suit against the husband of the lunatic and raising questions of law upon these and other matters appearing in the bill.

The Court below upon a preliminary hearing issued an injunction, which is the main subject of the present appeal. Before discussing its terms, it is desirable to clear away some of the preliminary questions involved so that the case may be put in position to proceed regularly to final determination.

A bill in equity will lie in appropriate circumstances for discovery and delivery of possession of deeds and other muniments of title, certificates of stock, negotiable securities, and other personal property having special and peculiar value which is not adequately represented by market price.

The committee of a lunatic is the proper party to bring and maintain such bill for the lunatic's property.

Such bill may be maintained by the committee against the husband of the lunatic where he denies her title, or there is reason to apprehend

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that he will deal with the property in any way adversely to her interest.

In the absence of specific restriction in its charter, which nowhere appears, the Equitable Trust Company, by virtue of its general powers under the Act of May 9, 1889, P. L. 159, to "execute trusts of every description," must be presumed to have corporate capacity to act as committee of the lunatic.

The bill could be filed, notwithstanding the removal of the record of the lunacy proceedings to this Court by the appeal from the order of commitment. That appeal did not oust or suspend the committee from its functions, or its duty to secure the property of the lunatic. The bill was filed in the same Court and of the same term and number as the lunacy proceedings, but that was a mere incident arising from the rules of the Courts of Philadelphia county for the proper and convenient distribution of their business. Except for those rules it might have been filed in a different Court and have made part of a different record.

The bill therefore was properly filed, but it must be sustained in the regular way, and the defendant cannot be deprived of property of which he is in possession under claim of title, without hearing and competent evidence. The extravagance of his claims cannot bar him from his actual rights. In view however of the nature of the property in controversy and the facility with which the purpose charged, to remove it from the jurisdiction, might be carried out, the Court was authorized to grant a preliminary injunction to protect the lunatic's interests, should her title be hereafter established.

This brings us to the consideration of the terms of the injunction. These are too broad. It appears by the agreed statement of facts that the appellant deposited in the Columbia Avenue Company, in November, 1894, a tin box, containing valuables not named, and in April, 1896, rented a safe in the vaults of the said company, and deposited therein a number of things also not specified. These acts were done in his own name and the later of them more than a year before the proceedings in lunacy began, though the inquisition found that the lunacy had extended back to February, 1896, thus antedating by two months the renting of the safe. The presumption from these facts is that part at least of the property on deposit in the Columbia Avenue Company is the appellant's own, and though his failure to say so in explicit terms and to specify the articles he so claims greatly weakens such presumption, yet he should not be deprived of the property without a full opportunity to defend his title. The injunction is also somewhat carelessly worded, so that it appears to be inconsistent in requiring the boxes to be opened by the Columbia Avenue Trust Company without the presence of the appellant, and in prohibiting him from opening them, while at the same time requiring him to make a detailed inventory of their contents. And the last paragraph is clearly excessive in requiring appellant to produce and deliver to the committee the bonds, mortgages, etc., including his own note in his wife's favor, the title, and even existence of which have not yet been established. This order can only be made on final hearing, the power of the Court at present being limited to the preservation of the existing status of the property until the title to it is determined.

In the present position of the case the committee, plaintiff, is entitled:

First, to discovery and inspection of the contents of the box and safe in the vaults of the Columbia Avenue Trust Company to be made in the presence of both parties, or their attorneys.

Second, to the immediate delivery of such of the contents of said box and safe, as are or may be admitted by the appellant to be the property of the lunatic.

Third, to an injunction until final hearing or until further order of the Court, restraining the appellant from selling, pledging, assigning, removing or otherwise interfering with such contents of the said box and safe, as may be claimed by him but also claimed by the committee as the property of the lunatic; with leave, however, to the appellant to apply at any time to the Court for permission to resume the possession and control of any of the said contents upon giving security that the same or the value thereof shall be forthcoming to abide the final decree in the case.

Fourth, the appellant to be at liberty in the presence of the proper attorneys or representatives of the Equitable Trust Company and the Columbia Avenue Trust Company to remove such contents of the said box and safe as are not claimed by the committee as the property of the lunatic; and after such removal, the Columbia Avenue Trust Company may be enjoined from permitting the appellant to have access to the said box and safe, except in the presence of the attorney or representative of said committee.

The injunction having been thus modified the case should proceed promptly to a final hearing and decree.

This disposes of the substantial controversy in the case, in its present position.

But the third assignment of error requires notice of another matter. The Court below on petition of the committee in July, 1897, ordered payment of certain expenses for costs of inquisi-

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tion, board of the lunatic, etc., out of the lunatic's estate, and the application of the income thereafter to her board from time to time.

When the case was here before, 185 Pa. 497, it was held that this could be done without notice to the party instituting the proceedings. But it is better practice to give notice to the next of kin, or parties standing in close relation to the lunatic. The danger of not doing so is illustrated by the similar, but more extensive order made in July, 1898, whereby the committee was authorized not only to apply the balance of the income, but "so much of the principal as may be necessary after the income is exhausted," to the support of the lunatic. This was a highly improvident order. The estate as set forth in the petition of the committee amounted in 1898 to about $9400, yielding an income of $650, which the expenses of maintenance as at present conducted would exceed by about $175 annually. The situation therefore was one of annually decreasing principal and increasing deficit, a situation calling for the utmost care and discretion in administration. This discretion should not be surrendered by the Court to any other tribunal and especially not to the committee by any general order. The principal of the estate should only be sacrificed to necessity, and such necessity should be determined in each specific instance, by the Court itself, having before it all the circumstances, including the nature and value of the property, the age, condition of health and situation in life of the lunatic, the effect of loss of accustomed comforts, the prospect of increasing infirmities, etc. It is the duty of the Court to see that the future comfort of the unfortunate shall be made as secure as the circumstances permit and for that purpose to keep present expenses within reasonable bounds. As said by this Court in Wier *v.* Myers, 34 Pa. 377, "all those expenses ought to be carefully supervised by the Court, and considering the helpless condition of the lunatic none ought to be allowed except such as are manifestly just and moderate." Especially is it the duty of the Court to see that the estate is protected in the administration. Commissions, fees and charges of all kinds should be allowed only on the most moderate scale of compensation.

We have considered this case as was our duty, in the light of the appellant's legal rights. But we are not impressed with the merits of his contention. Whatever claim or title he has to any of the property in controversy he should show promptly and clearly. As against the committee he has no right of possession of any of his wife's property, and in the language of the Chief Justice when the case was here before, if he has any such property in his possession he ought to turn it over to the committee and save further trouble.

The decree is reversed and the record is remitted with directions to amend the order of July 18, 1898, by striking out the authorization of the application of any part of the principal of the estate to the support of the lunatic without express direction of the Court, and to reform the order and injunction of November 15, 1898, in accordance with this opinion. The costs of this appeal to abide the final result of the case.

H. B.

Oct. '98,188. Supreme Court. November 10, 1898.

Canavan et al v. Neeld et al.

Contract—Construction of—Non-fulfillment of.

In interpreting a contract the intention of the parties must be sought not alone from the exact words, but from what should be reasonably implied from the undisputed circumstances existing at the time, and which necessarily must have operated on the minds of the parties.

Where a contract stipulates that on failure of one party to furnish material as specified in the contract, the other party may make up the deficiency from other sources and charge the expense to the defaulting party, a failure justifies the exercise of an option on the part of the party of the second part as to whether he shall manufacture the material himself or buy it already prepared in the open market.

Though an agreement reduced to writing be not signed by the parties thereto, yet, if they proceed to carry it into effect under its terms it is sufficient to sustain the validity of the contract as though completely executed.

Appeal of William Canavan and J. V. Patton, partners, doing business under the firm name of William Canavan, from the judgment of the Common Pleas No. 3, of Allegheny County, in an action wherein A. D. Neeld and Patrick Foley, partners, doing business as Neeld & Foley, were defendants.

The facts of the case are set forth in the opinion of the Supreme Court.

On the trial of the case, before KENNEDY, P. J., the defendants offered to prove the amount of delay in the contract caused by the alleged failure of the plaintiffs to comply with the terms of their contract. Objected to by the plaintiffs. Objection overruled. (First, second and third assignments of error.)

The Court charged the jury:

"If, however, the contract was that they were to furnish all the stone to be used in the construction of the bridge and they failed to do so, as claimed by the defendants, then the defendants are entitled to whatever damages resulted

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to them by reason of such failure." (Fourth assignment of error.)

The Court further charged that it was their duty to consider the claim of the defendants as to damages resulting to the machinery which defendants were required to provide and keep there for the building of this bridge, and the expense of keeping it and other property there while it was lying idle. (Sixth and seventh assignments of error.)

As to the plaintiffs operating their own quarry for the supplying of the stone the Court charged:

"If, however, the cost of obtaining the stone by that means, the opening of their own quarry, was the same as that at which they could purchase it in the open market at the time, and that greater than the contract price with the plaintiffs, then they would be allowed that difference." (Eighth assignment of error.)

Verdict of the jury was in favor of defendants and against plaintiffs, for $1267.41. Judgment thereon, whereupon plaintiffs appealed, assigning error, inter alia, as above indicated.

J. B. Chapman, (*J. W. Lee* with him), for appellants.

The clause in the contract as to the failure on the part of the plaintiffs to furnish stone is not a measure of damages for failure to deliver the stone, but is a specification of how the plaintiffs were to respond to the defendants if they failed in their contract to deliver the stone.

When plaintiffs quit furnishing stone, if defendants desired to enforce the contract against plaintiffs for failure to furnish the balance of the stone, it was incumbent upon them to purchase or contract for the purchase of the stone remaining undelivered at this time, and if the stone was then purchased at an advanced price plaintiffs were liable.

Arnold *v.* Blabon, 147 Pa. 372.

The damages should be such as may fairly and reasonably be considered either arising naturally, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract, as the probable result of the breach of it.

Hadley *v.* Baxendale, 9 Exchequer, 341.
Wire *v.* Foster, 62 Iowa, 114.

H. A. Davis, (*W. M. Galbraith* with him), for appellees.

January 2, 1899. DEAN, J. The defendants in July, 1896, entered into a contract with the city of Pittsburgh to build and complete within ten months what is known as the Schenley Park Bridge. Preliminary to commencing the work, they contracted with plaintiffs to furnish all the stone necessary for it, of certain dimensions and quality, in accordance with the plans and specifications of the director of public works of the city, and subject to his inspection and approval; the delivery to commence July 25, 1896, and continue at a weekly average of quantity, the whole to be on the ground by September 15, 1896. This contract, although drawn as stated, was not actually signed by the parties; the plaintiffs rather feebly denied it to be the contract, and although they admit that a copy was delivered to them, and they followed its specifications, yet they alleged instead of all the stone for the bridge, they were only to deliver such quantity as could reasonably be taken out at their quarry; but the weight of the evidence was clearly against them on this point, and it having been submitted to the jury, they have found the unsigned instrument embodied the contract. We therefore assume it to have been the contract. It contains this stipulation:

"In case the said first party (Canavan) fails to furnish suitable stone as fast as mentioned above, the said second party (Neeld & Foley) may purchase the deficiency, paying therefor open market rates, and charging said first party with any additional cost there may be."

It was averred by defendants and not denied, that plaintiffs had failed to perform their contract as to delivery of the quantities within the time named. Defendants protested against this violation of the contract, and notified plaintiffs to deliver, even after the expiration of the time, but they closed their quarry and made no further deliveries. Defendants then leased, opened and operated a quarry of their own, from which they obtained a considerable quantity of stone, and besides, purchased largely from other parties to complete their contract with the city. They averred the stone quarried by themselves, as well as a large part of that purchased exceeded in cost the price to be paid plaintiffs; besides they averred plaintiffs' default had imposed upon them greatly increased expense, because of the delay in completing their work. Plaintiffs sued for the contract price of the stone delivered, about $2000; defendants claimed to offset the damages occasioned directly by the breach of contract. On the issue thus framed, the case was tried. The Court instructed the jury that on plaintiffs' default, defendants had the right to go into the market and purchase stone at the market price, and hold defendants answerable for the difference between that and the contract price. And further if the market could not supply them with sufficient stone they had the right to open and work their own quarry to make up any deficiency, and if the cost of quarrying ex-

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ceeded the contract price, plaintiffs were answerable for the difference up to a cost not greater than the market price. Under the instructions the jury certified a balance in favor of defendants, and plaintiffs appeal, assigning nine errors.

The burden of appellants' complaint is set out in the fourth to ninth, inclusive, assignments of error; these all allege, that assuming the unsigned writing to be the contract, the Court adadopted a construction of it not warranted by its terms, and not in accord with the intention of the parties. It is in substance, argued that but one particular default was contemplated, the failure to furnish all the stone, and that for this but one measure of damage was expressly provided, and that was the difference between the contract price of delivery and the open market price.

In interpreting this clause of the contract, we seek the intention not alone from the exact words, but from what should be reasonably implied from the undisputed circumstances existing at the time, and which necessarily must have operated on the minds of the parties. It was well known to both, that the stone must be of uniform color, otherwise the city inspector might reject it, hence the desirability of obtaining the entire supply from one particular quarry; for whatever sameness might exist as to quality of the stone, in the same region, there might be quite a difference in color. And while the law would, without the insertion of this clause in the contract, have implied it, yet as if to add to the obligation of the plaintiffs, defendants exacted an express stipulation in the nature of a penalty which they thought would guard against default; they wanted the particular product of this one quarry, delivered weekly. They proceeded with the work on the bridge, and built into it about three hundred cubic yards of stone furnished by plaintiffs, when in face of the penalty, plaintiffs ceased deliveries. Defendants then as provided in the contract go into the open market to purchase building stone; not any kind or color, but such as would harmonize with that already in the walls, for none other would pass inspection. Necessarily, the market was somewhat limited. In attempting to purchase suitable stone, defendants found, either from quarrymen's knowledge of their necessities, or a combination to uphold prices, that they could not purchase, except at a price largely in excess of the contract price with plaintiffs. Instead of purchasing at what they deemed an excessive figure, in which they would have been justified by the literal words of the contract, they opened their own quarry and procured a considerable quantity of stone; then, other quarrymen who had demanded a large price, offered to furnish the stone at a much less one, and defendants accepted their offer. As there was now no necessity for continuing the operations at their own quarry, they closed it, and supplied themselves by purchase. There is no evidence that defendants did not act with good faith, their conduct under the circumstances was clearly to the advantage of plaintiffs. The stone both that quarried and the greater part of that purchased cost more than the contract price; but on the evidence submitted the jury has found that defendants procured it at as low a price as they could.

Plaintiffs argue that under the contract defendants had but one course open to them, to go into the market and purchase the stone; that by opening their own quarry, they adopted a method unknown to the contract and it must be assumed there is no warrant for charging them for these stone other than the contract price. We think such a construction altogether unreasonable. The open market price for suitable stone when plaintiffs made default was for one specification, $2 per yard more than the contract price, and 75 cents per yard more for another; defendants considered this extortion, and would not buy; but they must have stone, so they leased and operated their own quarry for about six months, then the dealers came down in price, and they actually bought considerable quantity at less than the contract price. Defendants admitted that the comparatively small quantity obtained from their own quarry cost a little more than the price asked by dealers when they opened the quarry; while they expected when they began work it would cost less. But the Court plainly instructed the jury, that the plaintiffs were not chargeable with a higher price than the stone could be purchased for in the open market.[1]

The reasonable construction of this clause, is that put upon it by the Court below; that is it measures the damages for plaintiffs' default in this particular at a sum not exceeding the difference between the open market price and that specified in the contract; it might be less than this, but not more. The words, "fail to furnish suitable stone as fast as" required by the agreement, meant that in no event was the partial or total failure of plaintiffs to work an interruption to defendants in completing their contract, but that they should have the right to at once go into the market and purchase. It did not restrict defendants to this single item of damages, but left open to them the right to claim other damages, which were the direct consequences of plaintiffs' broken contract in this particular.

From the evidence in their whole conduct it is highly probable defendants' business methods saved to plaintiffs more money than they saved

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for themselves. Appellants certainly have no grounds for complaint. There is nothing of merit in the other assignment of error.

The judgment is affirmed.

W. D. N.

Superior Court.

Oct. '98, 84. Superior Court. October 7, 1898.

Bell v. Philadelphia Binding and Mailing Company, Defendant. Hubbard Publishing Co., Garnishee.

Practice — Attachment execution — Judgment on answers—Debts not due.

The answers of a garnishee to interrogatories filed in support of an attachment execution are not construed with the same strictness as an affidavit of defence.

To justify the entry of judgment on answers there must be such a distinct admission of liability as to leave no doubt.

An absolute judgment cannot be entered against a garnishee upon an answer that he has executed and delivered to defendant negotiable notes which are not yet due.

A note not due may be attached, but if it passes into the hands of a bona fide purchaser before maturity, and without notice of the attachments, the attaching creditor will take nothing.

It seems in such a case, the Court has power to prevent the negotiation of the notes by defendant by requiring that the same be placed in such custody as will prevent their misapplication. But until it appears by the record that the notes are so deposited, judgment cannot be entered on the answers, although the execution be restricted until the notes are deposited with the prothonotary.

Appeal by the Hubbard Publishing Company, garnishee, from a judgment of Common Pleas No. 4, of Philadelphia County.

From the record it appeared that on December 23, 1897, judgment was entered on a single bill in favor of Albert D. C. Bell, against Philadelphia Binding and Mailing Company for $6387.59, and on same day attachment execution was issued against, inter alia, Hubbard Publishing Company.

On January 5, 1898, interrogatories in the usual form and rules to answer were filed, and on January 24, the Hubbard Company filed answers as follows:

In answer to the first interrogatory, the garnishee says that it does know the defendant.

In answer to the second interrogatory, the garnishee says that it has had business transactions with the defendant. That at the time of the service of the writ of attachment, there was due to the defendant a balance of $110.08, payable by a four months' note. That this balance has not been increased or diminished since the service of the aforesaid writ and attachment.

In answer to the third interrogatory, the garnishee says that in addition to the balance of $110.08 referred to in the answer to the second interrogatory, the following promissory notes had been given to the said defendant; one for $280.34 at four months, dated September 24, 1897; another for $238.73 at four months, dated October 8, 1897; and another for $238.73 at four months, dated October 18, 1897. None of these notes are yet due, and the garnishee has no knowledge whatever as to whether any or all of said notes have or have not been negotiated, and has no knowledge as to who is the holder or holders of them. In other respects the garnishee answers the third interrogatory in the negative.

The garnishee answers the fourth, fifth and sixth interrogatories in the negative, except as set forth in the answers to the second and third interrogatories.

On March 18, 1898, a rule for judgment on answers was taken, and on April 23, 1898, when, according to the statement of plaintiff's counsel, the notes were produced in Court and surrendered, the Court awarded judgment, as follows:

"April 23, 1898. It is adjudged that garnishees Hubbard Pub. Co. have in their possession $587.-54 due to the defendants, and that on the deposit with the prothonotary of two notes of garnishees dated October 8 and October 18, 1897, for $238.-73 each, plaintiff shall have execution thereof, less garnishee counsel fee taxed at $25."

Garnishee thereupon took this appeal, assigning for error this action of the Court.

J. Howard Gendell, for appellant.

Judgment cannot be entered against a garnishee unless there is a distinct liability admitted.

Hagy v. Hardin, 186 Pa. 428.
McCallum v. Lockhart, 179 Id. 427.

An attachment may be laid binding notes not due if it distinctly appears that the notes were in possession of defendant after maturity.

Day v. Zimmerman, 68 Pa. 72.

But one who takes the note before maturity and without notice of the attachment takes a good title, and could recover from garnishee notwithstanding the attachment.

Frank B. Ellis, for appellee.

Debts owing in present, but payable in future, may be attached.

Walker v. Gibbs, 2 Dall. 211.
Fulweiler v. Hughes, 17 Pa. 440.
Wetmore v. Price, 1 T. & H., sec. 1183.
Peterson v. Sinclair, 83 Pa. 250.
Bremer v. Mohn, 169 Id. 91.

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There was a clear admission of liability on the part of the garnishee and the judgment was entered after production of the notes, and in accord with the practice suggested by Justice LOWRIE, in—

Kieffer *v.* Ehler, 18 Pa. 391.

The fact that the debt attached is not presently demandable will not prevent judgment against the garnishee, but the judgment will be so moulded as to conform to the terms of payment.

Montayne *v.* Husted, 3 Kulp, 325.
Neely *v.* Grantham, 58 Pa. 436.
Maurer *v.* Kerper, 102 Id. 447.
Bouslough *v.* Bouslough, 68 Id. 497.
Rhodes *v.* Kemble, 12 Pa. C. C. 470.

March 23, 1899. W. D. PORTER, J. The plaintiff, having obtained judgment against the defendant, an execution attachment was issued and the Hubbard Publishing Company summoned as garnishee. Interrogatories and a rule to answer were duly served, whereupon the garnishee filed an answer admitting: First, an absolute indebtedness to the defendant in the sum of $110.08, and, second, that it had, prior to service of the attachment, given to the defendant three promissory notes: one for $280.34, at four months, dated September 24, 1897; another for $238.73, at four months, dated October 8, 1897; and another for $238.73, at four months, dated October 18, 1897. None of said notes were due, and the garnishee had no knowledge whatever as to whether any or all of said notes had or had not been negotiated, nor as to who was the holder or holders of said notes. Upon a rule for judgment for amount admitted by this answer, the Court below entered judgment against the garnishee in the sum of $587.54, and ordered that, "Upon deposit with the prothonotary of two notes of garnishee, dated October 8 and October 18, 1897, for $238.73, plaintiff shall have execution thereof." Garnishee appealed, and now assigns for error the entry of the judgment for the sum of $587.54.

It has been earnestly urged, on behalf of appellant, that this judgment ought to be reversed because the defendant in the original judgment had, prior to the service of the attachment, executed a general assignment for the benefit of creditors. The appellee seeks to strengthen his position by assuring us that he will be able to comply with the order of Court requiring him to deposit the negotiable notes with the prothonotary, before issuing execution. The record discloses nothing which, even in the most indirect way, tends to sustain either of these allegations of fact. The parties are here with the issue made upon the answer of the garnishee as originally filed. There was no motion in the Court below for leave to file an amended answer on the part of the garnishee; nor, on behalf of plaintiff, was there offer to cause the notes to be produced. Upon the answer this judgment must stand; if it is to be sustained. If the facts stated in the answer are not sufficient to entitle the plaintiff to the judgment entered, then the entry was erroneous. In such a case the Court cannot go outside of the answer; the admissions, like a special verdict, form the exclusive foundation of the judgment. If the facts stated appear to be insufficient to entitle the plaintiff to a judgment, the Court should refuse judgment and discharge the rule, leaving the plaintiff at liberty to rule the garnishee to plead to issue and proceed to trial: Lancaster County Bank *v.* Gross et al., 50 Pa. 224.

In passing upon the sufficiency of an affidavit of defence, the Court considers the question whether it states a complete defence to a cause of action set forth in the affidavit of claim or statement. If the statement presents a good cause of action, the law, in certain cases, puts upon the defendant the burden of stating a defence under oath, or, upon his default, judgment is entered against him; he fully understands the nature of the claim and his affidavit of defence is construed with strictness. In a rule for judgment upon the answer of a garnishee the plaintiff must rely upon the admissions of the answer, which are not construed with the same strictness as an affidavit of defence. For insufficient answers the plaintiff may except or demur. But to justify an entry of judgment upon an answer there must be a distinct admission of liability, such as leaves no doubt: McCallum *v.* Lockhart, 179 Pa. 427; Hagy *v.* Hardin, 186 Pa. 428.

There is but one question presented by this record. Did the answer of the garnishee warrant the Court below in entering judgment for the amount of the two notes which had been made by the garnishee, payable to the order of the judgment debtor, but which were not yet due? It is well settled that a debt owing in the present, but not payable until some time in the future, may be attached, the proceedings being moulded so as not to force premature payment: Fulweiler *v.* Hughes, 17 Pa. 440. A debt evidenced by a promissory note is liable to be attached in the hands of the maker before maturity, at the suit of a creditor of the payee or holder. "Though not due it is a debt within the meaning of the attachment laws, and, therefore, as between the payee and attaching creditor, it is bound by the service of the attachment on the maker; *and if after being attached, it remains in the hands of the payee until maturity*, it is bound by the attachment as against all persons into whose hands it

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may *thereafter* come": Day *v.* Zimmerman, 68 Pa. 74. But in that very case it was held that the attachment was unavailing against a bona fide holder or endorsee for value to whom the note has been transferred before maturity, without *actual* notice of the attachment. The negotiable character of the note is not destroyed by the service of an attachment upon the maker, at suit of a creditor of the payee; and the rights of a bona fide holder for value, who takes title without actual notice of the attachment, must prevail against those of the attaching creditor: Ludlow *v.* Bingham, 4 Dallas, 47; Kieffer *v.* Ehler, 18 Pa. 388; Hill *v.* Kroft, 29 Pa. 186.

In delivering the opinion of the Supreme Court, in Kieffer *v.* Ehler, 18 Pa. 388, Mr. Justice LOWRIE said, with regard to promissory notes: "They have a legal quality that renders the hold of an attachment upon them very uncertain. Unlike all other property, they carry their whole evidence of title on their face; and the law assures the right of him who obtains them for valuable consideration, by regular endorsement, and without actual notice of any adverse claim, or of such suspicious circumstances as should lead to inquiry. To hold that an attachment prevents a subsequent bona fide endorsee for value from acquiring a good title, would be almost a destruction of one of the essential characteristics of negotiable paper. . . . . Moreover, it would present the strange result, that the more hands such paper had passed through, the more endorsers there were on it, the less it would be worth in the money market; for it would be subject to the more risks of attachment. . . . . The doctrine of implied notice by lis pendens is totally inapplicable to such cases." The opinion closes with the suggestion of a way in which the creditor might render secure the hold of his attachment, viz.: "Certainly the negotiation of such paper by a defendant after he has had notice of the attachment is a fraud upon the law; and we think that the Court from which the attachment issues has power to prevent this, by requiring the instrument to be placed in such custody as will prevent it from being misapplied; taking care that it shall be demanded at maturity, and that proper notice be given to endorsers, if necessary; and that the money, if paid, shall stand in place of the note to abide the event."

Unless some such step is taken to prevent the negotiation of the note, it might in the course of business pass through the hands of a dozen holders, and while held by each one of them his creditor might cause the debt to be attached in the hands of the maker of the note. If one of such attaching creditors is entitled to judgment against the garnishee, before the maturity of the note, without causing the paper to be impounded, then each of the others would be equally well entitled, and we would have a dozen judgments against the garnishee for the same debt, yet when the note matured not one of the attachments would take one cent, if the note had passed into the hands of a bona fide holder, without actual notice of the attachments. To enter judgment against a garnishee, upon his answer, for a debt evidenced by a negotiable note not yet due, leaving the note afloat in the channels of business, would be a manifest hardship for which we find no warrant in the decisions of our Supreme Court. The mischief does not lie in the mere entry of judgment, without the consent of the debtor, for a debt not yet due, but the vice of the proceedings is in the entry of judgment in favor of a plaintiff whose right to recover is, and must remain, doubtful until after the maturity of the note. When a garnishee files his answer he may, or may not, know who is the holder of his outstanding commercial paper not yet due; but he certainly cannot know who is to be the holder when the paper finally matures. The doubt and uncertainty attendant upon the entry of judgment upon such an answer is illustrated in the present case; the answer admitted the making and delivery to the judgment debtor of three notes not yet due; yet the Court, for no reason which appears of record, excluded one of the notes and entered judgment for the two remaining. If plaintiff was entitled to judgment upon the answer for the amount of the two notes, he was also entitled to judgment for the amount of the third. The answer of the garnishee left the right of the plaintiff, to have judgment upon his attachment, uncertain and dependent upon future contingencies not within the control of the garnishee. The Court below entered judgment upon the answer, and ordered that plaintiff should have execution thereof when the two notes were deposited with the prothonotary. This suspension of the execution may have mitigated the consequences, but the judgment was a lien upon the real estate of the garnishee and would continue so to be, although the notes might never be deposited. The judgment entered was not warranted by the answer of the garnishee, which is the only ground upon which it could be sustained.

And now, March 23, 1899, the judgment of the Court below is reversed, and procedendo awarded.

W. M. S., Jr.

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Oct. '98, 89. Superior Court. November 17, 1898.

Habecker v. Lancaster Township.

Negligence—Township roads—Proximate cause.

The supervisors of a township are not bound to foresee and guard against accidents happening on their roads through the breaking of harness.

The backing strap of a wagon in which the plaintiff was traveling on a township road broke, causing the horse to veer to one side, and going over a low row of stones at the side of the road, he fell into a quarry hole, the plaintiff being injured:

***Held*, the proximate cause of the plaintiff's injury was the breaking of the strap and not the lack of a sufficient guard at the side of the road in front of the quarry hole, and consequently that the township was not liable to the plaintiff.**

Appeal of Christian H. Habecker and Susan F. Habecker, plaintiffs, from the judgment of the Common Pleas for Lancaster County, refusing to take off a non-suit in an action of trespass brought against Lancaster Township.

Two actions of trespass to recover for injuries received by the plaintiffs through the neglect of the defendant to keep its road in a safe condition were brought by Christian H. Habecker and Susan his wife, which actions were consolidated under the Act of May 8, 1895.

On the trial, before LIVINGSTON, P. J., the plaintiffs showed the following case: On August 21, 1895, Susan F. Habecker, one of the plaintiffs, and her friend, a Mrs. Good, with two children, were driving over a public road in Lancaster township, Lancaster county, in the direction of the city of Lancaster. By the side of the road was a quarry hole, and there was no fence or barrier between the road and the adjacent quarry, except a row of stones projecting about half a foot above the ground. Mrs. Habecker was driving down hill, when the left backing strap broke, causing the horse to veer to the right; to lighten the load Mrs. Good and one of the children jumped out; the horse continued until he reached the side of the road by the quarry hole, some forty feet from where the strap broke, and went over the row of stones into the hole; just as the horse and wagon were about to go over the embankment, Mrs. Habecker jumped out and was hurt; one of the children remained in the wagon.

The plaintiffs having rested, the Court entered a non-suit, which the Court in banc refused to take off. The plaintiffs took this appeal.

B. F. Davis, for appellants.

It is negligence in a municipality not to place barriers along side of a dangerous road.

Hey v. Philadelphia, 81 Pa. 44.
Township of Newlin v. Davis, 77 Id. 317.
Lower Macungie Twp. v. Merkhoffer, 71 Id. 276.
Hogan v. Township of West Mahanoy, 174 Id. 352.
Yoders v. Amwell Township, 172 Id. 447.
Trexler v. Greenwich Township, 168 Id. 214.
Scott Township v. Montgomery, 95 Id. 444.
Borough of Pittston v. Hart, 89 Id. 389.
Township of Aston v. McClure et al., 102 Id. 322.
Burrell Township v. Uncapher, 117 Id. 353.
Bitting v. Maxatawny Township, 177 Id. 213.

There may be two causes jointly proximate; it is therefore for the jury to say what caused the damage.

Burrell Twp. v. Uncapher, supra.
Yoders v. Amwell Twp., supra.

The breaking of the harness was an accident which might occur to any one driving over a highway, and therefore its necessary consequences are such as should have been foreseen by the township authorities.

Morrison v. Davis, 20 Pa. 171.
Hunt v. Pownal, 9 Vt. 411.
Winship v. Enfield, 42 N. H. 197.
Baldwin v. Turnpike Co., 40 Conn. 238.

Where several proximate causes contribute to an accident and each is an efficient cause, without which the accident would not have happened, it may be attributed to all or any of them; but it cannot be attributed to a cause, unless without its operation the accident would not have happened.

Ring v. Cohoes, 77 N. Y. 83.
Ehrgott v. The City of N. Y., 96 Id. 264.

Apply the rule here. The injuries in this case might not have happened from the breaking of the harness alone, but they were unavoidable in the absence of a barrier between the road and precipice.

Railroad Co. v. Hope, 80 Pa. 373.

Charles I. Landis, (*L. Ellmaker* with him), for appellee.

Proximate cause is always difficult of ascertainment, and each case is governed by its own peculiar facts. The injury must be the natural and probable consequences of the negligence, such a consequence as under the surrounding circumstances of the case might and ought to have been foreseen by the wrongdoer, as likely to flow from his act. But where an accident is caused by a distinct occurrence, without which no accident would have, or could have under the circumstances of the case, occurred, then the actual cause is the proximate cause, and to it alone the injury is to be attributed.

Willis v. Armstrong County, 183 Pa. 184.

The township was not bound to anticipate the danger to which broken harness might expose a traveler. It is not bound to provide against extraordinary circumstances.

Kieffer v. Hummelstown, 151 Pa. 304.
McCauley v. Logan, 152 Id. 202.
Schaeffer v. Jackson Twp., 150 Id. 145.

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To render a township liable for an injury by a defect in the highway, it must have been the sole efficient cause of the injury.

Chartiers Twp. *v.* Phillips, 122 Pa. 601.
Herr *v.* City of Lebanon, 149 Id. 222.

March 23, 1899. RICE, P. J. At the point where the plaintiff's injury occurred, the gutter on the left, going down the hill, was near to the wagon track, and at the side of the road on the right, five or six feet from the wagon track, but not, so far as the evidence shows, in the highway, was a quarry hole twelve or fifteen feet deep. This was guarded by a row of stones set on edge and projecting about half a foot above the ground. Some of the witnesses testified that the road slanted somewhat towards the quarry hole: that is, that one side was lower than the other. Christian Habecker, one of the plaintiffs, testified to the same effect, but on cross-examination, he admitted that the right side was but very little lower than the other, and that, as to the grade from one side to the other, the road was "reasonably level." So far as the evidence shows, the road at this point was straight, or nearly so, but was steep and narrow.

Mrs. Habecker was familiar with the road. As she was driving down the hill, with Mrs. Good and two small children as companions, the left backing strap broke, and, notwithstanding her efforts to prevent it, this caused the horse to veer to the right, (or, as the plaintiff described it) "the backing strap that was on pulled the horse over," and finally to go over the row of stones into the quarry hole. The backing strap broke about forty feet above this point and when it occurred, in order to lighten the load, the plaintiff called upon her companions to jump from the wagon. Mrs. Good and one of her children did so without injury. Just as the horse and wagon were about to go over the embankment, the plaintiff also jumped out and fell upon the stones. The other child remained in the wagon.

It is claimed that the township was negligent in not providing a sufficient guard at the quarry hole. Granting this, was it the efficient or proximate cause of the injury to the persons of Mrs. Habecker and her child and to the property of her husband?

It may be conceded for present purposes that if there had been a sufficiently strong guard rail, this particular injury would not have happened. It is also clear that if the backing strap had not broken, it would not have happened. Which was the proximate cause, and which, the Court or the jury, was to determine that question? The rule is: "The injury must be the natural and probable consequence of the negligence, such a consequence as under the surrounding circumstances of the case might and ought to have been foreseen by the wrongdoer, and likely to flow from his act:" Hoag *v.* R. R. Co., 85 Pa. 293; Yoders *v.* Amwell Township, 172 Pa. 447; Bitting *v.* Maxatawny, 177 Pa. 213. It is supposable that if the question was submitted to a jury they would find, and perhaps would be justified in finding, that the supervisors might and ought to have foreseen, that if the holdback strap broke, as one was driving down the hill, the accident would be likely to happen that did happen in the present case. Was it their duty to make the road safe against the happening of such a contingency? Upon this general question as to the duty to maintain guard rails upon bridges and along dangerous places at the side of highways, there are many adjudicated cases, most of which are reviewed in Yoders *v.* Amwell Township. It is sufficient to say that if the principle upon which that case was decided does not rule the present in the plaintiffs' favor, none of the earlier cases do. There the bridge, which was without guard rails, had been crossed in safety, but fourteen feet beyond the horse became frightened and backed on the bridge and then off. It was held, that the omission to provide guard rails was the dominant and, therefore, the proximate cause and the fright of the horse was an incident. Without it, it is true, the dominating cause could not have operated to produce the injury, but as susceptibility to fright is a common and well-known trait of even well-trained horses, it was for the jury to say whether or not it was an element in the danger of neglecting to properly guard the sides of the bridge which the supervisors ought to have foreseen and provided against. The case of Bitting *v.* Maxatawny, 171 Pa. 213; 180 Pa. 357, was ruled in the same way and upon the same principle. In the last-cited case the Court said: "The duty of the township is to provide a reasonably safe highway for ordinary travel by the ordinary horse, and as was said in Trexler *v.* Greenwich Township, 168 Pa. 218, there is no duty on the township to provide for travel by exceptionally vicious untrained and unmanageable animals. No roads, unless there were barriers on each side for the whole length of them, would make travel reasonably safe with such animals." In Willis *v.* Armstrong Co., 183 Pa. 184, it was sought to extend the doctrine of Yoders *v.* Amwell, to a case where a bridge not provided with guard rails had been crossed in safety and afterwards the traces broke in consequence of which the wagon ran back down grade and, missing the bridge, went over the embankment into the stream. It was held, however, that the plaintiff was properly non-suited. "At most the absence of guard rails was merely the remote

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cause of the injury. The sole, efficient and proximate cause was the breaking of the harness, in consequence of which the control of the wagon was lost." It is not often two cases can be found so nearly alike in all their essential and controlling facts as that case and the present. Township officers were under no more obligation to foresee the breaking of a holdback strap going down hill than the breaking of a trace going up hill, and were under no plainer obligation to provide against the consequences of the accident in one case than in another. Nor can the two cases be distinguished upon the ground that in the case cited, the place of danger had been passed, for that was the case in Yoders *v.* Amwell and Bitting *v.* Maxatawny. Willis *v.* Armstrong Co. differs, and is distinguishable from the cases last cited in the primary clause, and this distinction being recognized, there is no conflict between them. Nor does Willis *v.* Armstrong Co. stand alone. It is supported by many decisions where in real principle the case for the plaintiff was as strong as the present. Amongst these may be mentioned Chartiers Twp. *v.* Phillips, 122 Pa. 601; Jackson Township *v.* Wagner, 127 Pa. 184; Herr *v.* Lebanon, 149 Pa. 222; Schaeffer *v.* Jackson Township, 150 Pa. 145; Kieffer *v.* Hummelstown Borough, 151 Pa. 304.

In Yoders *v.* Amwell Township, Mr. Justice DEAN says: "Speculating on the doctrine of proximate and remote cause in supposed or hypothetical cases seems to have been a sort of intellectual recreation with text writers on the subject, since the squib case in 2 Wm. Black. 893." We have not felt called upon to indulge in such speculation. Whilst the rule upon the subject is well settled, the difficulty has been in the application of it to the facts of the innumerable cases that have arisen. The different results that have been reached in them depended not on any different view of the law, but of the facts: Haverly *v.* R. R. Co., 135 Pa. 50. So that in following Willis *v.* Armstrong Co., and the class of cases to which it belongs, the Court below did not come in conflict with Yoders *v.* Amwell and the class of cases to which it belongs. To adopt and repeat the language of the former case: The sole efficient and proximate cause was the breaking of the harness in consequence of which the control of the horse and wagon was lost. This conclusion renders it unnecessary to consider the other reasons assigned by the Court below, and urged in the argument here, in support of the judgment of non-suit.

Judgment affirmed.

H. B.

Oct. '98, 160. Superior Court. December 14, 1898.

In re Troubat Ave.

Quarter sessions—Opening of street—Jury—Appeal—Exceptions—Assignment of error—Practice.

An objection to the confirmation of a report of a jury of view in a proceeding to open streets which, if it had been presented in the original Court, would have avoided the entire proceeding, will not be considered as an assignment of error by the appellate court.

Error assigned to the confirmation of the report of viewers that the jury, having been reappointed, were not sworn again, is too broadly stated as "because the said report was contrary to law."

Assignments of error which raise merely questions of fact will not be considered by the appellate court.

Montgomery County's Appeal, 148 Pa. 640, and Keller's Private Road, 154 Pa. 547, followed.

Appeal of the City of Philadelphia, from the judgment of the Quarter Sessions of Philadelphia County, dismissing exceptions to the report of a jury of viewers in the matter of the opening of Troubat avenue.

The facts appearing by the record of the case were as follows: Charles E. Miller, a property owner in the vicinity on the line of the street in question, filed his petition on April 20, 1897, for the appointment of a jury to determine the public necessity for the opening of Troubat avenue, or Ninth street, from Oak lane to Sixty-ninth avenue. On June 9, 1897, the Court appointed a jury to determine whether public necessity required such opening. Before anything was done in the matter the time limited by statute for the action of a jury expired.

Nevertheless the jury held its first meeting on October 18, and was sworn in accordance with the oath prescribed by the Act of Assembly. A number of meetings were held, and while the jury still continued its sessions, the original petitioner, on January 6, 1898, filed another petition in which he set out the filing of the former petition; the appointment of a jury thereunder; that the jury had held a number of meetings; that the term for which the jury was appointed had expired, and praying the Court to re-appoint the said jury. On the same day the Court entered a decree appointing the same jurors. The jury appointed January 6, 1898, was never sworn.

A majority of the jurors reported damages to certain of the property owners and assessed no benefits.

Exceptions were filed by the city, inter alia, because the report was contrary to law, which was dismissed by the Court, (first assignment of error); and because public necessity was already

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amply provided for by two streets running almost parallel with Troubat avenue, less than 250 feet on each side thereof, (second assignment of error).

Exceptions dismissed and the report was confirmed. The city of Philadelphia appealed.

J. L. Patton, assistant city solicitor, (with him *F. L. Wayland*, assistant city solicitor, and *John L. Kinsey*, city solicitor), for appellant.

The jury appointed January 6, 1898, was in effect a new jury and was never organized in conformity with the requirements of the Act of Assembly, and their report should have been set aside. They should first of all have been sworn.

Act of June 13, 1836, P. L. 563, sec. 53.
Bryson's Road, 2 P. & W. 207.
Road from Morrison's Lane, 3 S. & R. 210.
Opening of 55th Street, 55 Leg. Int. 327.

The report of viewers is not conclusive, even with regard to the necessity or expediency of opening a street. It is advisory to the Court. The Court will not confirm it unless it approves it.

In re Girard Avenue, 11 Phila. 449.

J. Washington Logue and *H. Gilbert Cassidy*, for appellee.

March 23, 1899. ORLADY, J. The principal objection urged on this appeal, to prevent the confirmation of the report of viewers, was not suggested in the Court below, where the fact as to whether the jury of view had or had not been resworn after re-appointment, could have been legally ascertained, and if the jurors had not been resworn according to law, the case could have been recommitted to the jury, so as to have been regularly conducted, and a great delay in the proceedings would have been thus avoided; or, if the jury had been in fact resworn, the omission to so state in their report was a clerical oversight by the draughtsman, and a supplemental report in which that fact would clearly appear could have been filed. The docket entries show that the jurors were for good reasons re-appointed on January 6, 1898, and their report shows that, after that date, the counsel for the city and the property owners were regularly before them at nine meetings for the purpose of pressing their respective contentions. The case was conducted under the eye of zealous counsel, and the conclusions of the jury were well known to all the parties in interest. If the jurors were not resworn after being re-appointed, the proceedings should have been then halted until that requisite had been performed, or, if then overlooked, the attention of the Court below should have been directed to that fact by a more specific exception than "Because the report was contrary to law." During the eight months the case was pending, twenty-six meetings of the jury were held and damages aggregating over four thousand dollars were awarded to six property owners, who were obliged to employ counsel, submit to delay in having the case heard, and incur necessary expenses incident to protracted litigation, which burdens were increased by not plainly and promptly raising the only question of merit in the case. The three Judges of the Court below made a personal examination of the proposed highway, and of the properties alleged to have been damaged, before they confirmed the report of the viewers. In not taking an appeal from the award of the viewers the city assented to the fairness of the assessment. In trials in the civil Courts where exceptions are presented under similar circumstances they are not looked upon with favor, and the same rule applies in the Quarter Sessions. No question of jurisdiction arises, and we must treat the case here as it was treated on the trial below. We must regard it as the trial Judge was led to view it from the pleadings, the evidence, and the contentions of counsel: Hartley *v.* Decker, 89 Pa. 470; Walls *v.* Campbell, 125 Pa. 346; Knapp *v.* Griffin, 140 Pa. 604; Krepps *v.* Carlisle, 157 Pa. 358; Taylor *v.* Sattler, 6 Pa. Super. Ct. 229; Taylor *v.* Burrell, 7 Pa. Super. Ct. 461. Under these facts it is too late to ask for the reversal of the whole proceeding on an exception which could, and, if well founded, should have been brought to the notice of the jury on January 6, 1898, and to the Court below on the argument of the case. For these reasons the first assignment of error is not considered. The remaining assignments relate to matters which are not reviewable on this appeal. We cannot consider exceptions which raise only questions of fact: Montgomery County's Appeal, 148 Pa. 640; Keller's Private Road, 154 Pa. 547.

That the Court had jurisdiction, and properly exercised it, is well settled by Twenty-eighth Street, 102 Pa. 140, and Clark *v.* The City of Philadelphia, 171 Pa. 30.

The order and decree of the Court of Quarter Sessions is affirmed.

W. D. N.

Oct. '98, 24. Superior Court. November 22, 1898.

Zinnel v. Bergdoll.

Practice—Point reserved—Contract—Administrator—Master and servant—Lease.

When a question of law is reserved by the Court, it must be of controlling effect, and the facts upon which it arises must be set forth as part of the reservation or must distinctly and specifically appear on the record and be particularly referred to in the reserved point; it is error to enter judgment on a

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point reserved which touches one aspect of the case only and which could have been correctly disposed of without touching other material aspects of the case.

A parol contract whereby one is employed by an owner of real estate to look after his property at a fixed yearly sum has not the effect of a demise or parol lease of the land; a lease involves possession by the lessee. The employment as a superintendent or caretaker resembles that of a servant whose right of occupancy is merely derived from his employment.

If an administrator continue a contract of his decedent under the mistaken belief that it is binding after the death of one of the parties to it, he has a right to terminate it without liability thereafter; unless by an agreement or by his conduct he treats the contract as in force, for his convenience and assistance in caring for and closing up the estate in his charge.

Appeal of Emma C. Bergdoll, administratrix of the estate of Louis Bergdoll, from the judgment of the Common Pleas of Delaware County, in an action of assumpsit wherein Valentine Zinnel was plaintiff.

The facts of the case appearing at the trial, before CLAYTON, P. J., were as follows: The plaintiff was employed by Louis Bergdoll to work on his farm at the wages of $166.66 a month. Bergdoll died on September 9, 1896. After Bergdoll's death, the plaintiff on March 1, 1897, took a lease of the property and brought suit to recover his compensation for the time it was occupied after the owner's death in September up to March, 1897.

The defendant asked the Court to charge:

"The death of Louis Bergdoll, Jr., with whom the alleged contract for employment was made by the plaintiff dissolves the said contract and absolves further performance thereof, and the defendant, having paid in full to the time of said death, the verdict should be in favor of the defendant." Answer—"I am inclined to think that it would not apply to a contract of this kind; we will consider this question hereafter; I will reserve the point and you will give a verdict for the plaintiff for the amount of his claim, subject to a point of law reserved."

"The Court subsequently negatived this point and directed judgment to be entered in favor of the plaintiff on the verdict of the jury."

Error was assigned (first) in not affirming the defendant's point, and (second) in directing a verdict for the plaintiff on the point reserved.

W. B. Broomall, for appellant.

A contract between master and servant is at an end when either party thereto dies, or when the servant becomes unable to perform by reason of sickness or other permanent or considerable difficulty.

14 Am. & Eng. Ency. of Law, 749.
Schouler's Domestic Relations, sec. 473.
Womrath's Estate, 23 WEEKLY NOTES, 434.
Yerrington *v.* Greene et al., 7 R. I. 589.

Where the contract establishes a personal relation between the parties, it is dissolved by death Such a relation is established where a lumber manufacturer contracts with a lumber merchant to sell him a certain quantity of lumber to be made at his mill during five years for which he is paid as the lumber is delivered, and he dies before the time has elapsed. In such case his administrators are not bound to fulfill the contract for the remainder of the time.

Dickinson *v.* Calahan's Adm'rs, 19 Pa. 227.

All contracts are interpreted with reference to their subject matter; and, therefore, a contract to perform certain duties growing out of an existing relation ceases to be binding when the relation ceases.

Bland's Adm'r *v.* Umstead, 23 Pa. 316.

Survivorship must be mutual, if at all.

Valentine *v.* Norton, 17 Shep. 194.

The defendant was prevented by the act of God from availing himself of the services of the plaintiff. The contract is, therefore, discharged.

Baylies *v.* Fettyplace, 7 Mass. 338.
Knight *v.* Bean, 9 Shep. (Me.) 531.

A. D. MacDade, (*G. J. Parker* with him), for appellee.

There is no question as to the right of surrender of a portion of a term by the tenant if accepted by the landlord.

See—

Williams on Landlord and Tenant, page 54.
92 Pa. 444.
89 Pa. 58.

That the general law is, that the executor may complete any contract of his testator, "not peculiarly personal and the assets are liable if he did not," are shown by the case, RODGERS, J., of—

Peries *v.* Aycinena, 3 W. & S. 64.

A contract to pay money, although it falls due after the death of the obligor, does survive. And what is the difference between an agreement to pay at a future period or on a future contingency? The contract is to be completed, not by any personal performance, but by the payment of money. This act an executor can do as effectually as the testator.

See—

White's Exec'r *v.* Com'th, 39 Pa. 176.
Dickinson *v.* Calahan's Adm'rs, 7 Harris, 227.

All executory contracts survive the death of the contractor except those which require some special and personal quality or attention from the contractor.

Oram's Estate, 9 Phila. 359.

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February 17, 1899. SMITH, J. The agreement under which the plaintiff claims rests in parol. The burden of showing its existence and binding effect on the defendant by a preponderance of evidence, is, therefore, cast upon the plaintiff. Whether the agreement with the decedent was a lease of the premises managed by the plaintiff, or a personal contract of hiring were questions for the jury. It was also a question of fact for the jury to determine whether the administrator agreed with the plaintiff to continue the contract made with the decedent, or made another contract, in terms, or in legal effect. But conceding the power of the administrator, to extend the contract of the decedent for the purposes of administration, the Court had no right to assume its existence and continuation by the administrator, and direct a verdict for the plaintiff, subject to a point of law not necessarily decisive of the whole case: Wilde *v.* Trainor, 59 Pa. 439; Fisher *v.* Scharadin, 186 Pa. 565; Ginther *v.* Borough, 3 Pa. Super. Ct. 403. The point of law stated in the reservation touched one aspect of the case only and might have been correctly ruled without affecting other material features of the controversy. Judgment was entered on the verdict for the plaintiff, thus overruling, in effect, the proposition of law contained in the point. The point asked that judgment be directed for the defendant, and we cannot say, therefore, that as matter of law it should have been affirmed. Yet the proposition of law it contained was correct and, if material to the issue, the point should have been affirmed rather than overruled, and the judgment should be based on the entire reservation. Turning to the opinion of the Court in entering judgment on the reserved point, printed in the paper book of the appellee, it appears to be founded largely on statements of fact not found in the reservation, the record, or the evidence sent here. When a question of law is reserved by the trial Court it must be of controlling effect, and the facts upon which it arises must be set forth as part of the reservation or must distinctly and specifically appear on the record and be particularly referred to in the reserved point. The decision of the Court must then be based on the law and facts thus specifically stated. Matters of fact stated in the opinion, and evidently deemed material by the trial Judge, are wholly absent from the reservation as well as from the record and the evidence. Upon every principle of law and justice this is unwarranted. In extending the power to reserve questions of law to the Common Pleas Judges, the Legislature did not intend to grant them roving commissions to inquire into and pass upon the evidence generally, and thus usurp the functions of the jury. The reservation must be of a pure question of law. The facts upon which it is based must be admitted of record, or found by a jury; or stated by the Court as part of the reservation, when, if not objected to at the time, they will have the force of such admission. But the Court has no power under this mode of proceeding, to pass upon controverted matters of fact. It can only pass upon facts when ascertained and settled in this manner, and they become a part of the reserved question.

It is quite evident from the testimony that the contract between the plaintiff and the decedent was for the plaintiff's services and their compensation. The evidence does not show a demise of any part of the premises to the plaintiff. His occupancy was merely incidental to the convenient performance of his duties. He acquired no estate in the land, or the right to use it, except as the discharge of his duties made such use convenient. The land, all property on it, and its yield, belonged to the decedent and were for his sole use and benefit. The plaintiff was simply hired to work the farm, and had no interest in it or in the property connected with it. His wages were in no way dependent on the farm or its yield. The legal possession remained in the decedent, and the plaintiff was in no sense liable for rent. The essential elements of a demise are not shown in this case, and the Court should have so instructed the jury: McCormick *v.* Skiles, 163 Pa. 590. Under the evidence it was a personal contract terminating on the death of either party: West *v.* O'Callaghan, 15 Phila. Rep. 165; Dickinson *v.* Calahan, 19 Pa. 227; Bland *v.* Umstead, 23 Pa. 316.

If the administrator continued the contract of the decedent with the plaintiff, under the mistaken belief that it was binding after the death of the parties to it, he had a right to terminate it without liability thereafter; unless by an agreement, or by his conduct he treated the contract as in force, for his convenience and assistance in caring for and closing up the estate in his charge. The right to recover for services performed in the absence of an express contract on a quantum meruit if such services were accepted by the administrator, might also become material. These are all questions of fact for the jury, however, under proper instructions by the Court.

For the reasons given the judgment is reversed and a venire de novo awarded.

W. D. N.

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WEEKLY NOTES OF CASES.

VOL. XLIV.] *FRIDAY, APRIL 28, 1899.* [NO. 4.

Supreme Court.

Jan. '98, 289. Supreme Court. January 18, 1899.

Swope v. Donnelly.

Wills — Evidence — Declarations of testator — When admissible—For what purpose—Practice —Assignment of error.

Declarations of a testator, not a part of the res gestae, but so connected in point of time with the testamentary act as to justify the inference that they indicate the testator's state of mind when the will was executed, are admissible in evidence as direct proof of testamentary capacity, but are without force as tending to establish the fact of undue influence.

Declarations of a testator as to his intentions are admissible where the will is disputed on the ground of fraud or forgery, but proof of such declarations is not in itself sufficient either to establish the execution of a will or to overcome the testimony of subscribing witnesses, but is admissible only for the purpose of corroboration.

The admission of such testimony should be carefully guarded and its effect as corroborative only should be clearly defined.

In a contest as to the execution of an alleged will on a particular date, evidence that testatrix had said, some five years before, that she was going to a lawyer to have a will made and was only going to leave her husband what the law allowed him, and the testimony of another witness that a few months before the date of the alleged will testatrix had declared she then had a will in which she did not leave her husband any money, is too vague and remote to be considered as corroborative of the testimony of witnesses to the execution of the writing offered as a will.

An assignment of error that the Court erred in allowing plaintiffs to show declarations of an alleged testatrix prior to the date of the alleged will as to her intended disposition of her property, is not in compliance with the rules of the Supreme Court and will not be considered.

Appeal of Patrick F. Donnelly, from a judgment of the Common Pleas No. 4, for Philadelphia County, upon an issue devisavit vel non to test the validity of a certain paper alleged to be the will of Mary R. Donnelly.

The facts of the case, as they appeared on the trial, before ARNOLD, P. J., are as follows:

Mary R. Donnelly died December 25, 1893, leaving a husband, Patrick F. Donnelly, but no children.

On January 2, 1894, letters of administration were granted to the husband.

On May 26, 1896, Nellie Swope and Monica Doorley, sisters of Mrs. Donnelly, presented to the register of wills a paper dated December 10, 1893, purporting to be the will of Mary R. Donnelly, against which a caveat was filed by Patrick F. Donnelly, on the ground that the paper was a forgery. After hearing, the register certified the case for trial, and the issue was framed on the single question of forgery.

The alleged will is as follows:

Philadelphia December 10th 1893.

I will all my property real and personal to my sister & their children

all my clothes and furniture and two thousand dollars in cash I give to my sister Monica my Juelery I give to my Neice Margret

one thousand dollars in cash I give to my Neice Monica Levis

I want all my debts and expences paid

all the rest I want divided in equel parts between my two sisters Nellie and Monica

MARY R. DONNELLY.

It is alleged to have been written on Sunday afternoon, December 10, 1893, by Mary R. Donnelly, a sister of plaintiffs and wife of defendant, on the leaf of a sewing machine in the kitchen of Monica Doorley, one of the plaintiffs, on a piece of paper torn from a blank book.

At the trial Nellie Swope, one of the plaintiffs, her husband and two children testified that they saw the will written.

On the part of the defendant witnesses were called to show that on December 10, 1893, the date of the paper, Mrs. Donnelly was sick and did not leave her house.

Emma Witherspoon, a witness on behalf of plaintiffs, was asked: "What did she (Mary R. Donnelly) tell you she was going to make of her property?" Objected to. Objection overruled. (First assignment of error.)

The witness then testified to a conversation with decedent in October, 1893, as follows: "I said to her, 'Have you made a will, Mrs. Donnelly?' She says, 'I have.' She said, 'I have it here,' and held up her grip. I said, 'Well, I hope you have made it to satisfy yourself.' She said, 'I certainly have. I have left my sister well provided for.' She didn't mention to me the figure. 'I have left my sister well provided for,' and she says, 'my husband, I want him to have just what the law will allow, for he has already had sufficient of my money. I don't want any of my money to get in my husband's family. I want the balance of my hard earnings to go in my own family.' That was the conversation. We parted, Mrs. Donnelly and I, on my step. Nothing further. No figure. Q. Did you have any other conversation previous to that? A. Many

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times about asking her if she had made a will, and she said she would always particularly remember her sister, Monica Doorley. That was about the sum and substance of the conversation about the will."

Mary Muldoon was called on behalf of plaintiffs and it was proposed to prove by her conversations with decedent as to the disposition of her estate. Objected to. Objection overruled. Exception. (Second assignment of error.)

Witness then testified as follows:

"Q. Did you have any conversation with Mary Donnelly in reference to making her will and the disposition of her property? A. Yes, sir; many times. I was her most intimate friend, and she always said that she wanted all her money to go to her people. Q. What did she say she would do by her will? A. I kept her bank books for her three or four months for fear he would know —" (Objected to.)

By the Court—"Q. You say you heard her many times say she wanted her money to go to her people? A. Yes, sir. Q. Did you ever hear her say she had made a will? A. Yes, sir; and I went with her to make one. It was all for her own people. She said she knew he would get one-third, and that if she could keep him out of that, she would, but she knew by law she could not."

By Mr. Duffy—"Q. Did she succeed in making a will at that time? A. I went with her to a lawyer, but I thought she was able to attend to it herself, for she was always talking about making her will, and her people would be protected. She married very late in life and said she knew he took her for her money. Q. Did she say she would not leave him a dollar was it not that the law compelled her to? A. She positively did."

The Court submitted to the jury the question of fact as to whether or not Mary R. Donnelly did execute the paper offered as a will.

Verdict for plaintiffs and judgment thereon. Defendant appealed, assigning for error (1 and 2) the ruling on the evidence as above noted, and "3. The Court erred in allowing plaintiffs to show declarations of Mary R. Donnelly, prior to the date of the alleged will, as to her intended disposition of her property."

E. Cooper Shapley, for appellant.

The clear rule, in cases of wills, is that while the declarations of the testator, made at or about the time of the execution of a will, are admissible in evidence to show the state of his mind at the time the will was made, they are not admissible as evidence of the facts stated by him.

25 Am. & Eng. Ency. of Law, 1005.
Rusling *v.* Rusling, 36 N. J. Eq. 603.
Jones *v.* McLellan, 76 Me. 49.
Lang's Estate, 65 Cal. 19.
Moritz *v.* Brough, 16 S. & R. 405.
Rule *v.* Maupin, 84 Mo. 587.
Canada's Appeal, 47 Conn. 450.
Comstock *v.* Hadlyme, 8 Conn. 254.
Robinson *v.* Hutchinson, 26 Vt. 38.
Dickie *v.* Carter, 42 Ill. 376.
Bates *v.* Bates, 27 Iowa, 110.
Thompson *v.* Updegraff, 3 W. Va. 629.
Dinges *v.* Branson, 14 Id. 100.

Such declarations are inadmissible when the issue is forgery.

Waterman *v.* Whitney, 11 N. Y. 161.
Johnson *v.* Hicks, 1 Lansing, 150.

Or if made before the alleged execution of the paper. See—

Landis *v.* Landis, 1 Grant, 248.
Turner *v.* Hand, 3 Wall. Jr. 88.
Taylor's Will, 10 Abb. Pr. N. S. 300.

Thomas James Meagher, (*Patrick Duffy* with him), for appellees, cited, as to admissibility of the evidence of a declaration—

Doe *v.* Hardy, 1 M. & Rob. 525.
Hoppe *v.* Byers, 60 Md. 381.
Beadles *v.* Alexander, 9 Baxt. 604.
Johnson *v.* Brown, 51 Tex. 65.
Gould *v.* Lakes, L. R. 6, P. D. 1.
Harp *v.* Parr, 48 N. E. 113.
Sugden *v.* St. Leonards, L. R. 1, P. D. 154.

March 27, 1899. FELL, J. On the questions of testamentary capacity and fraud or undue influence in the procurement of a will, the declarations of a testator, not a part of the res gestae, but so connected in point of time with the testamentary act as to justify an inference that they indicate the state of the testator's mind when the will was executed, are admissible in evidence. Such declarations may be direct proof on the question of testamentary capacity, but as tending to establish the fact of undue influence they are hearsay merely, and without force. They are, however, admissible on that question as tending to show the susceptibility of the testator's mind to the influences which surrounded him: Herster *v.* Herster, 122 Pa. 239; Wharton's Evidence, secs. 1009-1012; Redfield on Wills, 551.

The proposition that the declarations of a testator as to his intentions are admissible where the will is disputed on the ground of fraud, circumvention or forgery has received the general assent of text writers on the subject; but the cases in which such declarations have been admitted, where the only question was that of forgery, are few. The trend of decision seems to be very decidedly in favor of their admission in corroboration of direct proof of the execution of the will, whether made before or after its date. In Turner *v.* Hand, 3 Wallace, Jr. 88, proof was admitted of conversations had with the decedent, both before and after the date of the alleged will, for the purpose of showing, among other things,

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that the dispositions of property contained in the paper were wholly at variance with his often-expressed testamentary intentions. In Tynan *v.* Paschal, 27 Texas, 286, declarations of the testator were said to be admissible to rebut the presumption of cancellation or revocation of a will arising from its loss or destruction before his death, and as tending in some degree to strengthen other proofs of its execution. The relevancy of such declarations was recognized in Johnson *v.* Brown, 51 Texas, 65, in a contest as to the genuineness of a will; and the declarations of the testator, made both before and after its date, expressions of ill will or of kindness toward the beneficiaries, were admitted. In Hoppe *v.* Byers, 60 Md. 381, a very carefully considered case in which the authorities on the subject are reviewed, it was held that after the introduction of direct proof of the genuineness of the handwriting, met by direct proof to the contrary, declarations of the deceased corroborative of such direct proofs were admissible in evidence. A like ruling was made in Taylor Will Case, 10 Abb. Pr. Rep. N. S. 300. In all of these cases it was said in effect that the proof of declarations was not in itself sufficient either to establish the execution of the will or to overcome the testimony of the subscribing witnesses, and that it was admissible only for the purpose of corroboration. In the opinion in Hoppe *v.* Byers, supra, it was said: "But in thus sustaining the ruling excepted to, it must be distinctly understood that we hold that such declarations would not be admissible if they stood alone, and had not been preceded by direct proof of witnesses to the genuineness of the handwriting. They are not to be taken as direct proof to establish the paper, but merely as corroborative of such direct proof, or as a circumstance in a case of this character, where such direct evidence has been first given, proper for the consideration of the jury." At the best this is a dangerous class of testimony, and its admission should be carefully guarded and its effect as corroborative only should be clearly defined.

In this case the deceased, who was a married woman without children, died on December 25, 1893. The writing offered for probate is dated December 10, 1893, and by it all her property is given to her sisters and nieces, to the exclusion of her husband. The assignments of error are to the admission of declarations of the deceased made to witnesses before the execution of the writing as to the disposition which she intended to make of her property. There was not the slightest limit as to the time when the declarations were made, and under general offers the witnesses were allowed to testify to conversations had at any time during the life of the deceased. This led to the introduction of testimony which was clearly irrelevant. One witness, Emma Witherspoon, testified to a conversation with the deceased in October preceding her death, in which she said she had executed a will, and then had it with her, in which she had provided for one of her sisters, and that she wished her husband to have only what the law would allow him. Another, Mary Muldoon, testified that the deceased had said to her that she wished her money to go to her people, and that she would not leave a dollar to her husband if the law did not compel her to do so; and that on one occasion she had gone with her to see a lawyer about making her will. This was about five years before her death. The writing in question, if genuine, was prepared by the deceased in the house of her sister about fifteen days before her death. The testimony of one of the witnesses tended to show that there had been a prior will; that of the other an intention to make a will, and perhaps that of both a general intent that her husband should receive only such share of her estate as the law would give him. But upon the real issue whether a will had been executed in December, 1893, this testimony threw a very uncertain light, and it was altogether too vague and remote to be considered as corroborative of the testimony of the witnesses to the execution of the writing offered as a will. The fact that a will with which the deceased was satisfied was in existence in October could not be corroborative of testimony that another will had been executed in December and the mere expression of an intention to make a will five years before would have no weight whatever.

In justice to the learned trial Judge, it should be said that many of the questions which elicited this irrelevant testimony were not objected to at the time, and he may have considered them as having been asked without objection. They came, however, without specific objections, under the general rulings on the subject, one of which was on the question: "What disposition did she tell you she was going to make of her property?" And the other on an offer to prove declarations of the deceased made at any time.

Leave was given at the argument to amend the first and second assignments by adding thereto the testimony to the admission of which exceptions were taken at the trial. The third assignment is not in compliance with the rules of this Court, and will not be considered. The first and second assignments of error are sustained, and the judgment is reversed with a venire facias de novo.

W. M. S., Jr.

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Jan. '99, 28. Supreme Court. March 24, 1899.

Kane v. Laughlin.

Equity—Demurrer.

Where a bill set out that plaintiff, being indebted to defendant, transferred to him certain real and personal property as collateral security, that defendant had realized from a portion of the property more than enough to pay the debt, and still holds the rest of the property and refuses to account, and prays a reformation of the agreement under which the property was transferred, an account and a reconveyance, a sufficient case for equitable interference is shown.

Appeal of James J. Kane, plaintiff, from the decree of the Common Pleas No. 1, for Philadelphia County, in a proceeding in equity against John Laughlin for an account and reconveyance of real estate.

The bill was originally filed in Common Pleas No. 2. The facts set out in the bill filed appear from the head note and the opinion of the Supreme Court, infra.

The defendant demurred, on the ground, inter alia, that no cause for equitable jurisdiction had been alleged and that the plaintiff had an adequate remedy and that it should have been filed in Common Pleas No. 1. Common Pleas No. 2 transferred the case to Common Pleas No. 1, which Court sustained the demurrer and dismissed the bill, without filing an opinion. The plaintiff took this appeal.

John M. Vanderslice, (with him *Charles L. Smyth* and *Christopher H. Murray*), for appellant.

It would appear unnecessary to cite any other authority to sustain this bill than the recent case of Johnston *v.* Price, 172 Pa. 427, in which Mr. Justice GREEN says: "It is almost a work of supererogation to cite the perfectly familiar authorities that in order to oust the equitable jurisdiction, the remedy, or supposed remedy, at law must be full, adequate and complete: Kirkpatrick *v.* McDonald, 11 Pa. 387; or that equitable jurisdiction does not depend on the want of a common law remedy: Electric Company's Appeal, 114 Pa. 574; or that the extension of the remedy at law to cases originally within the jurisdiction of a Court of equity is no bar to a chancery proceeding for the same cause: Wesley Church *v.* Moore, 10 Pa. 273; or that equity seeks to prevent unnecessary litigation by disposing in any one proceeding of all the questions which arise affecting many persons: Bierbower's Appeal, 107 Pa. 14; Harper's Appeal, 109 Pa. 9; or that there must not only be a remedy at law, but it must be adequate and reasonably convenient: Warner *v.* McMullin, 131 Pa. 370." See also—

Steinruck's Appeal, 70 Pa. 289.
Maffitt's Adm'r *v.* Rynd, 69 Id. 387.

Charles J. Sharkey, (*F. Pierce Buckley* with him), for appellee, cited—

Kane *v.* Traction Co., 186 Pa. 150.
Greenfield's Estate, 14 Id. 496.
R. R. Co. *v.* Shay, 82 Id. 203.
Hoffman *v.* R. R. Co., 157 Id. 195.
Frauenthal's Appeal, 100 Id. 291.

April 3, 1899. STERRETT, C. J. The only specification of error in this case is that, "The learned Court below erred in sustaining the demurrer and dismissing the bill."

The bill avers, in substance, that the plaintiff, being indebted to the defendant in about the sum of $2750, transferred to him certain real and personal estate and two judgments as collateral security. That the defendant realized $4000 from the personal property, and is largely overpaid. That he still holds the real estate and the judgments, and refuses to render any account. That a written agreement signed by the defendant (Exhibit A) falsely states the true amount of the indebtedness. The prayers are:

1st. For decree reforming said agreement so as to make it conform to the truth.

2d. For an account of the moneys received from the sale of the personal property, etc., and

3d. For a decree that the defendant reconvey the real estate; and that, in the meantime, he be restrained from transferring or in any way encumbering said real estate, etc.

The defendant demurred to the bill, and assigned, inter alia, for cause of demurrer, that "the plaintiff has not in and by his bill shown any case entitling him to the relief prayed," and that he "has a full, adequate and complete remedy at law."

Without filing any opinion or giving any reason for its action, the learned Court below sustained the demurrer and dismissed the bill, hence this appeal.

The effect of the demurrer was to admit the truth of all the averments of fact well pleaded. No one can read and consider the averments of fact properly set forth in the bill, without coming to the conclusion that a proper case for equitable relief is therein set forth. It is not our purpose to discuss the question. It is too plain for argument that—so far as anything appears on the record before us—the demurrer should not have been sustained. It follows that the decree must be reversed and the case remanded to the Court below for further proceedings.

Decree reversed at appellee's costs, and it is ordered and decreed that the demurrer be and is hereby overruled and the defendant is ordered to answer; and it is further ordered that the record be remitted to the Court below with instructions to proceed to final decree in accordance with the rules regulating equity practice. W. C. S.

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Oct. '98, 147. Supreme Court. February 28, 1899.

Steinmeyer v. Siebert.

Equity—Specific performance respecting things of a merely personal nature—Practice—Effect of finding of judge.

The rule that equity will not take jurisdiction to decree specific performance respecting goods, chattels, stocks and other things of a merely personal nature, is limited to cases where a compensation in damages will furnish a complete remedy. When the wrong is a betrayal of confidence equity will decree restitution, which may be specifically enforced against the wrong-doer.

The findings of fact by a judge, sitting as chancellor, under the new equity rules, while not binding on the appellate tribunal, will not be disturbed except for clear error. Mere preponderance of testimony against them is not sufficient to lead to a reversal if there is testimony which, if believed, will warrant them.

Appeal of P. W. Siebert, one of the defendants, from a decree of the Common Pleas No. 2, for Allegheny County, in a proceeding in equity in which William Steinmeyer, executor of Christian Siebert, deceased, was plaintiff.

The bill filed against P. W. Siebert and the Ewalt Street Bridge Company set up that Christian Siebert, father of P. W. Siebert, died in 1893, leaving a will appointing the plaintiff and P. W. Siebert his executors; that at the time of the death of Christian Siebert, and for a number of years prior thereto, P. W. Siebert occupied a confidential relation to Christian Siebert; that P. W. Siebert resigned his trust on June 29, 1894; that afterwards the plaintiff instituted certain proceedings in the Orphans' Court to compel the defendant to turn over to him certain property, including certain stocks, which defendant had in his possession and which belonged to the decedent's estate; that the Court directed the turning over of certain of the property, but dismissed the proceedings as to the stock for want of jurisdiction; that at the time of his death Christian Siebert owned a number of shares of the Ewalt Street Bridge Company; that the defendant, P. W. Siebert, had the custody of the certificates thereof; that he had had the stock transferred to his own name on the books of the company, while he was acting as executor of his father's estate. The bill prayed an account and discovery; that the stock be declared the property of the estate of the decedent; that P. W. Siebert be decreed to surrender the certificates and transfer and deliver the stock to the plaintiff.

The answer denied the confidential relation between the decedent and P. W. Siebert, and set up that the latter was the owner in good faith of the stock whose transfer was sought; and that the case was not one within equitable jurisdiction.

The case was heard by SHAFER, J., who held the case to be one of equitable jurisdiction, found the facts substantially as alleged in the bill, and made a decree directing the defendant, P. W. Siebert, to transfer the stock in question to the plaintiff, and the Ewalt Street Bridge Company to issue new certificates therefor to the plaintiff as executor of Christian Siebert.

P. W. Siebert took this appeal and assigned as error the assumption of jurisdiction, certain rulings on evidence, several findings of facts and the decree.

J. S. Ferguson, (*E. G. Ferguson* with him), for appellant.

W. B. Rodgers, (*J. R. Sterrett* with him), for appellee.

March 27, 1899. FELL, J. The contention that the plaintiff was not entitled to proceed in equity because he had an adequate remedy at law cannot be sustained. No contract in relation to the stock of the Ewalt Street Bridge Company is set up by the bill, but it is alleged therein that the defendant Siebert never had any right to or interest in the stock, and that he obtained the legal title thereto fraudulently and by the abuse of the relation of trust and confidence in which he stood to the real owner. The prayers of the bill were for discovery, an account and for transfer of the stock. The rule that jurisdiction in equity will not be entertained to decree a specific performance respecting goods, chattels, stocks and other things of a merely personal nature is limited to cases where a compensation in damages will furnish a complete remedy. Where the wrong is a betrayal of confidence, equity will decree restitution, which may be enforced specifically against the wrong-doer. In McGowin *v.* Remington, 12 Pa. 56, a clerk was compelled to surrender drafts, maps, plans, etc., which he had withheld from his employer; in Abbott's Executor *v.* Reeves, 49 Pa. 494, persons who had borrowed stocks and bonds from an executor were required to make restitution; in The Pennsylvania Co. *v.* Franklin Fire Ins. Co., 181 Pa. 40, the defendant was required to issue new certificates of stock to an owner whose certificates had been transferred under forged powers of attorney. In the case last cited it was said by our brother DEAN that on the ground that an action at law would be an inadequate remedy "equitable jurisdiction in suits by shareholders against the corporation has, on like prayers, been frequently sustained both in the English Courts and our own."

The established rule under the former practice was that the findings of a master on conflicting evidence, approved by the Court, would not be reversed except on clear evidence of mistake:

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Stocker *v.* Hutter, 134 Pa. 19; Brotherton *v.* Reynolds, 164 Pa. 134. The same rule applies to the findings of fact of a Judge sitting as a chancellor under the new equity rules; his findings are not conclusive upon us, but they will not be disturbed except for error which clearly appears. An apparent preponderance of testimony against them is not sufficient to lead to a reversal, if there is testimony which if believed will warrant them. The credibility of witnesses, and in a large degree the conclusions to be drawn from their testimony which depend upon their character, intelligence and knowledge of the subject, can be determined much better by the Judge who hears them than by us on appeal: Stockett *v.* Ryan, 176 Pa. 71; Com'th *v.* Stevens, 178 Pa. 543; Hancock *v.* Melloy, 187 Pa. 371. We have referred to this subject, not because we have entertained any doubt as to the correctness of the conclusions reached in this case, but in order that it may be better understood by the profession, as many cases come here on appeal in which the real question, as in this, is one of fact to be determined by the consideration of conflicting evidence. The findings of fact of the learned Judge are stated with clearness and precision, and we have no hesitation in accepting them as abundantly sustained by the testimony.

The decree is affirmed at the cost of the appellant.

H. B.

Superior Court.

Oct. '98, 125. Superior Court. October 18, 1898.

Howes v. Dolan.

Mechanics' liens—Scire facias—Judgment—Act June 16, 1836, P. L. 695—Act March 23, 1877, P. L. 34.

Where the plaintiff in a scire facias upon a mechanics' lien has obtained a verdict within five years from the issuing of the writ, yet is prevented from entering judgment until after the expiration of that period, by reason of the pending of a rule for a new trial, the judgment upon the discharge of the rule or motion relates to the date of the verdict and is valid.

The Act of March 23, 1877, P. L. 34, is a remedial law and the well-settled principle is applicable, that where the object of the Act is to cure a defect in the old law it is but reasonable to suppose that the Legislature intended to do so as effectually, broadly and completely as the language used, when understood in any fair and reasonable sense, would indicate.

Appeal of William E. Howes, Edgar J. Howes and John E. Howes, trading as William E. Howes & Bros., from the judgment of the Common Pleas No. 2, of Philadelphia County, entered on a scire facias sur mechanics' lien, wherein Mary A. Dolan, owner or reputed owner, and Thomas Harkin and Frederick Harkin, builders and contractors were defendants.

On October 11, 1892, plaintiffs filed a mechanics' lien against real estate owned by Mary A. Dolan, one of the defendants. On December 9, 1892, a sci. fa. was issued upon said lien returnable to the first Monday of January, 1893. On May 22, 1893, plea of nunquam indebitatus was filed and issue joined. On October 25, 1897, a trial was had and a verdict for plaintiffs was obtained. On October 27, 1897, a motion and a rule for a new trial were filed. On December 22, 1897, the rule was discharged. On December 27, 1897, judgment was entered on the verdict. On December 31, 1897, defendants filed an affidavit averring "that no judgment was recovered within five years from the issuing of said sci. fa., to wit, within five years from December 9, 1892, but after the expiration of said period of five years from December 9, 1892, the said plaintiffs have on December 27, 1897, entered a judgment upon a verdict recovered by them for $405.74. That your petitioner is advised that the entry of said judgment was unlawful, for the reason that said judgment was not obtained within five years from the time of the issuing of said sci. fa." Under this affidavit the Court granted a rule upon plaintiffs to show cause why the lien filed, together with the judgment entered thereon should not be stricken from the records, and on June 13, 1898, made the rule absolute without filing any opinion or intimating upon what ground it based its action.

Plaintiffs appealed and assigned as error the making the rule absolute and striking off the lien and judgment.

Peter Boyd, for appellants.

This case is ruled by the decision of the Supreme Court in—

Sweeny *v.* McGittigan, 20 Pa. 319.

The present case falls within the protection of the Act of March 23, 1877.

The title of the Act is as follows: "An Act making the verdict of a jury in the several Courts of Common Pleas of this Commonwealth a lien in certain cases." The preamble designates those cases as those in which a verdict is rendered "for a certain sum or sums therein specified," and section 1 enumerates the cases to which the Act applies as being those in which "a verdict is rendered by a jury in any of the Courts of Common Pleas of this Commonwealth for any specific sum of money."

Though the preamble of a law, as often said,

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is no part of the enactment, and, therefore, does not proprio vigore make the law, it is, nevertheless, a part of the law for some purposes. If it be referred to in the enacting clause to identify the subject matter of the law, or to explain the motive or the meaning of the Legislature, it can be used for this purpose.

Com'th v. Marshall, 69 Pa. 328.

Where the reason of a rule is general and the provisions special the rule is general in its application. And this maxim is especially applicable to the laws providing remedies. There the words are to be taken not literally, but according to the intent of the Legislature, and such construction is always to be made that the party grieved and in equal mischief may be relieved.

Schuylkill Navigation Co. v. Loose, 19 Pa. 15.

The plaintiffs could not have entered judgment until after the defendant had been given opportunity to file a rule for a new trial and until that rule was disposed of.

Seminary v. Bethlehem, 153 Pa. 583.

William A. Carr, (*W. Horace Hepburn* with him), for appellees.

When a scire facias is issued to revive a judgment, the lien is continued for five years, and no longer. The law does not recognize the possibility, when due diligence has been used, that the plaintiff can fail to obtain a judgment of revival within the period of five years, and what is due diligence is indicated by the act, viz., having a judgment of revival within that time.

Meason's Estate, 4 Watts, 341.
Ebright v. The Bank, 1 Id. 399.

The entry of a judgment on the sci. fa. was too late.

Hershey v. Shenk, 58 Pa. 382.
Fulton's Estate, 51 Id. 204.
Hunter v. Lanning, 76 Id. 25.
Philadelphia v. Scott, 93 Id. 25.

March 23, 1899. Rice, P. J. The plaintiffs obtained a verdict in a scire facias upon a mechanics' lien within five years from the date of the issuing of the sci. fa., but after five years from the date of the filing of the lien, but owing to the pendency of a rule for a new trial granted upon the defendants' application, judgment was not entered on the verdict until after the expiration of five years from the date of the issuing of the sci. fa. The question is whether the lien had expired at the time judgment was entered.

Section 24 of the Act of June 16, 1836, P. L. 695, provides that the lien of every such debt "shall expire at the end of five years from the day on which such claim shall have been filed, unless the same shall have been revived by scire facias in the manner provided by law in the case of judgments," etc.

By the Act of March 26, 1827, P. L. 129, which regulated the duration, and the revival of the liens of judgments—and which, so far as it relates to the question before us, was reenacted in the amendment of June 1, 1887, P. L. 289—the suing out of a writ of scire facias is effectual to continue the lien of a judgment for a period of five years from the date of issuing the writ, but the lien is gone at the end of that period unless the writ be duly prosecuted, and by "due prosecution," is meant the obtaining of a judgment within five years: Meason's Estate, 4 W. 341; Silverthorn v. Townsend, 37 Pa. 263; Fulton's Estate, 51 Pa. 204. See also Lichty v. Hochstetler, 91 Pa. 444, at p. 447; and Philadelphia v. Scott, 93 Pa. 25, at p. 28.

The application of this principle to mechanics' liens was plain. Where no judgment was obtained on a scire facias to revive a judgment within five years after the issuing of the writ, the lien was gone. So it was upon a mechanics' lien. Hence it was held in Ward v. Patterson, 46 Pa. 372, that, when a lien was filed in 1851, the scire facias tried, and defeated in 1852, new trial granted on conditions which were not complied with until 1863, and the case then tried, the lien was gone and the plaintiff could not recover.

In Hershey v. Shenk, 58 Pa. 382, the lien was filed November 13, 1856, the scire facias was sued out on November 11, 1861, and was tried on June 4, 1867. Between the last two dates the owner died. It was held by the Supreme Court, reversing the Court below, that this fact did not prevent the operation of the rule that the scire facias must be prosecuted to judgment within five years from the date of the issuing of the writ. A mechanics' claim is not a judgment, and, therefore, the twenty-fifth section of the Act of February 24, 1834, P. L. 77, does not extend the lien for a period of five years from the death of the owner.

The strictness of the rule is well illustrated by the case of Hunter v. Lanning, 76 Pa. 25. There the proceedings were as follows: November 14, 1865, lien filed; March 16, 1866, scire facias issued; April 6, 1870, verdict for plaintiff, and new trial granted; October 2, 1871, plea that five years had elapsed since the filing of the lien and the issuing of the scire facias, replication that continuances were obtained by the defendants both before and after the granting of the new trial, and that the delay in the prosecution of the claim was occasioned by their acts and not by the default of the plaintiff. On demurrer to the replication that judgment had not been obtained within five years from the issuing of the writ it was held that the lien was gone and judgment was entered for the defendants. This was affirmed, the Supreme Court saying, as to the excuses

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set up for the delay: "The proceeding here is against the building, and being in rem the lien must appear by the record and not by outside acts of estoppel."

The plaintiffs' counsel places much reliance on the case of Sweeny *v.* McGittigan, 20 Pa. 319. There the plaintiff obtained a verdict within five years from the date of the issuing of the writ, whereupon the defendants' counsel made a motion in arrest of judgment upon the ground that more than five years had elapsed between the filing of the claim and the verdict. This position was sustained by the Common Pleas, and the judgment arrested. True, the final order appears from the report of the case not to have been made until more than five years from the issuing of the writ, but the question and the only question, considered in the opinion of the Court below, and in the opinion of the Supreme Court was, whether the period of five years was to be computed from the date of the filing of the lien or of the issuing of the writ. The Supreme Court held that the computation was to be made from the latter date, and therefore reversed the judgment. Manifestly, the plaintiff could not be deprived of his right to judgment on the verdict by an erroneous ruling of the Court refusing it. In the present case the failure to obtain judgment within the prescribed time was not due to any erroneous action of the Court below, and it is argued with much force that in fixing five years as the period during which the mere issuing and pendency of a sci. fa. will keep the lien alive, the Legislature had in mind the delays incident to the prosecution of claims to judgment, and made what they deemed a sufficient allowance for them. It is urged that the explicit provision of the Act of 1827 left no room for construction and fully justified the emphatic declaration of Justice ROGERS, in Meason's Estate, supra, which has been quoted with approval in many subsequent cases: "When, then, a scire facias is issued to revive the judgment, the lien is continued for five years and no longer. The law does not recognize the possibility, when due diligence has been used, that the plaintiff can fail to obtain a judgment of revival within the period of five years; and what is diligence is indicated by the act, viz., having a judgment of revival within that time." See also the remarks in Fricker's Appeal, 1 W. 393; Ebright *v.* The Bank, 1 W. 397, and Armstrong's Appeal, 5 W. & S. 354.

It is to be observed, however, that in none of these cases was the precise question before us discussed. In none of them, excepting Sweeny *v.* McGittigan, had the plaintiff obtained a verdict within the five years. But granting that such a case would be governed by the strict rule enunciated in Meason's Estate, even if judgment were prevented by the pendency of a motion in arrest of judgment or a rule for a new trial, does not this furnish a very strong argument in favor of the proposition that the case is within the mischief intended to be remedied by the Act of March 23, 1877, P. L. 34? When Justice ROGERS said that the law does not recognize the possibility of a failure to obtain judgment within five years if due diligence is used, he had reference to limitations fixed by the existing statute law. What we have to determine is whether such a possibility has been recognized in later legislation and if the inconveniences and hardships that might result from a strict and literal enforcement of the former rule have been provided against.

We come then to a consideration of the Act of 1877, and in the discussion of it we shall assume, without deciding it, that the former rule was as rigid as the defendants' counsel contend it was. The Act provides as follows:

"That whenever a verdict is rendered by a jury . . . . for any specific sum of money, in such case the verdict shall be a lien upon the real estate situate within the proper county of the party or parties against whom said verdict shall be rendered, which lien shall remain unless the Court grant a new trial, or arrest the judgment," etc. It is argued that if this Act is applied to mechanics' liens, we must hold that a verdict for the plaintiffs in such a case is a lien upon all the lands of the defendants and of the contractor in the county,—a conclusion so in conflict with the entire law upon the subject as to make it absurd to suppose that the Legislature intended the Act to apply to cases where the judgment would have a restricted lien. It seems to us, however, that this argument is based on a too literal reading of the clause declaratory of the extent of the lien. If in a personal action upon an instrument containing an agreement restricting the lien, and collection of any judgment obtained upon it to certain land, a verdict should be rendered for the plaintiffs for a specific sum of money, must the Act of 1877 be so construed as either to make such verdict a lien on all the lands of the defendants, in spite of the agreement, or to deprive it of a lien altogether? Clearly not. The former construction would give the Act an effect that was manifestly never intended, and the latter would exclude cases plainly within the mischief to be remedied. If, however, we construe the words, "the real estate . . . . of the party" to mean the real estate that would be bound by the lien of a judgment upon the verdict, there is no greater difficulty so far as this point is concerned, in ap-

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plying the Act to the present case than there would be in the supposed case. It is often presumed that the Legislature intended exceptions to its language which would avoid absurd results. The illustrations referred to in the opinion of our brother ORLADY, in Lumberman's Exchange *v.* Lutz, 2 Pa. Super. Ct. 91, are in point.

This is a remedial law, and, as we have had occasion to remark in another case decided at last term, (Clay *v.* McCreanor), the well-settled principle is applicable, that where the object of an Act is to cure a defect in the old law it is but reasonable to suppose that the Legislature intended to do so as effectually, broadly and completely as the language used, when understood in any fair and reasonable sense, would indicate. A plaintiff in a scire facias upon a mechanics' lien who has obtained a verdict for "a specific sum of money" is within the strict letter of the law. Why should it be held that he is not within its spirit and intent? True, he already has a lien or he could not obtain a verdict; but if the verdict be rendered within four days prior to the expiration of five years from the issuing of the sci. fa., then, according to the defendant's contention, his lien would be gone before judgment could by any possibility be entered. See Seminary *v.* Bethlehem, 153 Pa. 583. The same would be true if the disposition of a motion in arrest of judgment or of a rule for a new trial should be delayed until after the five years had expired. The strictness of the old law, as declared in Meason's Estate, and the other cases above cited, was such, if the position of defendants' counsel be correct, that although the plaintiff may have diligently prosecuted the claim, and established by the verdict of a jury his right to have execution he might be deprived of that right by delays between verdict and judgment for which he was in no wise responsible. If in consequence of these delays he would, under the old law, have no lien when the motion or rule was disposed of and therefore no right to judgment, his case would seem to be within the mischief to be remedied by the Act of 1877, as indicated by the preamble. Such delays are unavoidable, but in order that the party who has established his right to recover a specific sum of money should not suffer in consequence of them, the verdict is made a lien. If the Act of 1877 does not apply to a case like the present, it is because a plaintiff so situated does not need its protection in order to secure to him the fruits of the verdict in his favor.

We all agree upon this proposition, that where a plaintiff in a scire facias upon a mechanics' lien has obtained a verdict within five years from the issuing of the writ, but in consequence of the pendency of a rule for a new trial or of a motion in arrest of judgment, is prevented from entering judgment until after the expiration of that period, he is nevertheless entitled to judgment upon the discharge of the rule or motion. This is as far as it is necessary to go in the present case, and is all we decide. The order striking off the mechanics' lien and the judgment entered thereon is reversed and set aside, at the costs of the appellees, and the judgment and mechanics' lien are reinstated.

W. D. N.

Oct. '98, 88. Superior Court. December 13, 1898.

Feehan v. Dobson.

Negligence—Trespasser—Child of tender years—Practice.

A child of tender years may be a trespasser and subject to the consequences of his trespass if injured in the course of his trespass.

Where an owner of a lot surrounded by a low wall, habitually places thereon hot coals or cinders, he is not responsible to a child of tender years, who, accompanied by an elder brother, climbs over the wall from the highway and, deceived by the appearance of ashes on top of a pile of coals, goes thereupon and is burned by the underlying hot coals.

Hydraulic Works *v.* Orr, 83 Pa. 332, distinguished.

Where the statement shows a good cause of action, and the defendant has not on the trial asked for binding instructions in his favor, although the evidence for plaintiff does not make such a case as should be submitted to the jury, the Court in reversing a judgment for plaintiff may grant a new venire.

Appeal of John Dobson and James Dobson, trading as John and James Dobson, defendants, from the judgment of the Common Pleas No. 1, for Philadelphia County, in an action of trespass brought by Joseph Feehan, by his father and next friend, P. H. Feehan.

This was an action to recover damages for personal injuries suffered through the alleged negligence of the defendants.

On the trial, before BREGY, J., the plaintiff showed the following case:

The defendants, John and James Dobson, were owners of the Mount Vernon Mills, situated at Manayunk, upon the River Road, which was a public paved street. The mills were situated on the east side of this River Road, and across the street on the west side the Dobsons owned a lot which lay between the street and the river, which lot was enclosed by a two and one-half feet high stone wall. This lot was used by the Dobsons for dumping the ashes from their mills, and directly opposite these mills was an ungated opening in the stone wall for the purpose of carting in the ashes.

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On August 27, 1897, the plaintiff, Joseph Feehan, a boy, not quite five years old, accompanied by his brother, aged fifteen, was sent out by his parents to seek wood in the river and coke on the ash heaps of Manayunk. In this pursuit they came upon the Dobsons' lot, having climbed over the wall, and Joseph Feehan, getting upon freshly-dumped ashes, which, having sufficiently cooled not to betray their character, was severely burned.

The defendants moved for a non-suit, which was refused, and offered no testimony.

The Court charged as follows:

"Gentlemen:—This is one of that kind of cases known in the law as 'negligence cases.' You will probably get better acquainted with them before you have been here very long. Plaintiffs are not, in such cases as this, entitled to recover verdicts unless they show you that the defendant has been guilty of negligence. Now, negligence may be better understood by you if I should put it in this way—that a plaintiff has no right to recover unless he shows that the defendant, or the person sued, has done something which he ought not to have done. Now, apply that to this case. [If the Messrs. Dobson have done something that they ought not to have done, which caused this boy to be injured, then there should be a verdict in his favor, and for such a sum as you think proper.] (First assignment of error.) Applying the principle still further, to the evidence, [if the Messrs. Dobson put on a lot hot ashes—or burning ashes on a lot—and they were covered over with something that concealed the fact that there were burning coals underneath, and that they were put in such a public and exposed place, or so near to a public street that a child about five years old could wander in there, and have his feet burned by treading on them, and suffered an injury, then that would be negligence, and they would be responsible for the injury they caused—because it was a thing that they ought not to have done so near a public highway,—they knowing that an injury might be inflicted upon anyone stepping or treading thereon.] (Second assignment of error.) If, on the other hand, this was an open public place where ashes were dumped, and the ashes were in such a condition as to make it plain to the eye of anybody, even a child, that it would be a dangerous thing to step on them—if the condition of things assimilated itself to the case of a person burning something where the fire was evident to the eye—then this would not be a pitfall, and they would not be liable, and your verdict should be for them. If you find, in fact, that the boy is entitled to anything, then he is entitled to such a sum as in your opinion would be proper to give him, in consideration of the pain and suffering he has undergone, by reason of his injuries. Medical expenses and such things are not in this case. Fortunately, the boy has not been injured in such a way as to cripple him for life. He was not long under the care of physicians. His injuries, fortunately, have been recovered from. If you find in that way, while you cannot say it is worth so many dollars, because there is no estimate upon which you can calculate the amount to be given—if you give him anything at all—yet to the case you will apply your reasonable common sense, and give him such a reasonable amount as you think he ought to receive on account of his injuries."

Verdict and judgment for plaintiff, $300. The defendants took this appeal and assigned as error the portions of the charge above included in brackets, and that the Court submitted the case to the jury.

Thomas Earle White, for appellants.

That a child of tender years may be a trespasser, and be subject to the consequences of his trespass, has been decided by this Court so many times, and in so many varying circumstances, that the question is no longer open to discussion.

Rodgers *v.* Lees, 140 Pa. 475.
Railroad Co. *v.* Hummell, 44 Id. 375.
Flower *v.* R. R. Co., 69 Id. 210.
Duff *v.* R. R. Co., 91 Id. 458.
Cauley *v.* R. R. Co., 95 Id. 398; s. c. 98 Id. 498.
Railroad Co. *v.* Connell, 88 Id. 520.
Moore *v.* R. R. Co., 99 Id. 301.
Railroad Co. *v.* Schwindling, 101 Id. 258.
Gillespie *v.* McGowan, 100 Id. 144.
Oil City Bridge Co. *v.* Jackson, 114 Id. 321.
McMullen *v.* R. R. Co., 132 Id. 107.

To enable a trespasser to recover for an injury, he must do more than show negligence. It must appear that there was a wanton or intentional injury inflicted upon him by the owner.

Gillespie *v.* McGowan, supra.

It will hardly be contended that the injuries to plaintiff were wantonly or intentionally inflicted. There was no evidence that anyone had ever been burned at the ash-heap before, or of any circumstance which would have even suggested to a prudent land owner the likelihood of such an accident.

Hydraulic Works *v.* Orr, 83 Pa. 332, which conflicts with the above line of cases has been overruled.

Gillespie *v.* McGowan, supra.

Louis Bregy, (*H. Homer Dalbey* with him), for appellee.

The responsibility of a land owner to a trespasser is to be determined by the character and location of the instrumentality causing the injury.

If it be of such a character that its inherent

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danger would appeal to the mature mind the owner of the ground upon which the injury is inflicted is not responsible, notwithstanding that he permits access to the dangerous thing or place; but where the danger is latent and hidden, and access is permitted to it by negligence of owner, his carelessness partakes of the nature of wantonness and fixes the liability for injury upon him.

Hydraulic Works *v.* Orr, 83 Pa. 332.
Schilling *v.* Abernethy, 112 Id. 437.

March 23, 1899. ORLADY, J. Joseph Feehan, aged five years, recovered a verdict of $300, as damages for personal injuries which were alleged to have been caused by the defendants' negligence under facts disclosed by the plaintiff's evidence, as follows: The defendants owned and operated a large manufacturing establishment, in the factory part of Manayunk, known as "The Mt. Vernon Mills," which fronted upon a public street, and on the opposite side of the street they owned a lot of ground which was used by them as a depository for the ashes and cinders taken from the mill furnaces. This refuse material, when taken to the outlot, was sometimes hot and fresh from the hearths, and at other times it was partially cooled. The outlot was enclosed by a stone wall, varying from two to three feet in height above the level of the street, and the only opening in the wall was a gateway nearly opposite to the mill furnaces. Without the consent of the owners, and prior to the plaintiff's accident, adults and children had been frequently upon the lot in quest of coal and coke in the ash heaps, and, as trespassers, they had been driven repeatedly from the premises. Although the parents of the injured child knew of this use of the outlot, they consented to the continuing trespasses of their children, and profited by these incursions, in the use of the fuel brought to their home.

On the day of the accident, the five-year-old plaintiff with his fifteen-year-old brother left their home for the purpose of picking up coal and wood, and when near to the Dobson lot they noticed what they believed to be a piece of coke on an ash pile, to secure which they went over the wall. The ash pile appeared to be cold, but when the plaintiff stepped upon it he was severely burned by underlying hot coals, from which perilous situation he was rescued by his elder brother, who, from his testimony, appears to be a bright intelligent boy.

At the conclusion of the plaintiff's case the defendant moved for a non-suit, which was refused by the Court and the cause was submitted to a jury with the instructions that, "If the Messrs. Dobson put on a lot hot ashes—or burning ashes on a lot—and they were covered over with something that concealed the fact that there were burning coals underneath, and that they were put in such a public and exposed place, or so near to a public street that a child about five years old could wander in there, and have his feet burned by treading on them, and suffered an injury, then that would be negligence, and they would be responsible for the injury they caused, because it was a thing they ought not to have done so near a public highway—they knowing that an injury might be inflicted upon any one stepping or treading thereon."

This child was, with the consent of his parents, where he had no right to be, and being of tender age he was under the immediate care of an elder brother, who was of sufficient intelligence and judgment to correctly appreciate the dangers they incurred. It was said in Rodgers *v.* Lees, 140 Pa. 475, "That a child of tender years may be a trespasser, and be subject to the consequences of his trespass has been decided by this Court so many times, and in so many varying circumstances, that the question is no longer open to discussion: P. & R. R. Co. *v.* Hummell, 44 Pa. 375; Flower *v.* R. R. Co., 69 Pa. 210; Duff *v.* A. V. R. Co., 91 Pa. 458; Cauley *v.* P. C. & St. L. R. Co., 95 Pa. 398; Cauley *v.* Railway Co., 98 Pa. 498; H. Pass. R. Co. *v.* Connell, 88 Pa. 520; Moore *v.* P. R. Co., 99 Pa. 301; B. & O. R. Co. *v.* Schwindling, 101 Pa. 258; Gillespie *v.* McGowan, 100 Pa. 144; Oil City & P. Bridge Co. *v.* Jackson, 114 Pa. 321; McMullen *v.* P. R. Co., 132 Pa. 107."

In Hydraulic Works Co. *v.* Orr, 83 Pa. (1877) 332, a case where, in the heart of a great city, "a large platform was left slightly inclined against a wall and was liable to be tilted over whenever touched, and crush children beneath it like mice in a dead fall," it was held that, "where the owner has reason to apprehend danger, owing to the peculiar situation of his property and its openness to accident, the rule will vary. The question then becomes one for a jury to be determined upon all the facts of the probability of danger, and the grossness of the act of imputed negligence." Of that case it was said, in Gillespie *v.* McGowan, 100 Pa. (1882) 144, that, "It is to be noticed that the opinion in Hydraulic Works Co. *v.* Orr, makes no reference to the assignments of error and contains no authorities in support. What this Court meant to decide in that case was that a person who maintains such a dangerous trap close to a public highway in the heart of a large city might be liable to a person injured thereby, although such person were a child six years of age trespassing upon the premises, and the familiar principle was invoked that 'one

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may not justifiably, or even excusably, place a dangerous pitfall, and wolf trap, or spring-gun, purposely to catch even wilful trespassers poaching upon his grounds.' Hydraulic Works Co. *v.* Orr is authority only for its own facts. It was not intended to assert the doctrine that 'a child cannot be treated as a trespasser or wrongdoer,' and so far as it appears to sanction such a principle it must be overruled. In Hydraulic Works Co. *v.* Orr, there was a recklessness that may be said to partake of the nature of wantonness, and it is only upon this principle that judgment can logically be sustained."

In Rodgers *v.* Lee, 140 Pa. (1891) 475, Hydraulic Works Co. *v.* Orr, is considered, and the Court said: "That case was put expressly upon the ground that there was nothing to indicate the dangerous character of the platform," etc. In Westerberg *v.* Kinzua, etc. R. Co., 142 Pa. (1891) 471, reference is made to Hydraulic Works Co. *v.* Orr, to distinguish it from the one then under consideration, because in that case "neither the children nor their parents had anything to put them on their guard against the danger," and a judgment of non-suit was affirmed. "A parent owes a reasonable duty of protection to his children, and cannot cast the whole of that duty upon strangers. If he permits them, when of tender years, to wander off in places of known danger, and by reason thereof an accident occurs to them, he has no just claim to make others bear the consequences of his own neglect": Westerberg *v.* Railroad Co., supra. "If the evidence were undisputed that these parents had habitually permitted a child of this age (four and a half years) to play on the street on which ran the trolley car, there could have been no recovery, or if the evidence had shown that they did not on that day, under the circumstances, exercise the care which a child of such tender years demanded, there could have been no recovery": Evers *v.* Traction Co., 176 Pa. 381; Penso *v.* McCormick, 9 L. R. A. 313.

This plaintiff was not injured by reason of a dangerous place in the vicinity of a public road, while traveling thereon, as in Horstick *v.* Dunkle, 145 Pa. 220, nor was he there by any suggestion of an invitation to be upon the ground, as in Barthold *v.* Philadelphia, 154 Pa. 109.

The case before us differs radically from Hydraulic Works Co. *v.* Orr, supra, on which the appellee relies. In that case, the open gate, sign or no sign, was an implied invitation to children to enter into an open alley from a busy street in the heart of a city; the child was accompanied by companions of his own tender age; the parents did not know of the danger, or the probable exposure of the child to it; the child was in pursuit of an infantile pleasure and the owner knew that former accidents had happened from the same cause. But in this case the gate was a necessary opening for the owner's use, through which the children did not wander, but scaled the wall, although it was a notice to stay out, and a barrier to be crossed; the child had his fifteen-year-old brother as a care-taker, and who was a participant in the hazard; the parents knew of the continuing trespass, but assented to the recurring risks which were recklessly taken; the sole object of the trespass was to take property which belonged to others; the place was in the factory portion of the town, and was inclosed as private property; there is no evidence of former accidents happening from the cause which injured this child, nor is Schilling *v.* Abernethy, 112 Pa. 437, at all similar in its fact to the one under consideration. The evidence adduced by the plaintiff was insufficient to sustain a verdict, and it should not have been submitted to a jury. The plaintiff's statement discloses a good cause of action, and the defendants did not ask for binding instructions.

The judgment is reversed, and a venire facias de novo awarded.

H. B.

Oct. '98, 31. Superior Court. November 22, 1898.

Farmers' National Bank v. Marshall.

Promissory notes—Discharge of endorser—Notice of protest.

An acceptance from the maker of a new note for the same debt will not operate as a payment of the old note, unless it is so intended by the parties, and this is a question for the jury; nor will it operate as a giving time to the drawer and so discharge the endorser.

It is not required of the bank holding a note and at the same time funds of the maker sufficient to meet the said note, to apply the said fund in payment, and failing to do so lose the right of recovery against the endorser; such requirement exists only when at maturity of the note the bank has sufficient funds of the maker.

The acts, protests and attestations of notaries public, are by statute prima facie evidence, but the power of a notary cannot be extended by the language of the official protest.

Where notice of protest is mailed to an endorser, it is necessary that the notary allege in the certificate or in parol testimony, that the letter enclosing the note of protest was "a prepaid letter" and properly stamped for transmission and delivery, in order to raise any presumption of delivery. A denial of the averment of notice contained in the certificate by the endorser is sufficient to carry the question to the jury.

A notice of protest is prima facie evidence that it was received by the person to whom it was addressed but that prima facie proof may be rebutted by evi-

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dence showing that it was not received. The question is one of fact solely for the determination of the jury.

Appeal of Joseph N. Marshall, defendant, from the judgment of the Common Pleas of Chester County, in an action of assumpsit by the Farmers' National Bank of West Chester.

This was an action to recover upon two promissory notes.

On the trial, before HEMPHILL, P. J., the following facts appeared:

Joseph N. Marshall, the defendant, endorsed as an accommodation endorser, two notes of $200 each, dated in October, 1892, payable in thirty days, made by Timothy S. Brick. The Farmers' National Bank of West Chester, Pa., the plaintiff, discounted these notes and had them protested at maturity for non-payment. The plaintiff gave evidence that notices were by the notary's clerk, that he had mailed the notices of protest to the defendant at four o'clock on the day of protest. Marshall never received the notices of protest, and for more than four years the bank made no demand on Marshall, and Marshall believed that said notes had been paid at maturity. Meantime Brick, the maker of the notes, was a continuous depositor and customer of the bank, and when these two notes in suit fell due in 1892 the bank took from Brick a $900 note, which included in it the notes in suit, payable in sixty days, and Brick, paid the bank the discount on this $900 note. Every sixty or ninety days for more than four years this $900 note was renewed and reduced until March, 1897, it had been reduced to $700, and the interest thereon paid by the maker, Brick, so that at the time this suit was brought no interest was claimed to be due. In February, 1897, the Farmers' National Bank took from Brick two judgment notes, one for $1200, and one for $400, which notes were placed upon record. Cashier Dowlin swore they were both settled and paid either in cash or in other securities, and that the $400 note was a part of the $700 note, and both these judgment notes were satisfied on the record three weeks after this suit was brought. In three months after this suit was brought Brick paid $100 more of the principal of this $900 note, thus reducing it to $600. Marshall never had any knowledge of these renewals or extensions of time for payment given by the bank to Brick.

The defendant submitted, inter alia, the following point:

"Where the bank holds funds of the maker of a note, when the note matures it is bound to consider the interest of the endorser, and if it allow the maker to withdraw his funds, the bank is liable and cannot recover in the action against the endorser." Answer of the Court—"That point is disaffirmed. My understanding of the law is, that where a note matures and the man has sufficient deposits in the bank, where the drawer has sufficient deposits in the bank, at the time of the maturity of the note to pay in full—it is the bank's duty to charge the note up against his deposit—otherwise it is not. It is not bound to do it at some later day if he should have deposits there."

The Court charged, inter alia, as follows:

"Gentlemen of the jury—As you have already learned, the questions involved here are principally, if not wholly, questions of law, and are for the Court to pass upon; we will under the circumstances therefore direct you to find a verdict for the plaintiff for $402.80, which is the amount of the two notes and the protests." (Eighth assignment of error.)

Verdict for plaintiff, $402.80, and judgment thereon. The defendant took this appeal and assigned error, inter alia, as above indicated.

Charles H. Pennypacker, for appellant.

The defendant is entitled to have the question of fact as to the sending of the notice decided by a jury.

Historical Publishing Co. *v.* Hartranft, 3 Pa. Super Ct. 59.
Jensen *v.* McCorkell, 154 Pa. 323.
London Assurance Corporation *v.* Russell, 1 Pa. Super. Ct. 320.

The questions of actual notice of non-payment and of waiver are always for the jury.

Axford *v.* Thompson, 3 Del. Co. Rep. 554.

The Act of December 14, 1854, provides for the admission of notarial protests in evidence when "certified according to law."

The notarial certificates in this case do not show any demand made upon the maker of the notes, and the evidence of William C. Lovett, the notary did not. It is the duty of a notary when he receives a bill or note intended to be protested to make demand of the party primarily liable, at his usual place of business within business hours.

Baumgardner *v.* Reeves, 35 Pa. 250.

If the oral testimony was in any degree in conflict with the notarial certificate, the only effect thereof was to carry the case to the jury.

Berg & Co. *v.* Abbott, 83 Pa. 177.

The $900 note was not merely collateral. Collateral security is merely concurrent security for another debt, whether antecedent or newly created. It is subsidiary to the principal debt, running parallel with it.

Munn *v.* McDonald, 10 Watts, 270.

A valid agreement extending the time of payment operates to suspend the right to prosecute and so discharge the endorser.

Pomeroy *v.* Tanner, 70 New York, 547.

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Manufacturers' and Mechanics' Bank v. Bank of Pennsylvania, 7 W. & S. 335.
Siebeneck v. Anchor Savings Bank, 111 Pa. 187.

William S. Windle and *Thomas S. Butler*, for appellee.

The notes in suit were payable at the Farmers' National Bank of West Chester, were discounted by that bank and were there at maturity. No further demand upon the maker was necessary.

Rahm v. Philadelphia Bank, 1 Rawle, 335.

Where, as in cities, there is a letter carrier who carries letters daily from the post office and delivers them daily at the house and places of business of those who are accustomed to receive letters by him, if a notice of dishonor is left at the post office in time to go by such carrier on the same day to the party, it will be deemed sufficient.

Shoemaker v. Bank, 59 Pa. 79.

It is sufficient proof of the delivery of a notice to show that it was sent in a letter by the post, without proving that the letter was received, provided the delivery be on the day on which notice should be given.

Smyth v. Hawthorn, 3 Rawle, 357.

Notice sent by the post, properly directed, is sufficient, though the letter containing it should miscarry.

Weakly v. Bell & Sterling, 9 Watts, 279.

It is sufficient proof of notice that it was in due time sent in a letter without proving that the letter was received.

Jones v. Wardell, 6 W. & S. 401.
Landis v. Marker, 2 Del. 473.
Weakly v. Bell & Sterling, 9 Watts, 279.
Sherer v. Easton Bank, 33 Pa. 134.
Payne v. Ulmer, 1 Walk. 516.

An indefinite extension of time to the maker would not have defeated the action.

Bank v. Legrand, 103 Pa. 309.
Stephens v. Bank, 88 Id. 157.

It is the right of a debtor who pays either in money or services to appropriate the payment to a particular debt; and the creditor cannot change the appropriation.

Martin v. Draher, 5 Watts, 544.
Stewart v. Keith, 12 Pa. 238.
Pennypacker v. Umberger, 22 Id. 492.
Jamison v. Collins, 83 Id. 359.

Where a debtor directs the application of payment to a particular debt, equity will not change the appropriation.

Selfridge v. Bank, 8 W. & S. 320.

If a creditor receive a draft from his debtor, he is bound to apply the proceeds as directed by the debtor.

Moorehead v. Bank, 3 W. & S. 550.

March 23, 1899. SMITH, J. The plaintiff held two negotiable notes of T. S. Brick, for $200 each, on which the defendant was endorser; and another note of $500, endorsed by Davis Pennock only. The notes not having been paid at maturity were protested, and it is alleged that notice of protest was mailed to the endorsers. Subsequently the plaintiff took from the maker a promissory note for $900, in part as collateral for the two notes endorsed by the defendant. This collateral note was renewed from time to time, on payment of the interest, and was finally reduced by payments to $600. The maker when making these payments directed that they be applied to the $500 note, endorsed by Pennock, which was accordingly done. This suit was brought against the defendant on the notes endorsed by him, and he seeks to avoid liability on the ground that the acceptance of the collateral note was, in effect, an extension of time to the maker, without the defendant's consent, and that, therefore, he was released from liability. The other principal ground of defence relied on here is the refusal of the Court to affirm the defendant's third point, that: "Where the bank holds funds of the maker of a note, when the note matures, it is bound to consider the interest of the endorser, and if it allow the maker to withdraw his funds, the bank is liable and cannot recover against the endorser." At the close of the evidence a verdict was directed for the plaintiff.

There would seem to be no room for serious dispute as to the law of the case. There is nothing in the evidence showing an extension of time to the maker on the notes in suit; and this cannot be implied from the fact that a note of the maker, as collateral to those in suit, was taken by the bank. "Nothing short of an agreement to give time which binds the creditor and prevents his bringing suit, will discharge the surety. Giving time and a contract to give time are distinct and independent things:" Brubaker *v.* Okeson, 36 Pa. 522. This principle applies, with like force, to makers and endorsers of commercial paper. It has been held that the acceptance from the maker of a new note for the same debt, with a new endorser will not operate as a payment of the old note, unless it was so intended by the parties, and this is a question for the jury: Kemmerer's Appeal, 102 Pa. 558; Dougherty & Co. *v.* Bash, 167 Pa. 429. "Taking a new note for the same debt mentioned in the old, without an agreement to give time to the drawer, or to deliver up the old note to him, or that the new shall be taken in satisfaction of the old note, has ever been considered a mere collateral security, which does not effect or alter the original liabilities of the parties on the old note in any respect whatever": Weakly *v.* Bell et al., 9 Watts, 283. See also McCartney *v.* Kipp, 171 Pa. 644. This rule

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is founded upon the doctrine that in order to be binding, an agreement to extend the time of payment must have the essential elements of a contract, including a sufficient consideration and a definite period of time: Campbell *v.* Floyd, 153 Pa. 84.

It is alleged in the appellee's paper book that the collateral note and its renewals contained these words: "This note being given in part as collateral security for two notes of $200 each, endorsed by Jos. N. Marshall." But this does not appear in the notes of evidence and no copy of this note is given in the paper book, although it was probably introduced in evidence, and is now relied upon as a material feature of the case. It is the duty of the appellant to print the entire evidence, including all documents material to the issue, as required by the rules of Court. If this provision was by a separate writing, or was, as alleged, incorporated as a part of the collateral note, it would come within the ruling of Weakly *v.* Bell, above quoted, and would be for the Court to construe; otherwise the purpose of the parties in giving the collateral note would be wholly for the jury, under proper instructions.

The third point of defendant, above quoted, is as an abstract proposition, correct, and as such might have been affirmed. But it did not correctly state the facts of the present case, and for this reason was rightly refused. If the evidence showed that, at the time either of the notes in suit matured, the bank held sufficient funds of the maker to meet either, it was in duty bound to apply the funds in payment, and, failing to do so, could not recover from the endorser. This is on the principle that where the creditor has the means of satisfaction, belonging to the principal debtor, actually or potentially within his grasp at the maturity of the obligation, he must retain it for the benefit of the surety, or the latter will be relieved from liability. But this duty is not a continuing one in the case of a bank holding commercial paper. The deposit must be sufficient at the maturity of the note; subsequent deposits will not raise the duty: Bank *v.* Peltz, 176 Pa. 513. "The general rule is well settled that, while the bank may appropriate funds in its hands belonging to any previous party to the note, to the payment of it, ... yet it is not bound to do so. The note may be treated as, in effect, an order or check authorizing the bank to apply the deposit to the payment, but the deposit is not payment in law. . . . . But where the bank holds funds of the maker when the note matures, it is bound to consider the interests of the endorsers or sureties, and if it allow the maker to withdraw his funds after protest, and the endorsers are losers thereby, the bank is liable to them. The reason of this rule is, that the maker is the principal debtor, and liable to all the endorsers, whose undertaking is to pay if he does not": Bank *v.* Seitz, 150 Pa. 632; cited approvingly in Bank *v.* Peltz, supra. There was no attempt here to show the state of Brick's account at the maturity of the notes, and, in the absence of evidence showing a balance in his favor sufficient to meet them at that time, this rule could not be applied. The fact that the defendant may have been an accommodation endorser does not affect his liability under the evidence in this case.

We think the Court below erred in directing a verdict for the plaintiff on all the evidence. This for a reason not referred to in the argument, but adequately raised by the eighth specification. It is within the power of the Court to pass upon the evidence when the facts or the conclusions to be drawn from them are not in dispute. And when the evidence involves the intrinsic effect of a paper, its construction is exclusively for the Court. Where, however, the question is not the legal effect of a written instrument, and it is offered as evidence of a fact, merely, its interpretation is for the jury: McGee *v.* Bank, 5 Watts, 32. In this case the protest of a notary public was held to have the probative force of a deposition only, a substitute for oral testimony delivered at bar. "It is but testimony of a witness still; and its having been put upon paper, not more for the sake of convenience than necessity, cannot change its properties or its nature. Had the notary testified in person, as he might, that he had given notice at Northumberland, no one would pretend it to be the province of the Court to say whether he means that he had given it through the post office, or that the party was present to receive it. His meaning would be for the jury, and so it must be in respect to what he testifies under the sanction of an official, instead of a judicial oath." The Act of January 2, 1815, as well as the Act of December 14, 1854, makes the acts, protests and attestations of notaries public prima facie evidence; and such has been the legal status and effect ascribed to notarial certificates by the Court: Kase *v.* Getchell, 21 Pa. 503; Bennett *v.* Young, 18 Pa. 261. In this last case it was held that the power of a notary cannot be extended by the language of his official protest, and it can have no greater legal effect than is given by the Act of Assembly. By the statutes referred to it is expressly provided: "That any party may be permitted to contradict, by other evidence, any such certificate." In the present action, brought more than four years after maturity of the notes, the plaintiff did not rely upon the notarial certificate alone, to show

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notice of protest to the defendant, but gave oral testimony on this point, by the notary's clerk, to the effect that the body of the certificate was prepared by him and that he (the clerk) mailed the notices of protest to the defendant by four o'clock on the day of protest. Further testimony, by a letter carrier, was to the effect that a letter if mailed by four o'clock on any working day would be delivered at the house of the defendant on the same day. It is not alleged in the certificate or in the parol testimony that the letter enclosing the note of protest was "a prepaid letter," or that it was properly stamped for transmission and delivery. This we think was part of the necessary preliminary proof in order to raise the presumption of delivery by mail to the defendant. The defendant testified that he never received any notice of protest, and had no knowledge of any kind, directly or indirectly, that the notes had been dishonored, and that he was never called upon to pay them until about the time this suit was commenced. While this testimony if not literally in contradiction of the notarial certificate in the present case, it is certainly in contradiction of its import and legal purpose. The object of such certificate is to show a notice of protest to the endorser, and this testimony of the defendant is in denial of the fact thus officially averred. It is, in effect a denial of the averment of notice contained in the certificate, and sufficient to carry this question to the jury. The certificate sets forth that the notary demanded payment at maturity which was refused and that he thereupon "gave notice of the non-payment thereof to the endorsers this day by mail through the West Chester post office, enclosed and directed to Joseph N. Marshall," the defendant. Whether such notice was deposited in the post office duly addressed, is a question of fact depending on parol testimony. It is not an official declaration, and like all questions when resting in parol, is for the jury to decide, under proper instructions.

This conclusion does not conflict with the earlier decisions of the Supreme Court holding that sending notice of protest by mail is constructive notice, and sufficient in law. "It is sufficient proof of delivery of a notice to show, that it was sent in a letter by the post, without proving that the letter was received, provided the delivery be on the day on which notice should be given. The presumption is a fair one, that the letter reaches its destination in due time; and whether it does or not, this is all the law requires; it would be extremely inconvenient, to require more": Smyth *v.* Hawthorn, 3 Rawle, 355; Weakly *v.* Bell, 9 Watts, 273; Jones *v.* Wardell, 6 W. & S. 401; Smith *v.* Bank, 5 S. &. R. 321.

Under the evidence of the plaintiff, whether the notice was mailed was made to depend on oral testimony, as well as on the notary's certificate. The whole question was thereby drawn to the jury: Association *v.* Kilpatrick, 140 Pa. 405. The case of Jensen *v.* McCorkell, 154 Pa. 323, was, like the present, a suit against the endorser of a promissory note, and the only question there was whether the defendant was legally notified of the dishonor of the note. The notary by whom the note was protested testified that he enclosed notice of protest, in an envelope addressed to the defendant at his place of residence in the city and mailed it at the post office. It was also in evidence that the carrier delivery service delivered the defendant's mail at a sub-post office, where he usually received mail. The defendant denied having received notice of protest. In affirming a judgment for the plaintiff the Supreme Court said: "The plaintiff's evidence, as we have seen, was to the effect that on the day the note was dishonored, a notice of protest, properly addressed to the defendant was deposited in the Philadelphia post office. In due course of mail the letter thus deposited by the notary would be properly transmitted to the sub-post office—in the vicinity of defendant's residence—where he was accustomed to regularly receive his letters and other mail matter. The plaintiff's evidence on that subject was sufficient to warrant the jury in finding the fact of which their verdict is necessarily predicated, viz., that the letter reached its destination—defendant's place of business or residence—by due course of mail, etc. As we said in Whitmore *v.* Dwelling House Insurance Co., 148 Pa. 405; 23 Atl. R. 1131, it is well settled that the fact of depositing in the post office a properly addressed, prepaid letter, raises a natural presumption, founded in common experience, that it reached its destination by due course of mail. In other words, it is prima facie evidence that it was received by the person to whom it was addressed but that prima facie proof may be rebutted by evidence showing it was not received. The question is one of fact solely for the determination of the jury under all the evidence": Folsom *v.* Cook, 115 Pa. 549; Insurance Co. *v.* Tunkhannock Toy Co., 97 Pa. 424; Huntly *v.* Whittier, 105 Mass. 391; Briggs *v.* Hervey, 130 Mass. 188; London Assurance Co. *v.* Russell, 1 Pa. Super. Ct. 320.

We think that under the evidence this case should have been submitted to the jury.

For the reasons given the judgment is reversed and a venire de novo awarded.

W. C. S.

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WEEKLY NOTES OF CASES.

VOL. XLIV.] *FRIDAY, MAY 5, 1899.* [No. 5.

Supreme Court.

Jan. '96, 558, 564, 577. Supreme Court. Jan. 31, 1899.

Estate of Charles Baeder.
Baeder's Appeal.
Shirk's Appeal.
Kruse's Appeal.

Will—Trust—Discretion of executors—"Residue."

A testator directed that on the death of his wife his estate should be divided into as many shares as he should leave children or issue of deceased children; the will then provided: "I direct my trustees to pay to each of my sons as they respectively attain twenty-one years of age five thousand dollars; and on their attaining twenty-five years of age I empower my trustees to pay or transfer to them respectively such further sum or property as shall together with the amount theretofore received by them from myself as an advancement or under this will amount to the half of their share in my estate; the same being divided into as many shares as there are children or the issue of deceased children. This power is to be exercised either in the whole or partially and from time to time as my trustees shall deem proper looking to the habits, condition and circumstances of my said sons respectively. The residue of the share of my sons shall be retained by my trustees and the income paid to the said sons" upon a spendthrift trust, with remainder over:

***Held,* the effect of the will was to divide the share of each son into three parts, one part, $5000, to be paid absolutely at twenty-one; a second, not less than one-half, to be put into strict trust; and the third, of indeterminate amount, to go into or to be exempted from the trust according to the exercise of the discretion of the trustees.**

***Held,* further, that the trustees must actually exercise this discretion in order to impress unpaid money with the trust; if they simply failed to pay over, the amount unpaid would on the death of a son pass as part of his estate, but if there was an active exercise of discretion not to pay over to any son, then the amount concerning which discretion had been so exercised would not be held to have passed to the said son, even in favor of a creditor.**

Appeals of Julia Baeder, individually, and as executrix of Charles B. Baeder, deceased, Emily B. Shirk, executrix of William A. Baeder, deceased, and Albert E. Kruse, from the decree of the Orphans' Court of Montgomery County, in the matter of the estate of Charles Baeder, deceased.

Charles Baeder died September 25, 1885, leaving to survive him a widow, Rachel Ann Baeder, and eight children, to wit, William A. Baeder, Henry H. Baeder, Charles B. Baeder, Matilda E. Webb, Anna Williams, Elizabeth Baeder, afterwards the wife of Charles A. Esling, Emma L. Mallon, and Josephine Barton.

He provided by his will, as follows:

"Fourth. I direct that my wife shall receive out of the clear income of my estate real and personal as the same accrues so long as she remains my widow, the one-half thereof. In the event of her marriage I devise and bequeath to her one-fourth of the clear income of my estate to be paid to her by my trustees in full of all claims on my estate. Subject to the foregoing provisions I direct that all my estate and property shall be divided into as many shares as I may leave children or the issue of deceased children.

"Fifth. I direct my trustees to pay to each of my sons as they respectively attain twenty-one years of age five thousand dollars; and on their attaining twenty-five years I empower my trustees to pay or transfer to them respectively such further sum or property as shall together with the amount theretofore received by them from myself as an advancement or under this will amount to the half of their share in my estate; the same being divided into as many shares as there are children or the issue of deceased children. This power is to be exercised either in the whole or partially and from time to time as my trustees shall deem proper looking to the habits, condition and circumstances of my said sons respectively. The residue of the share of my sons shall be retained by my trustees and the income paid to the said sons respectively as and when it accrues during their respective lives without liability to be taken in execution by their creditors and without liability to their debts, contracts or engagements, but solely for their own use and paid them upon their own receipts or applied for their maintenance only.

"Sixth. As to the shares of my daughters, I direct that as my daughters respectively attain twenty-one years of age or marry or having done so before my death my said trustees shall pay or assign to each of them such sum or property as together with the amount which may have been received by them respectively as an advancement shall be equal in value to one-fourth of their share of my estate. The remaining three-fourths shall be retained by my trustees and the income as it accrues shall be paid to my said daughters during their lives respectively, but so that the same shall not be liable to their debts, contracts or engagements or subject to their control or that of their husbands, but so that they shall receive the net income after it has accrued for their own separate use and without the power to an-

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ticipate the same by themselves, their husbands or anyone else.

"Seventh. Upon the death of my said sons and daughters respectively, the shares, property, and estate so held in trust for them shall pass to their children and the issue of deceased children such issue taking their parent's share. If there shall be no issue of my children respectively, living at the time of their deaths, then I direct that the share of such deceased child shall constitute a part of the residue of my estate and shall pass under this will as if such child had died before me. This provision shall extend to original and accrued shares derived under this will."

At the time of decedent's death all the sons were over twenty-five years of age.

William A. Baeder died in 1890, leaving a widow, Emily D., whom he appointed his executrix, and who in 1893 married H. R. Shirk; Charles B. Baeder died in 1891, leaving a widow, Julia, whom he appointed his executrix. The widow died in 1894; and an account was filed by the executor and trustee, the Philadelphia Trust, Safe Deposit and Insurance Company, which account was referred to Montgomery Evans, Esq., as auditor.

Before the auditor, Albert E. Kruse made claim upon the share of Henry H. Baeder, by virtue of a judgment, C. P. No. 1, for Philadelphia county of September term, 1887, No. 708, for $5736.52, revived April 13, 1895, for $8188.88. As to Henry H. Baeder's share it appeared that the trustee had exercised its discretion adversely to paying him any portion of the share given him under the will. As to William A. Baeder, it appeared that $11,135.50 had been paid him during his life; and that the same amount had been paid Charles B. Baeder, and that no discretion was exercised by the trustee as to their shares, either to grant or deny payment. The auditor disallowed the claim of the attaching creditor and held as to the shares of William A. and Charles B., that the discretion of the trustee remaining unexercised at the time of their death, the portion of the share unpaid was vested in them and passed as a portion of their estate. To this finding Albert E. Kruse, Anna Williams, the Real Estate Trust Company of Philadelphia, committee of Josephine Barton, and the accountant, filed exceptions. The Court, WEAND, J., delivering the opinion, holding that there was no vesting of any portion of the shares given to a son of Charles Baeder, unless in the absence of a positive exercise of a discretion to pay such portion to them, sustained the exceptions of Mrs. Williams, of the accountant, and of the committee of Mrs. Barton, and dismissed those of Kruse. The matter having gone back to the auditor an amended report was filed in accordance with the opinion of the Court, to which exceptions were filed by Emily D. Shirk, Julia Baeder and A. E. Kruse, which exceptions were dismissed and a final decree of distribution made. Mrs. Shirk, Mrs. Baeder and A. E. Kruse took appeals. The two former assigning as error their exclusion from distribution, and Kruse that the Court erred in not holding that there was an absolute interest in the advancement of one-half the estate bequeathed to H. H. Baeder on his attaining the age of twenty-five.

The case was previously argued February 2, 1897, at which time, STERRETT, C. J., and MCCOLLUM, J., were absent, by *J. Rodman Paul* and *John G. Johnson*, (*E. S. Sayers* with them), for appellants, and *James P. Townsend* and *William Henry Lex*, (*George Junkin* with them), for appellees.

A reargument before the full bench was ordered by the Court, which was accordingly made.

J. Rodman Paul and *John G. Johnson*, for appellants.

Richard C. Dale, for appellees.

April 10, 1899. MITCHELL, J. Item fifth of the will provides: "Fifth, I direct my trustees to pay to each of my sons as they respectively attain twenty-one years of age five thousand dollars; and on their attaining twenty-five years of age, I empower my trustees to pay or transfer to them respectively such further sum or property as shall together with the amount theretofore received by them from myself as an advancement or under this will amount to the half of their share in my estate; the same being divided into as many shares as there are children or the issue of deceased children. This power is to be exercised either in the whole or partially and from time to time as my trustees shall deem proper looking to the habits, condition and circumstances of my said sons respectively. The residue of the share of my sons shall be retained by my trustees" upon a strict spendthrift trust. One of the sons having died without issue. after the age of twenty-five, but before payment to him of anything but the $5000 when he reached twenty-one, a controversy arises over the meaning of the word "residue" in the sentence last quoted. The auditor held it to include only such part of the share of each son, as the trustees had affirmatively refused to pay over, without regard to the actual payment; the Court on the contrary held that it included all of the share that the trustees had not affirmatively taken out of the trust by paying it over; and finally the appellants claim that it included the full half of the share not put in mandatory trust, without reference to the ac-

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tion of the trustees whose discretion ended with the death of the son. The case is not without difficulty as is apparent from the widely discrepant views already taken, and the fact that this Court found it necessary to order a reargument before a full bench.

It is always a safe rule in approaching the interpretation of a word or phrase, to start with a clear view of the testator's general intent, or as it is frequently called, the scheme of his will. In the present case it will be found helpful. Subject to the provision for his widow, which is of primary obligation, the testator, divides his whole estate into as many shares as he leaves children, or the representative issue of deceased children. Next he gives each son one-half his share payable $5000 at twenty-one, and thereafter the income absolutely and the principal after the age of twenty-five from time to time in the discretion of the trustees. Lastly he leaves the residue, of each share in strict trust. Prima facie this "residue" must mean the other half, the portion left after the distribution of the half which the first clause has provided for. Unquestionably his general intent was that his sons should have control and disposition of one-half their shares, and should not have control of the other half. This will be clear if we suppose the testator or his draughtsman had simply reversed the order of his expression of his will and put the trust first. It is hardly to be doubted that he would have said "one-half of the share shall be retained by my trustees," etc., and then the provision for payment of the other half, which was not primarily intended to be beyond their control as part of the mandatory trust, but to be confided to the sons' own control, though subject as to the time of payment to the conditions named. This reversal of the order makes no change in the meaning or in the intent apparent throughout the whole fifth item, though it leads naturally to the use of the word "half" in place of "residue" in describing the trust, and thereby illustrates the meaning of "residue" as actually used.

There is nothing in the proper meaning and use of the word "residue" which is distorted by this construction. Coming in the order that it did there were reasons why it should have been used instead of "half." While it was not certain that there would be any more than half the share to go in trust, yet there might be, as will be considered on another branch of the case. If testator had used the word "half" in making the trust he might have raised a question as to whether under any exercise of the trustee's discretion more than half could be included in the trust. He was attentive to the possibility of too literal construction of his words as is shown by his careful definition of the expression "share of such deceased child" in item seven, where he specifically declares that it shall "extend to original and accrued shares derived under this will." If he had reversed the order as suggested for illustration, and stated the trust as to one-half first, he would have had to add some other provision to cover any sums out of the second half that his trustees should determine not to pay to the sons, if it was his intention that such sums should go to increase the amount in trust. But conceding that to be his intention, in the order of arrangement that he adopted, the word "residue" was an appropriate term to describe the half peremptorily put in trust, and the possible additions to result from the action of the trustees.

If we approach the question from the technical side, the result is the same. Precedents as said by this Court in Redding *v.* Rice, 171 Pa. 301, are of little value in the construction of wills, but there are certain well-settled rules in regard to trusts, whether testamentary or other, that must be regarded. The entire shares of the sons in this will are left in trust as to each until he reaches the age of twenty-one; then the trust ends as to five thousand dollars, but continues as to the rest until twenty-five, when a new duty arises on the part of the trustees, to determine whether a further portion of the share, not to exceed half in all, shall be paid. The testator "empowers" the trustees to make such payments, but the power clearly belongs to that class which in trusts is equivalent to a direction. In fact it is called by the testator himself a direction in referring to it in the seventh item of his fourth codicil. "All directions for payment to my sons and daughters of any share of the principal of my estate," etc. The time and manner of payment were left to the discretion of the trustees based on habits, condition and circumstances of the son in each instance, but the testator intended that the power should be exercised and his expression of authority was in effect a command. Until it was exercised that part of the share remained in what may be called the secondary branch of the trust, with a duty to be performed, but the time left to the trustee. It could not pass into the last branch of the trust, until the final determination of the trustees adverse to the payment, for the discretion was meant to last as long as the habits and circumstances of the son were open to change, that is during life, and when once the share passed into the last imperative trust, all further authority to pay was at an end. Until such final exercise of discretion adverse to payment no part of the first half of the share could become part of the "residue" which was to go into strict trust, but thereupon might do so, and

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that possibility may have been one of the reasons leading the testator to the use of the word "residue" in describing the subject of the final trust.

We do not get any assistance from the provisions of the will relating to the shares of the sons' widows, or of the daughters. The former manifestly refer to the estate after it reaches the spendthrift trust, and throw no light on the preliminary question of what is to go there. The bequest to the daughters was of one fourth of their shares absolutely on coming of age or marrying and three-fourths in strict spendthrift trust. No discretion as to either part is left to the trustees and no light is thrown on the subject of discretion in the trustees as to the shares of the sons.

The general intent of the testator as already said contemplated that the sons should have control of half their shares, yet the time of coming into such control was subject to conditions. The power of the trustees to pay is "to be exercised either in whole or partially, and from time to time as my trustees shall deem proper, looking to the habits, condition and circumstances of my said sons respectively." Under this provision the time of payment was within the discretion of the trustees, but this discretion must be based on "habits, condition and circumstances" of the son, and when this personal basis of judgment has been removed by the death of the son the authority to longer postpone payment must fall with it. It is found by the auditor, and conceded in the argument, that there was no exercise of the discretion of the trustees, adverse to the payment of his full half to Charles B. Baeder, and that the payment was deferred for other reasons connected with the general administration of the estate. On his death, therefore, the right to the unpaid portion of his half share passed into his estate and it became payable to his executrix, the appellant.

Decree reversed as to this appellant, and distribution directed to be amended in accordance with this opinion.

SHIRK'S APPEAL.

Eo die. MITCHELL, J. This case involves the same question and is determined by the decision in Baeder's Estate, Baeder's Appeal, opinion filed herewith.

Decree reversed as to appellant, and distribution directed to be amended in accordance with this opinion.

KRUSE'S APPEAL.

Eo die. MITCHELL, J. The testator left his estate to trustees, giving each child an equal share and as to the sons, providing: "Fifth, I direct my trustees to pay to each of my sons as they respectively attain twenty-one years of age five thousand dollars; and on their attaining twenty five years, I empower my trustees to pay or transfer to them respectively such further sum or property as shall together with the amount theretofore received by them from myself as an advancement, or under this will, amount to the half of their share in my estate. . . . . This power is to be exercised either in the whole or partially and from time to time as my trustees shall deem proper, looking to the habits, condition and circumstances of my said sons respectively. The residue of the share of my sons shall be retained by my trustees," etc., in strict spendthrift trust. The controversy arises over the meaning of "residue" in the last sentence. The general intent and effect of the will upon the share of a son who died after attaining the age of twenty-five, but before the exercise of the discretion of the trustees one way or the other, on the subject of payment to him, was considered and determined in Baeder's Estate, Baeder's Appeal, opinion filed herewith. We now have the same question under a different state of facts. One of the sons, Henry H. Baeder is living, above the age of twenty-five years, and has received the five thousand dollars payable at twenty-one and some other small payments, but as to him the trustees have declared that it is not in their judgment expedient to pay any further portion of his share. The appellant is a creditor who attached the unpaid balance of one-half Henry's share. The auditor and Court below held that the attachment took nothing. We thus have the question of the effect of the exercise of the discretion given to the trustees.

The effect of the fifth clause above quoted was to divide the share of each son into three parts with different duties upon the trustees as to each. Five thousand dollars were to be paid at twenty-one, and so much of the trust ended. Another part, not less than one-half, was put in strict trust. As to both of these parts there was no discretion in any one, the direction was mandatory. But between these parts was the balance of the share, whose position was undeterminate to the extent that it was neither given in present possession nor withheld absolutely. As to it there was clearly an active trust with the duty of the trustees to pay the income to the son, and from time to time such portions of the principal as they should deem expedient in view of his habits and circumstances. So long as their discretion was not exercised this part of the share remained under what may be called the second trust. If they exercised their discretion favorably

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and paid over any portion, clearly that passed out of their further control, and became part of the son's general estate. But if they decided adversely, that they would not pay, it seems equally clear that for the time being at least, that portion was no longer under the second but passed into the final or spendthrift trust, and neither the son nor his creditors could obtain any grasp, or hold upon it. This seems the logical and necessary result of the discretionary power lodged in the trustees by the testator.

Decree affirmed as to this appellant at appellant's costs.

H. B.

Jan. '98, 272. Supreme Court. January 13,1899.

Hutchison v. Thomas.

Equity—Injunction—Building agreement—Covenant.

A specification in a building agreement that the houses, which are the subject of the contract, should not be built within a certain distance of the city building line, is a mere personal agreement between the owner of the land and the contracting builder, and is not a covenant that runs with the land or an easement of the other properties subject of the same agreement. Therefore equity will not enjoin a subsequent owner of one of the properties in the chain of title, from continuing his building to the city building line.

Appeal of Joseph C. Hutchison, from the decree of the Common Pleas No. 2, of Philadelphia County, refusing a preliminary injunction as prayed for in a bill in equity, wherein John Thomas was defendant.

The facts of the case are set forth in the opinion of the Supreme Court.

The Court dismissed the plaintiff's bill. Plaintiff thereupon appealed, assigning as error, this action of the Court.

Joseph P. McCullen, for appellant.

If there was a mere agreement and no covenant, this Court would enforce it against a party purchasing with notice of it, for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased.

Tulk v. Moxhay, 2 Phillips, 774.
Western v. McDermott, 2 Ch. App. 72.

The right exists not only where the parties execute a mutual deed of covenant, but where a mutual contract can be established.

Kerr on Injunction, 476.

An owner of three adjoining lots executed on the same day three separate deeds for the three lots to three separate owners. The deed for the middle lot contained a restriction as to the building to be placed thereon. The other two deeds did not mention the restriction.

It was held that the restriction was in the nature of a covenant running with the land, that it was intended to create and did create an easement of light and air in favor of the two adjoining lots.

Muzzarelli v. Hulshizer, 163 Pa. 643.

It is well settled that, on the conveyance of several parcels of land, there is an implied grant or reservation, as the case may be, of all apparent and continuous easements or incidents of property which may have been created or used by the vendor during the unity of the possession, though they could not then, from his general ownership, have a legal existence. Where a continuous and apparent easement or servitude is imposed by the owner of real estate on a part thereof for the benefit of another part the purchaser at private or judicial sale, in the absence of an expressed reservation or agreement, takes the property subject to the easement or servitude.

Geible v. Smith, 146 Pa. 276.
Ormsby v. Pinkerton, 159 Id. 458.

A purchaser of land, with notice of a right or interest in it existing only by agreement with his vendor, is bound to do that which his grantor had agreed to perform, because it would be unconscientious and inequitable for him to violate or disregard the valid agreements of the vendor in regard to the estate, of which he had notice when he became the purchaser.

Parker v. Nightingale, 6 Allen, 341.

A purchaser without a restriction in his deed, but from one who was restricted by a personal covenant not running with the land or binding his assigns, yet with notice of the fact, is bound by the restriction in a Court of equity.

Hodge v. Sloan, 107 N. Y. 250.
Trustees of Columbia College v. Lynch, 70 N. Y. 447.

The right to have land not built upon, for the benefit of the light, air, etc., of neighboring land, may be made an easement and such easement may be created by words of covenant as well as by words of grant.

Ladd v. City of Boston, 151 Mass. 585.

The precise form or nature of the covenant or agreement is quite immaterial. It is not essential that it should run with the land. A personal covenant or agreement will be held valid and binding in equity on a purchaser taking the estate with notice. It is not binding on him merely because he stands as an assignee of the party who made the agreement, but because he has taken the estate with notice of a valid agreement

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concerning it, which he cannot equitably refuse to perform.

Whitney *v.* Union Rwy. Co., 11 Gray, 359, 364.

Where land is sold in lots the inference and presumption is that the covenants are intended for the common benefit of the several purchasers, and this is especially true where the whole property is sold.

Nottingham Brick Co. *v.* Butler, 15 Q. B. Div. 261.
Collins *v.* Castle, 36 Ch. Div. 243.
Raynor *v.* Lyon, 46 Hun, 227.

Here Laws sold the land in lots, and also sold the entire property, so divided.

Where the agreement for a building line is in accordance with a general plan for all the lots, the authorities agree that this is evidence that the intention was that the covenant should not be merely personal in its nature, but that it was meant to be for the benefit of the land and to run with the title.

Skinner *v.* Shepard, 130 Mass. 180.
Linzee *v.* Mixer, 101 Id. 512.
Sanborn *v.* Rice, 129 Id. 387.
Mulligan *v.* Jordan, 50 N. J. Eq. 363.
Winfield *v.* Henning, 6 C. E. Greene, 188.
Hamlen *v.* Werner, 144 Mass. 396.
Peck *v.* Conway, 119 Id. 546.
Western *v.* McDermott, supra.
Parker *v.* Nightingale, supra.
Hano *v.* Bigelow, 155 Mass. 341.
Jackson *v.* Stevenson, 156 Id. 501.
Child *v.* Douglas, Kay, 565.
Dana *v.* Wentworth, 111 Mass. 291.
Jeffries *v.* Jeffries, 117 Id. 184.
Jewell *v.* Lee, 14 Allen, 145.
Badger *v.* Boardman, 16 Gray, 559.

John C. Bell, (*F. G. Taylor* with him), for appellee.

It has never been considered in this State that a contract for the privilege of light and air over another man's ground could be implied from the fact that such a privilege has been long enjoyed; or that on a sale of a house and lot such a contract could be implied from the character of the improvements on the lot sold, and the adjoining lots.

Haverstick *v.* Sipe, 33 Pa. 368.

An easement for light and air will never be implied under any circumstances short of a necessity so absolute as to destroy the use of the plaintiff's whole building.

Donnelly *v.* Krosskop, 19 WEEKLY NOTES, 558.

An agreement between the owners of adjacent estates for the erection of buildings thereon in a uniform manner does not by implication require that the buildings shall forever thereafter remain in the same position or the same size and shape as when erected.

Hubbell *v.* Warren, 8 Allen (Mass.) 173.

Restrictive covenants relative to the use of buildings are to be construed most strictly against the covenant, and unless the thing sought to be enjoined is plainly within its provisions, an injunction will not issue in enforcement thereof.

Clark *v.* Jammes, 87 Hun, 215.
St. Andrew's Church Appeal, 67 Pa. 512.

The burden is on a subsequent purchaser to show that the restriction was not for the benefit of the grantor and his personal convenience.

Badger *v.* Boardman, 16 Gray, 559.
Jewell *v.* Lee, 14 Allen, 145.
Skinner *v.* Shepard, 130 Mass. 180.

All doubts must be resolved in favor of natural rights and against restrictions.

Hutchinson *v.* Ulrich, 145 Ill. 336.
Eckhart *v.* Irons, 128 Ill. 582.
See also Haeussler *v.* Missouri Iron Co., 110 Mo. 188; 33 Am. St. Rep. 431.

March 13, 1899. FELL, J. This appeal is from the refusal of the Court to grant a preliminary injunction, but by agreement between the parties the case is now heard as if a final decree had been entered refusing the injunction and dismissing the bill. There is practically no dispute as to the facts. In 1872, J. A. T. Laws sold a tract of land in Philadelphia extending from Thirteenth to Broad street, and from Castle avenue to Morris street, to E. A. Yarnall, for $85,440, and agreed to advance him $50,160 to enable him to erect buildings thereon. Yarnall agreed to pay for the land and to secure the advances by creating ground rents and mortgages in favor of Laws on the lots into which the tract was to be divided. By an agreement between the parties which was acknowledged and recorded, it was provided that the tract should be divided into forty-two lots and buildings erected thereon in accordance with certain plans and specifications. The specifications contained numerous details as to the size and design of the houses, the materials of which they were to be built, and among other provisions there was one that they should be built ten feet back from the street, with porticoes in front. This agreement was fully complied with. The houses were erected in 1873, and all of the ground rents and mortgages have been extinguished or satisfied.

The plaintiff in the bill became the owner of the lot at the northeast corner of Broad street and Castle avenue, with the house thereon erected, which fronted on Broad street with side windows facing Castle avenue. The defendant is the owner of the adjoining property on the north, and in 1898 tore down the house with the intention of erecting a new one which would extend beyond the line fixed by Laws and Yarnall in

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1873. The bill was filed to restrain him from so building.

The first article of the agreement between Laws and Yarnall provided for the sale of the land, the second for the advances that were to be made, the third for the creation of ground rents and mortgages to secure the purchase money and the advances. The fourth article provided as follows: "The said E. A. Yarnall, in order to further and better secure the said advances and purchase money, shall and will erect, or cause to be erected, within one year, forty-two houses upon said forty-two lots of ground, according to the specifications hereto annexed, which specifications are made and form a part of this agreement." The provision on which the plaintiff relies is in the specifications for six of the houses on Broad street, and is found in the following connection: "Each house to be twenty feet front and seventy-two feet deep, containing thirteen rooms, including bath-room, and to be built ten feet back from the line of the street, the cellars to be seven feet in the clear from the bottom of the joists and to extend under the whole building with an elevation of three feet," etc. Following this in the same sentence are minute directions which relate to the height of the different stories, the material to be used and the manner in which the houses are to be built. These include the laying of the joists and floors, the size of the studding, the plastering, mantels, ranges, heaters, wash-boards, gas-pipes and fixtures, arrangement of kitchens and bath-rooms, the fence boards for the side-yards, the iron fences in front, painting and paving,—in fact all of the minute details of construction. As it was by virtue of the agreement for the sale and improvement of the property that Yarnall took the title which has passed to the parties to the suit, the covenant might be binding, notwithstanding that they are not incorporated in the deed, if they were meant to be for the benefit of the land. Whether they were so intended, or were merely personal for the benefit of the grantor, is the primary question.

The manifest purpose of the agreement was to secure the development of the property in a manner which Laws considered best calculated to secure the purchase money and the advances which he was about to make. It related to the houses then to be built, and contained no covenant that thereafter houses should not be built on the ground in a manner other than that provided in the specifications, and not even a suggestion can be found in it that no house except of the kind specified shall ever be erected on the ground. The provision that the agreement should not be taken to be merged by the execution of the deed was simply a wise provision against a possible claim that all prior agreements were merged in the deed.

Our conclusion is that the agreement was a builder's agreement merely, that the covenants were personal and for the benefit of the grantor only, that they were fully performed and the agreement at an end when the ground rents and mortgages were paid and the grantor's interest in the property ceased. Under this view of the agreement the appellant has no standing, and the injunction was properly refused.

The decree of the Court of Common Pleas is affirmed and the bill is dismissed at the cost of the appellant. W. D. N.

Jan. '98, 386. Supreme Court. March 21, 1899.

De Walt's Appeal.

Constitutionality of liquor license laws—Act June 24, 1895 (Superior Court Act).

The Act of Assembly entitled "An Act to restrain and regulate the sale of vinous and spirituous, malt or brewed liquors, or any admixture thereof," approved May 13, 1887, is constitutional.

The Superior Court Act contemplates appeals from it to the Supreme Court on constitutional grounds only, as to actual, open and unsettled constitutional questions, not as to so-called questions that have theretofore been raised, fully considered and more than once definitively settled.

It is the duty of the Supreme Court or one of its Justices, to be satisfied preliminarily, that the case appealed is one in which a right of appeal is contemplated by the Superior Court Act.

Appeal of Hiram De Walt, from the judgment of the Superior Court of Pennsylvania, in affirming the order of the Quarter Sessions of Philadelphia County.

One James F. Boyle, applied to the Court of Quarter Sessions for a retail liquor license. Hiram De Walt appeared as a remonstrant. The license was granted. De Walt took an appeal to the Superior Court, by which Court the action of the Quarter Sessions was affirmed. De Walt then took this appeal, and by his assignments of error raised the question of the constitutionality of the Act of May 13, 1887.

Hiram De Walt, the appellant, p. p.

The retail liquor saloon or dram shop is a common nuisance. In the license case 5 Howard, 626 (1847), Justice WOODBURY says: "The sale of the article (liquor) which, especially where retailed in small quantities, is likely to attract together within the State unusual numbers and encourage idleness, wastefulness and drunkenness."

Mugler *v.* Kansas, 123 U. S. 623.
Crowley *v.* Christensen, 137 Id. 86.

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The retail liquor saloon or dram shop exists only by permission of the Acts of Legislature.

"The popular understanding of the word 'license' undoubtedly is, permission to do something which without the license would not be allowed." This is the legal meaning.

Youngblood *v.* Sexton, 32 Michigan, 406.
State *v.* Hipp, 38 Ohio, 206.

The United States Supreme Court having declared the retail liquor saloon or dram shop to be "a source of crime and misery," it cannot exist without a license authorized by some Act of Legislature. The Legislature of Pennsylvania has declared, by Act of May 13, 1887, and other Acts, "That it shall be unlawful to keep or maintain any house, room, or place, hotel, inn, or tavern, where any vinous, spirituous, malt or brewed liquors or any admixture thereof, are sold by retail, except a license therefor shall have been previously obtained as hereinafter provided."

"There is no inherent right in a citizen to sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or of a citizen of the United States."

"Neither the petitioner nor any other person in this State has any property in the right to sell liquor."

Crowley *v.* Christensen, 137 U. S. 86.
Raudenbusch's Petition, 120 Pa. 342.

On the contrary, our law creates a monopoly in this business, but not in any other business.

It would create a revolution if the Legislature endeavored to create a monopoly in the sale of dry goods, groceries, provisions or anything tending to promote "the public health or welfare."

There is no analogy between the saloon license and the licenses granted by legislative act and city ordinances for conducting certain other businesses, such as the licensing of druggists, physicians, auctioneers, theatres, brokers, insurance agents, hucksters, the marriage license, etc.

The effort to muddle this question by specious allusions on the part of advocates of the system of saloon licensing, to the police power of the State, does not dim nor obscure the fact that the saloon as it now exists and is conducted is malum in se.

Acts of Legislature creating, permitting or attempting to regulate the retail liquor saloon or dram shop, are unconstitutional and void.

The United States Constitution in its preamble declares that it was ordained and established in order to insure domestic tranquillity and to promote the general welfare.

The Constitution of Pennsylvania in its declaration of rights declares that all men have certain inherent and indefeasible rights, among which are those of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

No law can be enacted by Congress or the State Legislature contrary to these.

Blackstone says: "A law is a rule of action prescribed by the supreme power of a State, commanding what is right and prohibiting what is wrong."

It must be admitted, "That which is wrong cannot be law."

Will anyone seriously contend that the Legislature can establish "a source of crime or misery"?

If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the Courts so to adjudge, and thereby give effect to the Constitution.

Will anyone pretend that a statute creating a retail liquor saloon or dram shop "promotes the general welfare"?

A dram shop always depreciates the value of surrounding property and produces an immoral effect upon the community. Catholic and Protestant churches remonstrate whenever it is proposed to establish one near any of them.

But it will be contended that the license Acts must be constitutional, because they have existed more than two hundred years. But the attention of the Court has never before been called to this phase of their constitutionality. The contention heretofore has always been against the constitutionality of their prohibitory features. I contend against the constitutionality of the feature *creating* the dram shop. This is a new contention in our State, and the Courts must now consider it as a new question.

April 3, 1899. STERRETT, C. J. This appeal, from the judgment of the Superior Court affirming the order granting a retail liquor license to James F. Boyle, is here without any allowance by that Court, or by this Court or any of its Justices.

It is claimed by appellant, who appears in person, that the appeal is rightly here, because, in his opinion, "the case involves the construction or application of the Constitution of the United States," as well as "the construction or application of the Constitution of Pennsylvania": Superior Court Act, June 24, 1895, P. L. 217. He says, the retailing of intoxicating liquors "is a common nuisance," which exists only by permission of Acts of the Legislature. His broad

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proposition is, that any Act of Assembly, which regulates or attempts to regulate the retail sale of spirituous, vinous or malt liquors, is necessarily and essentially unconstitutional; and, applying that principle to the facts of this case, his contention is that our Acts of Assembly providing for the granting of hotel, saloon and restaurant licenses and regulating the sale of intoxicating liquors thereunder, are, ex necessitate rei, unconstitutional and void, and should be so declared by the Courts, notwithstanding the fact that the same question has been repeatedly presented to them, and after full consideration, such Acts have been adjudged constitutional.

Adhering to that line of decisions, the Superior Court in this case said: "And notwithstanding the very earnest argument of the appellant, who appeared in person, we see no reason to doubt the constitutionality of the law under which this license was granted. The power of the State to regulate the sale of intoxicating liquors and, in the exercise of that power, to authorize the granting of licenses to fit persons under such conditions as the Legislature may impose, is too well settled to be open to discussion." We unanimously concur in this conclusion; and if we thought that this case should be disposed of on its merits alone, we would affirm the judgment of the learned Court below for the reason so accurately and tersely stated in the last sentence of the foregoing quotation from its opinion.

But, aside from the want of merit, we are of opinion that, according to the true intent and meaning of the provision above referred to, this case does not involve any such constitutional "construction" or "application" as is contemplated by the Superior Court Act. It contemplates only actual, open and unsettled constitutional questions—not so-called questions that have theretofore been raised, fully considered and more than once definitively settled, as had been appellant's supposed question in this case. It was never intended that such practically dead issues of law should be revived and re-revived and agitated ad infinitum. The ipse dixit of an appellant, that his case involves a constitutional question, does not make it so; and it is the duty of this Court or one of its Justices to be satisfied, preliminarily, that the case is one in which a right of appeal is contemplated by the Act. If it is not a case in which the right of appeal from the judgment or decree of the Superior Court is given, the sooner that fact is determined, the better for all parties concerned. Such a course of practice will, in many cases, avoid useless expenditure of time and money and tend to prevent useless and vexatious delays.

In addition to all that, regular and orderly practice requires that applications for all appeals should be by petition, setting forth clearly and distinctly the reasons therefor, etc., so that this Court or any of its Justices may readily determine whether the application is within the latter as well as the spirit of the Superior Court Act. In this connection, it is worthy of notice that the last sentence of sec. 18 of the Act May 19, 1897, P. L. 71, appears to contemplate, that, as the first step in the proceeding, petitions for allowance of appeals be filed with the prothonotary of this Court, so that a record of the same may be kept, etc. If the Court is in session, they will be laid before it and acted upon; if not, they will be forwarded to such Justice or Justices as the petitioners may suggest. Our established practice is that, as far as practicable, each member of the Court shall participate in the disposition of such petitions.

Without further elaboration, our opinion is that there is no ground on which an appeal in this case can be based, and hence the appeal is quashed, and it is ordered that the appellant pay the costs.

A. T. D.

Superior Court.

Feb. '99, 18. Superior Court. February 16, 1899.

Blaisdell v. Dean, Owner, and Guise, Contractor.

Mechanics' lien—Act of June 26, 1895—Separate stipulation allowed by—Sufficieny of.

Under the Act of June 26, 1895, P. L. 369, providing that an owner of property may protect himself against mechanics' liens by filing a stipulation that such liens shall not be filed, it is sufficient if the separate stipulation filed is an original document and not a copy, furnishing record notice to all subcontractors of the existence and terms of covenant against liens contained in the original contract.

Semble, that it is better practice if the separate stipulation is a separate and distinct agreement, with provisions of the original contract repeated, and not merely a stipulation reciting that the original contract contains a clause providing that no liens shall be filed.

D. entered into a written contract with G. for the erection of a building, in which contract was contained a stipulation that no liens should be filed. He did not file with the prothonotary the whole contract, but a separate writing signed and sealed by him and by the contractor. In the writing filed the original contract was recited to have been executed and to contain the necessary agreement against liens. By the stipulation it was further agreed that the contract together with the stipulation was executed before work was authorized to commence under the contract. B., a sub-contractor,

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filed a mechanics' lien against the building, and D. took a rule to have the lien stricken off, which the Court made absolute:

***Held*, not to be error.**

Appeal of Frank W. Blaisdell, plaintiff, from the action of the Court of Common Pleas, of Lycoming County, making absolute a rule to strike off the mechanics' lien, filed by Frank W. Blaisdell against Hettie Kern Dean, owner, and David P. Guise, contractor.

The facts of this case were as follows: On February 10, 1897, Hettie Kern Dean entered into a contract with David P. Guise for the erection of a dwelling house. The contract contained a covenant against the filing of mechanics' liens.

On the same day, viz., February 10, 1897, the said owner and contractor, under their separate hands and seals, executed a separate stipulation, reciting that the above building contract had been entered into between them for the erection of a two-story brick dwelling house, upon lot of appellee situate in Vallamont, in the township of Loyalsock, county of Lycoming, and State of Pennsylvania, being the northwest corner of Campbell street and Glenwood avenue, setting forth and quoting the exact words of the covenant against the entering of mechanics' liens contained in said building contract, and also a statement that said contract and the said separate stipulation were entered into and executed before work was authorized to commence or proceed under said contract. This paper was filed in the prothonotary's office on February 12, 1897. On August 12, 1898, Frank W. Blaisdell, a sub-contractor entered a mechanics' lien against the house. A motion having been made by the owner to strike off this lien, on the ground that the contract contained a covenant against filing liens, and that the filing of the separate stipulation was a compliance with the Act of June 26, 1895, so as to prevent the filing of any liens, the Court made the rule to strike off the lien absolute, METZGER, P. J., filing the following opinion:

"The stipulation filed in the Court of Common Pleas to No. 10, March term, 1897, is in our judgment a compliance with the Act of Assembly of June 26, 1895. It is an original paper signed by both parties, and their signatures are undisputed, and the mere fact that it is copied from the covenants contained in the contract cannot change the character of the instrument. It is difficult for us to discover any reason for filing more than this stipulation. It gives the information and notice intended by the Act, and is therefore a substantial compliance with its provisions. Therefore, now, to wit, November 12, 1898, the rule to strike off the mechanics' lien in this case is made absolute."

Whereupon the plaintiff took this appeal, assigning for error this action of the Court.

Max L. Mitchell, for appellant.

The object of the Act of June 26, 1895, was to give information as well as notice; and this is not done simply by a reference in the paper filed to a covenant contained in another instrument which is not on record.

Either the contract itself must be filed, or the separate stipulation allowed by the Act must itself contain the covenant relied on to prevent the lien.

The defendant relies solely upon a covenant contained in her original contract to bar liens. And far from recording the contract, as the Act provides shall be done when it is relied upon as a bar, she attempts to record only a part of it, and in the record itself she declares that that part is a copy.

The intention of the Act was to render it unnecessary for the sub-contractor or material man to do more than examine the record, but here they must demand to see the original to know precisely what the covenant is.

An insufficient instrument recorded in the proper office is not notice within the Acts.

Heister *v.* Fortner, 2 Binn. 40.
Friedley *v.* Hamilton, 17 S. & R. 70.

James B. Krause, for appellee.

The stipulation filed is an original agreement separately signed and sealed by the parties. It gives notice of all that is required to put sub-contractors, material men and laborers on their guard, namely:

1. That a building contract was entered into, and when, and by whom.
2. The kind of building and its exact location.
3. The covenant against entering mechanics' liens.

The entering of the entire building contract could not have given more explicit notice or information to a prudent sub-contractor, material man, or laborer. It is not always desirable for owners and builders to disclose their private affairs and such non-essentials of the building contract as are not necessary to give the notice of covenants against liens required by law, and hence the law wisely permits the filing of a separate stipulation.

March 23, 1899. W. W. PORTER, J. The Act of June 26, 1895, P. L. 369, provides that the owner of property may protect himself against the filing of a mechanics' lien by a contractor, or by any sub-contractor, under a contract to build, by filing with the prothonotary the written contract

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in which it has been agreed that no lien shall be filed, or by filing a written stipulation, separate and apart from the contract. In the present case the owner entered into a written contract for the erection of a building, in which contract was contained a stipulation that no liens should be filed. He did not file with the prothonotary the whole contract, but a separate writing, signed and sealed by him and by the contractor. In the latter the original contract is recited to have been executed and to contain the necessary agreement against liens. By the stipulation it was further agreed that the contract together with the stipulation was executed before work was authorized to commence under the contract.

It will be observed that this separate stipulation is an original document, and not a copy. It furnishes record notice to all sub-contractors of the existence and terms of the stipulation against liens contained in the original contract. It gives to them all the information contemplated by the Act. It thus fulfills all that is required by the spirit of the Act. The lien, filed by the sub-contractor in the face of such a document of record, was properly stricken off.

We are led to observe further, however, that the better practice in such a case would be not simply to recite in the separate stipulation that the original contract contains a clause providing that no liens shall be filed, but to execute a separate and distinct agreement, with the provision repeated so that the separate stipulation may comply with the strict letter of the statute. For the reasons above given, we affirm the judgment of the Court below, in this case.

Judgment affirmed. S. H. T.

Oct. '98, 26. Superior Court. October 4, 1898.

Gardiner v. Bair.

Landlord and tenant—Surrender—Holding over.

A tenant for years cannot relieve himself from liability to pay rent by vacating the premises during the term and sending the key to his landlord; to make the giving up of a key a surrender, it must be accepted by the landlord with the intention of releasing the tenant from the liability.

A lease for a year with the privilege of an extension, is for a year only; if the tenant hold over without notice he will be held to have elected to extend the lease, but if the lease provide that notice of intention to quit shall be given at a time specified, then if the lessee, having given notice that he will not accept the extension, does not give the required notice of intention to quit at the end of the first year, he becomes a tenant from year to year, and liable for an additional year's rent.

Appeal of Oliver H. Bair, defendant from the judgment of the Common Pleas No. 3, for Philadelphia County, in an action of assumpsit brought by James Gardiner.

This was an action to recover rent. On the trial, before McMichael, J., the facts appeared as follows: The plaintiff by a written lease demised certain premises to the defendant "for the term of one year from the first day of September, 1891, at the rent of $480 per annum with the privilege of four additional years at the rent of $540 per annum for the first year and $600 per annum for the three years." The lease contained the following provision with regard to notice: "And it is hereby mutually agreed, that either party hereto may determine this lease at the end of said term, by giving the other notice thereof, at least three months prior thereto, but in default of such notice, this lease shall continue upon the same terms and conditions as are herein contained, for a further period of one year and so on from year to year unless or until terminated by either party hereto giving to the other three months' notice for removal previous to the expiration of the then current term."

The defendant vacated the premises at the end of the first year, to wit, August 31, 1892, having as he claimed, given notice to plaintiff of his intention so to do on June 1, 1892. The plaintiff claimed the said notice was received June 15, 1892.

On August 31, 1892, defendant's clerk offered the keys to Mr. Taylor, the attorney for the appellee, with the statement that they were the keys of the demised property. He refused to accept the keys, and stated he would hold the defendant for the rent. The clerk then went to plaintiff's dwelling, rang the bell and handed him an envelope containing a bunch of keys, saying, "Keys of Eighteenth and Wharton," to which plaintiff made no reply. Plaintiff denied that the keys were those of the demised premises.

The rent was paid in full to August 31, 1892. The premises were rented by the lessor to a new tenant on February 1, 1893, at a rental of $40 per month.

The plaintiff claimed to recover the sum of $495, being eleven months rent at $45 per month, accruing after the vacation of the premises leased, less a credit for $240, being six months' rent at $40 per month, received from the new tenant. The balance claimed was $255.

Plaintiff also claimed the sum of $80 damages to the building, caused by the removal of a wire screen, by erecting a clock, and for damages to the heater.

The Court declined the following points of the defendant:

"1. Under the lease in suit the defendant had

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a right to vacate the premises leased at the expiration of the first year without giving the plaintiff lessor any notice of his intention to vacate.

"2. If notice of defendant's intention to vacate was necessary, the notice given was ample and filled every legal requirement.

"3. If the jury believe that the plaintiff accepted the keys without any qualification, the verdict as to rent must be for the defendant." (Third, fourth and fifth assignments of error.)

In the general charge the Court said, inter alia.

"The second question of fact that you will have to determine is, was there a surrender of the lease, and in order that there should be a surrender, it is not enough that the tenant gives up the keys, nor is it enough that the landlord takes the keys." (First assignment of error.)

"After a pretty careful consideration of this lease, I have reached the conclusion (and the construction of a written document is for me and not for you), that if you reach the conclusion that the notice was not given in time, and there was no surrender, you should assess the damages at $40 a month for the year. This is not an easy contract to construe. Sometimes scriveners put in these papers ambiguous expressions, and it is a difficult question for the Court to determine what is meant. The conclusion that I have reached is, that this is a lease for a term of one year, and there is also a covenant that either party may determine this lease at the end of said term by giving the other notice thereof, at least three months prior thereto, but in default of such notice, this lease shall continue upon the same terms and conditions as are herein continued, for a further period of one year, and so on from year to year unless or until terminated by either party hereto giving to the other three months' notice for removal, prior to the expiration of the then current term. That is, the tenant is not bound under the law to give notice of removal, although the landlord is, in order to obtain possession. But if he does not give notice when he has specially covenanted so to do, he is bound by his covenant. Men who are sui juris, are presumed to know what they are doing, and may make contracts which will be binding upon them. So that the tenant had a right to make this contract and did make a contract to that effect, that if he did not give three months' notice before the expiration of the lease, the lease should continue for a further period of one year, and so on from year to year. And from year to year merely means that he was to renew the same covenant from year to year. With regard to the privilege of four additional years at $540, my opinion is that that was a privilege that was not accepted by the tenant, and may be treated as out of the case. There may be other methods of construing this lease, but that seems to me to be a simple and business-like way to look at it. They make a lease for one year, and if neither the landlord nor the tenant gave notice three months prior to the expiration of the year, the lease was to continue from year to year. But then they stuck in that the tenant was to have the privilege of the four years additional, and the landlord was to have the additional rent. My idea is, that the only thing to say is, that the option was not taken advantage of by either party. And that simplifies the case for you, because that leaves the simple question of fact for you to determine." (Second assignment of error.)

Verdict for plaintiff, $341. A remittitur for $40 was filed, and judgment was entered. The defendant took this appeal and filed assignments of error above indicated.

Isaac D. Yocum, for appellant.

The lease was for the term of one year, with the privilege of an additional term of four years. The lessee under such lease had a right to vacate the premises leased at the end of the first year without giving notice.

MacGregor *v.* Rawle, 57 Pa. 184.
Wilcox *v.* Montour Co., 147 Id. 540.
Ashhurst *v.* Phonograph Co., 166 Id. 357.
Cairns *v.* Llewellyn, 2 Pa. Super. Ct. 599.

But it is contended that the following printed clause: "And it is hereby mutually agreed, that either party hereto may determine this lease at the end of said term, by giving the other notice thereof, at least three months prior thereto, but in default of such notice, this lease shall continue upon the same terms and conditions as are herein contained, for a further period of one year, and so on from year to year, unless or until terminated by either party hereto giving to the other three months' notice for removal previous to the expiration of the then current term," controlled the demise in the earlier part of the lease, and which was in writing. The written clause in case of conflict controls.

Elkins *v.* Transportation Co., 81* Pa. 315; 32 P. F. Sm.
Grandin *v.* Ins. Co., 107 Id. 26.
West Branch Lumber Ex. *v.* Ins. Co., 183 Id. 366.
Heller's Estate, 6 Pa. Super. Ct. 246.

But the two clauses do not conflict. The Court erred in holding the lease one from year to year. It was either for one year or for five years.

Lipper *v.* Bouvé, 6 Pa. Super. Ct. 452.

Bradbury Bedell, for appellee.

The mere receipt of the keys could not release defendant.

Breuckmann *v.* Twibill, 89 Pa. 58.
Auer *v.* Penn, 99 Id. 370.

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Reeves v. McComeskey, 168 Id. 571.
Lane v. Nelson, 167 Id. 602.

The lease creates but one term; and that a "term of one year." With the creation of this term, an option is given for an additional term of four years. It is claimed that this option was never exercised. Admitting this for the present argument, then the clause relating to the option can be taken from the lease and we have:

1. A lease at a specified rent for the term of one year.

2. A covenant that, unless notice be given at least three months prior to the end of the term by the party desiring to terminate it of his intention so to determine it, the lease shall remain in force for another year, and so on.

Now what term is referred to in this clause? The answer must be the term created by the lease and that term was for one year. This is the view the Judge took of the lease, considering the notice sent on June 15, 1892, an election on the part of appellant not to exercise the option of an additional four years as provided in the lease.

Striking out the option clause which the appellant says he declined to exercise by his notice given June 15, this case comes directly within the rulings of the Supreme Court in the case of—

Wilcox v. Iron & Steel Co., 147 Pa. 540.

March 23, 1899. W. D. PORTER, J. The plaintiff leased to the defendant a store and dwelling, "for the term of one year from the first day of September, A. D. 1891, at the rent of $480 per annum, with the privilege of four additional years at the rent of $540 per annum for the first year and $600 per annum for the three remaining years, to be paid in equal monthly portions in advance." In addition to other covenants the lease contained the following, viz.: "And it is hereby mutually agreed, that either party hereto may determine this lease at the end of said term by giving the other notice thereof, at least three months prior thereto, but in default of such notice, this lease shall continue upon the same terms and conditions as are herein contained, for a further period of one year and so on from year to year unless or until terminated by either party hereto giving the other three months' notice of removal previous to the expiration of the then current term." The defendant went into possession under this lease and continued to occupy the premises until August 31, 1892, when he moved out, having paid the rent up to that time. The premises remained unoccupied until February, 1893, at which time the plaintiff secured another tenant at the same rental which defendant had paid during the preceding year. The plaintiff brought this action to recover for injury to the building done by defendant and for rent during the time that the property was unoccupied after defendant's removal. Plaintiff recovered a verdict upon which judgment was entered, whereupon defendant appealed and the rulings of the Court upon the trial are now assigned for error.

The first and fifth assignments of error relate to the oral charge of the Court and the answer to one of defendant's points upon the question of alleged surrender by the tenant and acceptance by the landlord of the demised premises. The language of the Court must be considered in connection with the testimony upon the subject to which it referred.

The only testimony offered in support of the alleged surrender was that of a clerk of the defendant. He swore, that he took the keys of the building to plaintiff's agent, Taylor, who refused to take them; witness then went to the house of the plainiff, rang the bell and, when plaintiff came to the door, handed him the keys in an envelope, said: "The keys of Eighteenth and Wharton," and walked away. There is no evidence that the landlord knew who this clerk was or from whom he came. The defendant contends that if the landlord received the keys without saying anything the tenant is relieved from payment of rent. The learned Judge charged the jury in these words: "The second question of fact that you will have to determine is, was there a surrender of the lease. And in order that there should be a surrender, it is not enough that the tenant gives up the keys, nor is it enough that the landlord takes the keys. The tenant must give up the term, and the landlord, or his agent on his behalf, must accept the surrender of the term. And that is a question of fact, which I leave to you under the evidence. Did the landlord accept the surrender of the term?" This instruction was as favorable as the defendant had any right to expect. A surrender of demised premises, in order to be effectual to release a tenant from payment of rent, must be accepted by the lessor and the burden of proof is upon the lessee: Lipper v. Bouve, 6 Pa. Super. Ct. 452; Lane v. Nelson, 167 Pa. 602. "Nothing is better settled in Pennsylvania than that a tenant for years cannot relieve himself from his liability under his covenant to pay rent by vacating the demised premises during the term, and sending the key to his landlord," said Mr. Justice PAXSON, in Auer v. Penn, 99 Pa. 370.

The second, third and fourth assignments relate to the construction which the Court put upon the covenants of the lease and raise but a simple question. Could the lessee escape liability, under the terms of the lease, for a second year,

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by vacating the premises at the end of the first year, without having given three months' notice of his intention to terminate the tenancy? The only clauses of the lease involved in the consideration of this question are the granting clause and that providing, that, in default of three months' notice, by either party, previous to the expiration of the then current term the lease should continue upon the same terms and conditions, for a further period of one year and so on from year to year. The grant was for the term of one year at the rent of $480 per annum, with the privilege in the lessee to extend this term four additional years at an increased rent; the clause requiring notice three months previous to the end of the term, in order to avoid liability for an additional year, did not curtail the right of the tenant to exercise his option to retain the premises for four full additional years, and these clauses are not repugnant to each other.

The term created by the lease was one year from September 1, 1891, for that period both landlord and tenant were bound, and, while it is true, that it was within the power of the lessee to extend the term, yet until there was an acceptance by him of the additional term, or a holding over, the term created by the lease ended with the first year: Cairns *v.* Llewellyn, 2 Pa. Super. Ct. 599; McClelland *v.* Rush, 150 Pa. 57. If under the lease in question neither of the parties had given notice and the lessee had simply continued to occupy the premises, after the expiration of the first year, he would, in the absence of further evidence, have been held to have exercised his option to accept the full additional term of four years, upon the ground that such holding over was notice to the landlord that the lessee elected to exercise his privilege: Lipper *v.* Bouve, above cited; Harding *v.* Seeley, 148 Pa. 20. But the defendant had, on June 15, 1892, notified the plaintiff that he declined to accept the additional term of four years and that notice was in time to save him from incurring liability for the term of four years at the increased rent. That notice put an end to the option of defendant to extend the term, which remained as created by the lease. Under the terms of the lease the defendant was not compelled to accept or reject the additional term of four years until the expiration of the original one year term; but if he failed to give the landlord notice of his intended removal three months before the end of the original term his liability for the following year, under the covenant with regard to notice is a different question. If the defendant had given three months' notice of intended removal his liability would have ended with the first year. If the plaintiff had given such notice, the result would have been to force the defendant to make his election; he must have removed at the end of the original term or have accepted the additional term of four years. As was said by Judge Rice, in reference to a covenant in the very words of that with regard to notice in this lease, "Undoubtedly one purpose of this covenant was to put the landlord and the tenant on equal footing, so that the former should know a reasonable time before the end of the year whether he must seek another tenant, and the tenant should know whether he must seek another habitation": Lane *v.* Nelson, 167 Pa. 605.

The defendant covenanted that, in default of notice to the plaintiff three months prior to the end of the term, he should be bound by the terms of the lease for a further period of one year. The jury have found that defendant did not give such notice. When it was too late the agent of defendant did attempt to give notice, which was received under protest. Under his contract the defendant is liable: Wilcox *v.* Montour Iron Co., 147 Pa. 540.

The defendant has no grounds for complaint against the rulings of the learned Judge of the Court below.

Judgment affirmed.

H. B.

Oct. '98, 113. Superior Court. October 12, 1898.

Acetylene Light etc. Co. v. Smith.

Corporations—Subscriptions to stock—Allegations of fraud—Rescinding of contract—Affidavit of defence—Interest on unpaid instalments.

There is no doubt that where one is induced to make a subscription to the capital stock of a company by fraudulent representations and false statements of material facts by an agent of the company appointed to obtain subscriptions, the contract may be avoided by the subscriber, but to properly state such defence in an action to recover an assessment, the defendant must do more than simply set out in his affidavit in general terms that false and fraudulent representations were made; he must set forth what the representations were and wherein they were false and that he was deceived.

Where a transaction is merely contrary to good faith and fair dealing, upon the discovery of the fraud it is within the power of the defendant to either ratify or rescind the contract, but it is his duty to act promptly and, in case he elects to rescind, to notify the plaintiff without delay. Omission to repudiate within a reasonable time is evidence, and may be conclusive evidence, of an election to affirm the contract.

The interest which a subscriber is liable to pay for delay in payment of instalments called upon his stock, is fixed by the act of May 9, 1889, P. L. 180, at one-half of one per cent. per month, which is equal to the legal interest on the amounts due, but is not in addition to interest, for the Act limits the

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amount for which suit may be brought to the amount called for and unpaid, and in addition one-half of one per cent. per month upon said amount for delay.

Appeal of Benjamin H. Smith, defendant, from judgment of Common Pleas No. 2, of Philadelphia County, in an action by Acetylene Light, Heat and Power Company to recover unpaid assessments of stock.

The facts in this case are fully set forth in the opinion of the Superior Court, infra.

The plaintiff obtained a rule for judgment for want of sufficient affidavit of defence, which was made absolute. The defendant took this appeal. The assignments of error were that the Court erred, first, in entering judgment for want of a sufficient affidavit of defence; and, second, in making absolute the rule for judgment for want of a sufficient affidavit of defence.

Lewis Lawrence Smith, for appellant.

Fraud with respect to a material fact, used by a corporation or its principal officers, as an inducement to subscription for its stock, will, when properly set up, avoid the contract of subscription.

Fraud with respect to a material fact may consist either in a suppression of what is true, or in assertion of what is false.

Thompson on Corporations, sec. 1383.
Henderson *v.* Lacon, L. R. 5 Eq. 262.
Cook on Stock and Stockholders, sec. 139 et seq.
Crossman *v.* Bridge Co., 26 Pa. 69.
Lare *v.* Specialty Co., 155 Id. 33.
Howard *v.* Turner, 155 Id. 349.

So far as appears from the affidavits, defendant exercised all due diligence in connection with his subscription; and in response to his inquiries of the promoters and officers themselves, he was given plausible answers which were themselves misrepresentations and uttered to substantiate former statements. Finally, on discovering the fraud, he declined to pay further. Upon discovery of fraud he may, if he do nothing affirmatively to ratify the subscription contract, wait until he is sued on a call, and put in his defence then. He is not bound to bring an action on his own behalf. Indeed, the defence to suit on a call is the ordinary way in which the question is raised.

Cook on Stock, etc., sec. 154.
Howard *v.* Turner, 155 Pa. 349.

There was no need of tender. This is a case where deceit would lie, and it would then be futile to tender the stock and demand the purchase price, for if it were refused, judgment would be had against the corporation, as well as the officers guilty of the deceit.

Lare *v.* Specialty Co., 155 Pa. 33.
Thompson on Corp., sec. 1453.

A tender in a case of rescission for fraud is in time, when necessary, if made at trial.

Sloane *v.* Shiffer, 156 Pa. 59.

The judgment in this case is erroneous, because it involves the payment of not only the principal of the calls, and the penalty of one-half per cent. per month, but also interest. The Act of May 9, 1889, P. L. 180, which authorizes the imposition of a penalty, distinctly states that it is for delay of payment; in other words, the penalty takes the place of interest.

This case is not governed by the case of Acetylene, etc., Co. *v.* Beck, 6 Pa. Super. Ct. 584.

H. B. Gill, (with him *Silas W. Pettit* and *John R. Read*), for appellee, cited—

Phila. Bourse *v.* Downing, 6 Pa. Super. Ct. 590.
Blanton *v.* Craven, 173 Pa. 374.
Lewis *v.* Dunlap, 5 Pa. Super. Ct. 625.
Brownlee *v.* Railroad Co., 18 Ind. 68.
Crossman *v.* Penrose Ferry Bridge Co., 26 Pa. 69.
Guarantee Co. *v.* Mayer, 141 Id. 511.
Acetylene Co. *v.* Beck, 6 Pa. Super. Ct. 584.
Thompson on Corporations, sec. 1462.

March 23, 1899. W. D. Porter, J. The defendant, by agreement in writing dated October 5, 1895, subscribed for one hundred shares of the stock of the plaintiff corporation, at the rate of fifty dollars per share, and in accordance with the terms and at the date of the agreement, paid fifty per centum of the amount in cash, and undertook to pay the balance as it should be called by the board of directors of the corporation. Upon calls duly made by the board of directors, he paid, on April 20, 1896, five dollars per share, and, on October 1, 1896, a second payment of five dollars per share.

Two calls, each for three dollars per share, were subsequently duly made, payable, respectively, on May 7 and June 25, 1897, which defendant failed to pay. The corporation brought this action to recover the amounts due upon these calls, aggregating $600, and the defendant filed an affidavit of defence. The Court made absolute a rule for judgment for want of a sufficient affidavit of defence, from which judgment the defendant appeals.

The written agreement of defendant to pay for the stock was absolute upon its face; but he now alleges in his affidavit that this subscription was induced by means of false and fraudulent representations made to him by the officers of the plaintiff corporation. There is no doubt that, where one is induced to make a subscription to the capital stock of a company by fraudulent representations or false statements of material facts by an agent of the company, appointed to obtain subscriptions, the contract may be avoided by the subscriber: Crossman *v.* Bridge Company, 26

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Pa. 69. When, however, the contract to pay is absolute, as in this case, a defendant must, in order to prevent judgment, do more than simply state in his affidavit, in general terms, that false and fraudulent representations were made. He must set forth what the false representations were and state wherein they were false and that he was deceived. In the present case the affidavit of defence sets forth a number of representations, alleged to have been made by plaintiff's agents, and they allege that each and all of said statements were false and misleading and calculated to deceive and that deponent was deceived to his great injury. But there is no attempt made to set forth wherein the representations were false; nor does the defendant venture upon any positive ground as to what the facts really were touching the matters to which the representations related. In such a case the affidavit of defence should set forth the false representations and, also, what the defendant alleges to be the truth, with regard to the matters as to which he claims to have been deceived, in order that the Court may pass upon the materiality of the alleged variance of the representations from the truth. This the defendant has failed to do; his affidavits are vague, indefinite and insufficient: Blanton for use *v.* Craven, 173 Pa. 374; Acetylene Light Co. *v.* Beck, 6 Pa. Super. Ct. 584.

But even if false and fraudulent representations were made by plaintiff's agents and properly set forth and duly negatived by defendant in his affidavit, yet must the plaintiff have judgment, upon defendant's own showing. The defendant alleges that the false representations, upon which he seeks to avoid his contract, were made prior to his subscription for the stock which bears date October 5, 1895, and he admits in his affidavit that he learned, in September, 1896, "That said statements, announcements and assurances were false and misleading, and that he had been deceived thereby." The fraud alleged was not of such a character as to involve a crime, in which case ratification of the contract would have been contrary to public policy and could not have been permitted; but the transaction was merely contrary to good faith and fair dealing, it affected individual interests only, and upon discovery of the fraud, it was within the power of the defendant to either ratify or rescind the contract. The contract was not void, but voidable only at the option of the party defrauded. If plaintiff was guilty of the alleged fraud, the defendant, upon discovering it, had an undoubted right to rescind the contract, and upon tender of the stock to demand the return of the price paid for it; but it was his duty to act promptly and, in case he elected to rescind, notify the plaintiff without delay. Omission to repudiate within a reasonable time is evidence, and may be conclusive evidence, of an election to affirm the contract: Shisler *v.* Vandike, 92 Pa. 447; Leaming *v.* Wise, 73 Pa. 173; Bispham's Equity, secs. 260 and 472. What is a reasonable time within which to exercise the right of rescission is, when the facts are undisputed, a question of law to be determined by the Court: Leaming *v.* Wise, supra; Howard, Receiver, *v.* Turner, 155 Pa. 349.

The defendant had full knowledge of the alleged fraud in September, 1896, and gave no notice of an election to rescind until one full year later, when he filed his affidavit of defence; but in the meantime he had, in October, 1896, paid without question an instalment upon the stock. There was not only unreasonable delay to repudiate, but a payment in affirmance of the contract after full knowledge of the alleged fraud. The defendant, having taken the chances of an advance in the market price of stock, highly speculative in character, for the period of a year, must abide by his own election. The allegations of the affidavit as to mismanagement of the affairs of the corporation, and change of its methods of business, constitute no defence to this action: Acetylene Company *v.* Beck, 6 Pa. Super. Ct. 584; Bristol Iron & Steel Co. *v.* Selliez, 175 Pa. 18.

The affidavits of defence are not sufficient to entitle the defendant to a jury trial, and the Court below was clearly right in entering judgment, but the plaintiff was not entitled to interest upon the amounts due down to the date of judgment. The amount which the defendant shall be liable to pay for delay in payment of the instalments called upon his stock is fixed, by the Act of May 9, 1889, P. L. 180, at one-half of one per centum per month. This is equal to the legal interest on the amounts due, but it is not in addition to interest, for the Act limits the amount for which suit may be brought to the amount called for and unpaid and, in addition, one-half of one per centum per month upon said amount for delay. The plaintiff here claimed both interest and the allowance under the Act for delay, which the Court, no doubt inadvertently, allowed.

The record is remitted to the Court below, with direction that the judgment be modified, by striking out from the computation the amount included as interest prior to the entry of judgment, and that judgment be entered for amount of the instalments called for and unpaid and one-half of one per centum per month, on said instalments from the time they, severally, were payable. And it is ordered that the costs of this appeal be paid by the appellee.

W. C. S.

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WEEKLY NOTES OF CASES.

VOL. XLIV.] *FRIDAY, MAY 12, 1899.* [No. 6.

Supreme Court.

Jan. '98, 390. Supreme Court. January 20, 1899.

Cope's Estate.

Constitutional law—Taxes and taxation—Equality and uniformity of taxation—Constitution of Pennsylvania—Article III., sec. 7—Article IX., secs. 1 and 2—Act May 12, 1897—Direct inheritance tax.

The Act of May 12, 1897, is an Act imposing taxes on the personal property therein specified; and as such it must comply with the fundamental principles of taxation, and the provisions of the Constitution relating thereto. It is of the very essence of taxation that it should be relatively equal and uniform.

This right to equality is insured to the people by the Constitution, Art. IX., secs. 1 and 2, which provides that: "All taxes shall be uniform upon the same class of subjects;" and prohibits the exemption of any property from taxation, except as therein set forth.

While the Constitution recognizes the authority of the Legislature to classify the subjects of taxation, a classification that is based solely on a difference in quantity of precisely the same kind of property is necessarily unjust, arbitrary and illegal.

The question as to the authority of the Legislature to impose a bonus or excise on the devolution of property, not considered, as the Act of May 12, 1897, is simply a taxing statute, and does not profess to be an amendment or supplement to any law relative to the estates of decedents.

Even if the Act were one imposing a bonus on the devolution of decedents' estates it would, in its present form, still be unconstitutional as violating Art. III., sec. 7, of the Constitution.

The exemption in the collateral inheritance tax law is not a precedent, as the statute making that exemption was executed in 1826, when the Constitution did not impose the present limitations, as to exemptions, on the power of the Legislature.

Appeal of the Commonwealth of Pennsylvania, from the decree of the Orphans' Court for Philadelphia County, dismissing exceptions to the adjudication of the account of John M. Whitall, executor of the estate of Marmaduke C. Cope, deceased.

The facts of this case were as follows: Marmaduke C. Cope died testate on September 5, 1897. John M. Whitall was appointed executor of the last will and testament of the deceased. He filed his account in due form and at the proper time in the Orphans' Court for Philadelphia County.

The auditing Judge (HANNA, P. J.,) made a schedule of distribution showing balance due said estate of $917,519.88, which amount represented the personal estate of said decedent. On this amount the Commonwealth claimed a tax of 2 per cent. on the balance for distribution, after deducting the cost of audit and expenses of administration, under the Act of May 12, 1897. The Court refused to allow the claim of the Commonwealth for the amount of the direct inheritance tax due under the provisions of the said Act of May 12, 1897, and proceeded to make a distribution of the proceeds of the personal estate of said decedent, according to the provisions of the will, without taking into consideration the claim of the Commonwealth for said direct inheritance tax. To this adjudication, in so far as the claim of the Commonwealth for said tax was disallowed, exceptions were filed in due form in the Court below. The Court disallowed the claim of the Commonwealth, and dismissed the exceptions, whereupon the Commonwealth took this appeal, assigning for error this action of the Court.

Francis A. Osbourn and *John P. Elkin*, attorney-general, (*Henry C. McCormick* and *John C. Grady* with them), for appellant.

The exemption of a particular kind of property from a particular kind of tax, does not make a revenue statute unconstitutional, even though the property is not among those enumerated in sec. 1 of Art. IX. of the Constitution.

Appeal of Hawes Mfg. Co., 1 Monaghan, 353.
Com'th v. Brewing Co., 145 Pa. 83.
Minot v. Winthrop, 162 Mass. 113.
Act of June 30, 1885, P. L. 193.
Act of May 6, 1887, P. L. 79.
Act of June 1, 1889, P. L. 420.
Act of June 8, 1891, P. L. 229.
Act of June 8, 1893, P. L. 355.

Such a construction would render void the collateral inheritance tax of May 6, 1887.

Such exemptions in collateral and direct inheritance tax statutes have always been favored by law-making bodies and have generally been sustained by the Courts.

Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283.

The Act in question imposes a tax upon the right of succession to personal estates, and the tax imposed is uniform upon the whole class taxed. Inequality in the result does not offend against the provision of the Constitution which requires uniformity of taxation.

Orcutt's Appeal, 97 Pa. 179.
Com'th v. Delaware Division Canal Co., 23 WEEKLY NOTES, 216.

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Com'th *v.* Brush Electric Light Company, 28 WEEKLY NOTES, 527.
Com'th *v.* Merchants & Manufacturers Bank, 36 WEEKLY NOTES, 291.

Statutes imposing inheritance taxes are not within the meaning of the constitutional provisions which require uniformity of taxation. Such succession tax is a privilege demanded for the privilege of transmitting one's estate, and is not a tax on property. It is in substance and effect a modification of the statutes of descent, distribution and wills, and is to that extent a limitation upon the right to bequeath or inherit personal estates.

2 Bl. Com., pp. 10 to 13.
Strode *v.* Com'th, 52 Pa. 181.
Clymer *v.* Com'th, 52 Id. 185.
U. S. *v.* Perkins, 163 U. S. 627.
Com'th *v.* Gilpin's Ex'rs, 3 Dist. 711.
Com'th *v.* Herman, 16 WEEKLY NOTES, 212.
Mager *v.* Grima, 8 Howard, 490.
State *v.* Alston, 74 Tenn. 674; 28 L. R. A. 178.
Minot *v.* Winthrop, 26 L. R. A. 259.
State *v.* Hamlin, 25 Id. 636.
State *v.* Dalrymple, 3 Id. 375.
Kochersperger *v.* Drake, 47 N. E. R. 321.
Eyre *v.* Jacob, 14 Gratt. 430.
Wallace *v.* Myers, 38 Fed. Rep. 184.
In re Swift's Estate, 137 N. Y. 83.
Pullen *v.* Commissioners, 66 N. C. 363.
Peters *v.* Lynchburg, 76 Va. 927.
Schoolfield *v.* Lynchburg, 78 Id. 366.
Mixter's Estate, 28 WEEKLY NOTES, 182.

The Act of May 12, 1897, does not, however, change the law of descent or succession and is not special legislation. It is merely the exercise by the Legislature of its power to regulate the transmission of estates.

West, The Inheritance Tax, pp. 95 & 102, et seq.
Dos Passos, The Inheritance Tax, chap. II., sec. 8.
Magoun *v.* Illinois Trust & Savings Bank, 170 U. S. 283, and cases cited.

R. C. Dale, (*Charles E. Morgan, Jr.*, with him), for appellee.

The Act of May 12, 1897, is a taxing statute, and as such must be uniform upon the class of subjects taxed.

Constitution of Pennsylvania, Art. IX., sec. 2.
Perkins *v.* Philadelphia, 33 WEEKLY NOTES, 41.

In making a classification for taxing or other legislative purposes, the classification must rest on a rational foundation.

Wheeler *v.* The City of Philadelphia, 77 Pa. 338.
Com'th *v.* Patton, 88 Id. 258.
Scowden's Appeal, 96 Id. 422.
Davis *v.* Clark, 106 Id. 377.
Morrison *v.* Bachert, 17 WEEKLY NOTES, 353.
Weinman *v.* Pass. Ry. Co., 20 WEEKLY NOTES, 455.
In re Ruan Street, 25 WEEKLY NOTES, 349.
City of Scranton *v.* Whyte, 30 WEEKLY NOTES, 74.
Safe Deposit Co. *v.* Fricke, 31 WEEKLY NOTES, 324.
City of Philadelphia *v.* Westminster Cemetery Co., 34 WEEKLY NOTES, 361.
Chalfant *v.* Edwards, 38 WEEKLY NOTES, 261.

In the Act in question there is no reason underlying the proposed classification.

Gulf, Colorado & S. F. Ry. Co. *v.* Ellis, 165 U. S. 150.

The case of Magoun *v.* The Illinois Trust & Savings Bank, 170 U. S. 283, is not in point, as the question there involved was whether anv provision of the Federal Constitution was violated.

In many States similar Acts have been declared unconstitutional.

State *v.* Ferris, 53 Ohio, 314.
State *v.* Gorman, 40 Minn. 232.
State *v.* Mann, 76 Wisconsin, 469.
Curry *v.* Spencer, 61 N. H. 624.
State *v.* Switzler, 143 Mo. 287.

A law containing arbitrary exemptions can in no just sense be called uniform.

Hyde *v.* Continental Trust Co., 157 U. S. 586.
Fox's Appeal, 17 WEEKLY NOTES, 449.
Missouri *v.* Switzler, 45 S. W. Rep. 245.
City of Westport *v.* McGee, 30 Id. 523.

April 24, 1899. STERRETT, C. J. This appeal challenges the validity of the decree of the Court below, in which the Act of April 12, 1897, P. L. 56, entitled "An Act taxing gifts, legacies and inheritances in certain cases and providing for the collection thereof," was adjudged unconstitutional and void.

Sec. 1 of the Act declares: "That from and after the passage of this Act all personal property of whatsoever kind and nature which shall pass by will, or by the intestate law of this State, from any person who may be seised or possessed of the same . . . . shall be and the same is hereby made subject to a tax of two dollars on every one hundred dollars of the clear value of such personal property, after deducting the debts of the decedent and costs of administration, ... to be paid for the use of the Commonwealth; and all heirs, legatees, devisees, administrators, executors and trustees shall only be discharged from liability for the amount of such taxes, ... by paying the same for the use aforesaid as hereinafter directed: Provided, That personal property to the amount of five thousand dollars shall be exempt from the payment of this tax in all estates: And provided further, That so much of the estates of persons heretofore deceased as has not been actually distributed and paid to persons entitled thereto prior to the passage of this Act shall be liable to the tax imposed by this law, as well as the estates of persons who die hereafter."

The last-quoted proviso appears to have been added by way of amendment to the first section of the bill, while it was under consideration, with the view of so enlarging (by improper use of a

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proviso) the scope of that section as to bring within its operation undistributed portions of all estates of persons theretofore deceased. Inasmuch as the testator, in the case now under consideration, died September 5, 1897—nearly five months after the passage of the Act above cited —the retroactive provision of said proviso is not involved and requires no further notice in this case. In other cases, however, which have been argued, the Commonwealth's claims are based upon the retroactive operation of said proviso. In disposing of them, it may not be amiss to consider the retroactive effect of the proviso.

The manifest effect of the first above-quoted proviso is to effectually exclude from the operation of the taxing provisions of the Act "personal property to the amount of five thousand dollars . . . . . in all estates." To that extent, the operation of the Act is restricted and qualified.

It is further restricted and qualified by sec. 16, which provides: "This Act shall be known as the direct inheritance tax law, and shall not be held to change, modify or alter the existing law in reference to the collection of collateral inheritance taxes, it being the intention of this Act to impose a direct inheritance tax on all estates or parts of estates not subject to the Act or Acts providing for the collection of collateral inheritance taxes."

The intervening sections, two to fifteen inclusive, are devoted to what may be called the administrative provisions of the Act. The second declares: "If the said tax shall be paid within three months after the death of the decedent, a discount of 5 per cent. shall be made and allowed, and if the said tax is not paid at the end of one year from the death of the decedent, interest at the rate of 6 per cent. per annum shall be charged for such year, and after the expiration of one year from the death of the decedent, interest shall be charged at the rate of 12 per centum per annum on such tax," etc.

The proviso to sec. 5 declares: "That all taxes imposed by this Act shall be a lien upon the personal property of the estate on which the tax is imposed, or upon the proceeds arising from the sale of such property from the time the said tax is due and payable, and shall continue a lien until said tax is paid and receipted for by the proper officer of the Commonwealth."

As defined and limited by the Act itself, the tax sought to be charged and collected under its provisions is imposed, in express terms on "all personal property of whatsoever kind and nature which shall (thereafter) pass by will, or by the intestate laws of this State," from the respective owners thereof upon their decease, and upon all property, of the same kind, which had theretofore passed, in the same manner, from the owners thereof and was not "actually distributed and paid to the persons entitled thereto prior to the passage of this Act"; but exempting, however, from said tax, "in all estates," personal property to the amount of five thousand dollars, and excepting from the operation of the Act all personal property that is "subject to the Act or Acts providing for the collection of collateral inheritance taxes."

As already stated, Marmaduke C. Cope, the testator in this case, died nearly five months after the passage of the Act, and in due course his executor's account was filed and confirmed, showing $917,519.88, net balance of personal property for distribution. The learned auditing Judge of the Court below rejected the Commonwealth's claim on the fund for State tax, under the provisions of the so-called "direct inheritance tax law" in question, on the ground that in Blight's Estate, 6 Dist. Rep. 459; Portuondo's Estate, Id. 462, and other cases involving the same question, the said Court had theretofore declared the said law unconstitutional and void. Exceptions to said adjudication having been filed by the Commonwealth, the same were duly considered and dismissed by the Court in banc, which, in an opinion by its learned president, confirmed the adjudication and decreed distribution accordingly. Hence this appeal by the Commonwealth.

Substantially, the only question involved in the five specifications of error is this: Did the learned Court below err in deciding that the Act in question is unconstitutional? In our opinion, it did not.

As to the character of the Act, there cannot be any doubt. That it is an Act imposing taxes on the personal property therein specified is too plain for discussion. To hold otherwise would be a perversion of the plain meaning of the words employed in entitling the Act and specifying its provisions. As we have seen its title declares it to be, "An Act taxing gifts, legacies," etc., and providing for the collection thereof. Sec. 16 declares that it shall be "known as the direct inheritance tax law." The "personal property" specified in the Act is, in express words, "made subject to the tax," etc.: Sec. 1. The second proviso to that section expressly declares: "that so much of the estates of persons heretofore deceased as has not been actually distributed and paid to persons entitled thereto prior to the passage of this Act shall be liable to the tax imposed by this law, as well as the estates of persons who die hereafter." Sec. 5 declares: "All taxes imposed by this Act shall be a lien upon the personal property of the estate on which the tax is

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imposed, or upon the proceeds arising from the sale of such property," etc. It is also an Act exempting "from the payment of this tax, in all estates," personal property specified therein to the amount of five thousand dollars.

The Act in question has none of the features of an intestate law, or of an Act regulating the disposition of property by will or by instruments in the nature thereof. On the contrary, upon its face and in all its provisions, it is manifestly a tax law, clearly and distinctly predicated of the actual existence and general operation of an in-intestate law and a will's act, under the operation of one or other of which the personal property intended by its provisions to be subjected to taxation, would pass from the then, as well as subsequent owners thereof, to others, or had theretofore passed and become vested in others prior to the date of the Act under consideration.

Having thus seen that the Act in question is essentially and avowedly a "tax law," imposing a State tax on certain specified personal property, and providing for the collection thereof, let us briefly inquire whether it offends against the fundamental principles of taxation, or the provisions of our constitution relating thereto. If it does, our manifest duty is to support and defend the latter by declaring the Act unconstitutional: Perkins *v.* Philadelphia, 156 Pa. 554. In that case, it was well said, inter alia, by our brother DEAN: "Every department of the government is bound by its (the constitution's) provisions, but especially is this Court, for on it is the duty of judicially determining any violation of it."

It is of the very essence of taxation that it should be relatively equal and uniform, and where the burden is common there should be a common contribution to discharge it: Cooley's Constl. Lim. 495. In his treatise on Taxation, 2d. Ed. pp. 2, 3, the same learned author says: "In an exercise of the power to tax, the purpose always is that a common burden shall be sustained by common contributions, regulated by some fixed general rule and apportioned by the law according to some uniform ratio of equality. The power is not, therefore, arbitrary, but rests on fixed principles of justice which have for their object the protection of the taxpayer against exceptional and invidious exactions, and is to have effect through established rules operating impartially."

"Equality in the imposition of the burden is of the very essence of the right, and though absolute equality and absolute justice may not be attainable, the adoption of some rule, tending to that end, is indispensable. Equality as far as practicable, and security of property against irresponsible power are principles which underlie the power of taxation as declared ends and principles of fundamental laws": Desty on Taxation, 29 and cases there cited.

As was well said by Mr. Justice BREWER, in his dissenting opinion in Magoun *v.* The Illinois Trust and Savings Bank, 170 U. S. 283, 301: "Equality in right, in protection and in burden is the thought which has run through the life of this nation and its constitutional enactments from the Declaration of Independence to the present hour. Of course, absolute equality is not attainable, and the fact that a law, whether tax law or other, works inequality in its actual operation, does not prove its unconstitutionality: Merchants' Bank *v.* Pennsylvania, 167 U. S. 461. But where a tax law directly, necessarily and intentionally, creates an inequality of burden, it then becomes imperative to inquire whether this inequality thus intentionally created, can find any constitutional justification."

Further citation of authorities, in support of these fundamental principles, is unnecessary. In nearly every State in the Union they are more or less carefully guarded, against specific transgressions, by constitutional restrictions and limitations.

Our Constitution (Art. IX., secs. 1 and 2) declares: "All taxes shall be uniform upon the same class of subjects, within the territorial limits of the authority levying the tax, but the General Assembly may, by general laws, exempt from taxation public property used for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit, and institutions of purely public charity."

"All laws exempting property from taxation, other than the property above enumerated, shall be void."

The language of sec. 1, as to what the rule of uniformity shall embrace, is as broad and comprehensive as it could possibly have been made. The words, "all taxes" must necessarily be construed to include property tax, inheritance tax, succession tax and all other kinds of tax the subjects of which are susceptible of just and proper classification. By necessary implication, the first clause of that section recognizes the authority of the Legislature to justly and fairly, but never arbitrarily, classify those subjects of taxation with the view of effecting relative equality of burdens. A pretended classification that is based solely on a difference in quantity of precisely the same kind of property is necessarily unjust, arbitrary and illegal. For example, a division of personal property into three classes with the view of imposing a different tax rate on each,—class 1, consisting of personal property exceeding in val-

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ue the sum of $100,000; class 2, consisting of personal property exceeding in value $20,000, and not exceeding $100,000, and class 3, consisting of personal property not exceeding in value $20,000—would be so manifestly arbitrary and illegal that no one would attempt to justify it.

The next clause of sec. 1, expressly authorizes the Legislature to exempt from taxation four specified classes or kinds of property. This specific delegation of authority to exempt, impliedly prohibits express exemption from taxation of any other property, but to place this matter beyond the reach of doubt, it is expressly ordained in sec. 2, that "All laws exempting property from taxation other than the property above enumerated shall be void."

These limitations on the power of the Legislature mean something. They are plainly intended to secure, as far as possible, uniformity and relative equality of taxation, by prohibiting generally the exemption of a certain part of any recognized class of property and subjecting the residue to a tax that should be borne uniformly by the entire class, and by guarding against any other device that necessarily or intentionally infringes on the established rules of uniformity and relative equality which, as we have seen, underlie every just system of taxation. In any view that can reasonably be taken of these limitations, it must be manifest to any reflecting mind that the Act in question offends against them by undertaking to wholly exempt from taxation the personal property of a very large percentage of decedents' estates, and impose increased and unequal burdens on the residue of the same class of property.

If the authority to exempt, etc., which was assumed and exercised by the Legislature in this case is sanctioned by this Court, the constitutional rule of uniformity virtually becomes a dead letter, and in view of the will of the people as plainly declared in the fundamental law of the State, the unrestrained will of the Legislature becomes the supreme law on that subject. If the Legislature had authority under the Constitution, to do what was done in this case, they had like authority to reverse their order of taxation, etc., and thus impose the tax on personal property amounting in value to five thousand dollars and less, and exempt therefrom all property of same recognized class in excess of that sum; and, consequently, they have like authority, in every case, to establish any other arbitrary ratio, between the amount in value of property to be taxed and that which shall be exempt therefrom, in any class of subjects.

The Commonwealth's contention is that the "two dollars on every one hundred dollars of the clear value of such personal property" in excess of five thousand dollars, is not a tax according to the true intent and meaning of Art. IX., secs. 1 and 2 of the Constitution, above quoted; that independently of the taxing power, the Legislature was fully empowered to pass the Act in question, and hence it is not within the inhibition of Art. IX. of the Constitution; that in the language of Dos Passos on Inheritance Tax, chap. 2, sec. 8, "Such taxes are nothing more than a burden, bonus, excise or assessment, as they have been variously defined, imposed by the government upon the passing, devolution, transmission or privilege of taking or receiving property under wills and intestate laws, whether such property passes to collateral or lineal heirs."

These propositions are predicated of the assumed principle that the right to inherit or succeed to property is not a natural but merely a civil right (1 Sharswood's Blackstone, 398 and 399), and hence the Commonwealth, acting through its law-making power, may assert its sovereign right to take and appropriate to its own use such portion or portions of the estates—real, personal and mixed—of every decedent as the Legislature in its wisdom may consider necessary and proper. They also assume that the people of this State, in their fundamental law, have placed no restriction on legislative power in that regard.

Without pausing to consider the soundness as well as the scope of the principle thus broadly asserted, but conceding for argument sake merely, that the Legislature has the power, under our Constitution, to so change the law of descent and succession as to give the Commonwealth a certain portion of every decedent's estate, or to otherwise regulate the transmission or devolution of such estates, it does not by any means follow that the "direct inheritance tax law" under consideration is such an Act. As we have seen, the Act does not profess to be a supplement to or an amendment of our laws relating to the estates of testates or intestates, but quite the reverse. There is nothing in its title or its text to indicate anything else than that it was intended to be a tax law imposing a tax of 2 per centum on the personal property of decedents therein specified within the scope of Art. IX. of the Constitution; but assuming, for argument sake only, that it is otherwise,—that it was in fact intended to be an Act supplementary to or amendatory of existing laws regulating the succession to estates of decedents, we think it clearly offends against that clause of Art. III., sec. 7 of the Constitution, which declares: "The General Assembly shall not pass any local or special law . . . . changing the law of descent or succession."

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As our laws of descent and succession stood prior to the passage of the "direct inheritance tax law," the personal property specified in said Act was never subject to any "burden, bonus, excise or assessment" whatever. The pre-existing law of succession is changed by that Act, in that it imposes a burden on so much of said property as is in excess of $5000, and leaves it unchanged as to the residue. It is therefore a special and not a general Act, because it does thus impose a burden on a part of said property, and declares that, in all estates, personal property, not exceeding $5000 in value, shall be exempt from said burden. It thus changes the law of succession as to part of the property specified therein, and attaches a condition to the right of succession which is neither general nor uniform, in that the burden is not imposed upon all distributees or all estates of decedents, but only upon a portion of them arbitrarily selected, while others in precisely the same class are exempted therefrom. As to classification, it is very clear that $5000, in value of the personal property specified in the Act, is precisely the same in kind as $50,000 (or any other sum) in value of said property. The money value of any given kind of property, such as that specified in the Act, can never be made a legal basis of subdivision or classification for the purpose of imposing unequal burdens on either of such classes, or wholly exempting either of them from any burden.

On the Commonwealth's own assumption, therefore, the Act is a special law, changing the law of succession, and is clearly forbidden by Art. III. of the Constitution.

In the absence of reliable data, the practical operation of the five thousand dollars' exemption proviso cannot be definitely stated, but it would perhaps be safe to say that, outside of the large centres of population, from 90 to 95 per cent. of the estates of decedents, administered by the Orphans' Courts from year to year, do not separately represent personal property exceeding in value the sum of $5000; so that probably not more than from 5 to 10 per cent. of said estates, therein administered, are subject to the 2 per cent. direct inheritance tax. Whatever the percentage of such estates may be,—whether more or less than 5 to 10 per centum,—it conclusively shows the special character of the Act in question. It also illustrates the injustice and inequality that must result from such special legislation. If the exempted personal property were subjected to the same tax rate that is required to be paid on personal property in excess of $5000, it would yield to the Commonwealth an average of about fifty dollars on each decedent's estate,—a sum that is by no means insignificant when the aggregate number of such estates is taken into consideration.

Appellant's suggestion, that we have a precedent for exemption in the proviso to our collateral inheritance tax law, has no force when we recall the fact that said proviso was enacted in 1826 (P. L. 227), long before the adoption of our present Constitution containing the limitations, on the powers of the Legislature, which we have been considering. No such limitations existed in 1826 when the proviso to our collateral inheritance tax law was enacted, and of course it was a valid enactment which has never been repealed or modified.

There are other points of minor importance to which reference might be made, but enough has been said to show that in any view that can be reasonably taken of the Act in question it is unconstitutional and void.

Decree affirmed and appeal dismissed at appellant's costs.

S. H. T.

Jan. '98, 391 & 392. Supreme Court. January 20, 1899.

Hagy's Estate.
Graff's Estate.
Commonwealth's Appeals.

These two cases were argued at the same time as Cope's Estate, reported above.

Francis A. Osbourn and *John P. Elkin*, attorney-general, (*Henry C. McCormick* and *John C. Grady* with them), for appellant.

Charles Wetherill and *Joseph R. Rhoads* for appellees.

April 24, 1899. STERRETT, C. J. This appeal was heard and considered with No. 390 of January term, 1898,—Estate of Marmaduke C. Cope, deceased—in which an opinion affirming the decree of the Court below has just been filed. Both cases involve substantially the same questions; and, for reasons given at length in the opinion referred to, the decree in this case is also affirmed and appeal dismissed at appellant's costs.

S. H. T.

Jan. '97, 440. Supreme Court. January 24, 1898.

Portuondo's Estate.

Constitutional law—Taxes and taxation—Constitution of Pennsylvania—Acticle IX., secs. 1 and 2—Act May 12, 1897—Direct inheritance tax.

The Act of May 12, 1897, is unconstitutional as violating the provisions of the Constitution of Pennsylvania, requiring uniformity in taxation.

The question as to the constitutionality of the

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retroactive provisions of the Act is therefore not considered.

Appeal of the Commonwealth of Pennsylvania, from the decree of the Orphans' Court of Philadelphia County, dismissing exceptions to the adjudication of the account of John E. Faunce and the Northern Saving Fund, Safe Deposit & Trust Company, executors of the estate of Juan F. Portuondo, deceased.

The facts of this case were as follows: Juan F. Portuondo died testate on the 7th day of January, 1896, having named as the executors of his will John E. Faunce and the Northern Saving Fund, Safe Deposit and Trust Company. At the audit of the executors' account, which was filed in due form in the Orphans' Court for Philadelphia County, the Commonwealth claimed 2 per cent. upon the net balance, as shown by the account, after deducting certain proceeds of real estate, and that amount of the estate upon which a collateral inheritance tax was paid. This claim was made under the provisions of the Act of May 12, 1897. The auditing Judge refused to allow the claim of the Commonwealth. To this adjudication of the auditing Judge, exceptions were filed, which were dismissed by the Court in banc, on the ground that the Act of May 12, 1897, was unconstitutional, opinions being filed by FERGUSON, J., and PENROSE, J., and a dissenting opinion by ASHMAN, J. (6 Dist. Rep. 748.) Whereupon the Commonwealth appealed, assigning for error this action of the Court.

John P. Elkin, (with him *Francis A. Osbourn*, *John C. Grady* and *Henry C. McCormick*, attorney-general), for appellant.

John G. Johnson, (*F. Gaston* with him) for appellees.

April 24, 1899. STERRETT, C. J. This and four other appeals by the Commonwealth, involving substantially the same questions, were heard and considered together at last term. The appellant's claims against the respective estates were for State tax under the second proviso to the first section of the Act of May 12, 1897, "known as the direct inheritance tax law," which is as follows: "And provided further, That so much of the estates of persons heretofore deceased as have not been actually distributed and paid to the persons entitled thereto prior to the passage of this Act shall be liable to the tax imposed by this law as well as the estates of persons who die hereafater."

The enacting clause of the first section preceding the two provisos is manifestly prospective and seeks to impose the 2 per cent. tax only on personal property thereafter passing from the respective owners thereof under the intestate law or by will etc., while the proviso above quoted is distinctly and indefinitely retroactive in its operation, and is claimed to have been inserted for the purpose of so enlarging the scope of the Act as to bring within its terms and provisions undistributed and unpaid portions of the respective personal estates of those who died prior to the passage of the Act.

While these cases involved generally the constitutionality of the Act, as a whole, they specifically challenged the constitutionality of its retroactive provisions as being more manifestly violative of the principles of uniformity and relative equality which underlie every just system of taxation. In view of this difference between the retroactive and the prospective provisions of the Act, etc., it was deemed advisable to withhold our decision until parties interested in the prospective provisions of the Act had an opportunity of being heard. That opportunity was presented at this term, and after a full and able discussion by learned counsel on both sides, and a careful consideration of the act, in its entirety, we are fully satisfied that the learned Court below was clearly right in declaring that the Act in question is unconstitutional and void. Our reasons for thus concluding are stated in an opinion just filed in Cope's Estate, Commonwealth's Appeal, No. 390, January term, 1898, and need not be repeated here.

In view of our decision in Cope's Estate it is unnecessary to consider in detail the objections specifically urged against the retroactive provisions of the Act.

For reasons given in the opinion referred to, the decree in this case is affirmed and appeal dismissed at appellant's costs.

S. H. T.

Jan. '97, 438, 462, 463, 464. Supreme Court. Jan. 24, '98.

Lacey's Estate.
D'Almbert's Estate.
Smith's Estate.
Bell's Estate.
Commonwealth's Appeals.

These four cases were argued at the same time as Portuondo's Estate.

John P. Elkin, (with him *Francis A. Osbourn*, *John C. Grady* and *Henry C. McCormick*, attorney-general), for appellant.

John Samuel, *R. L. Ashhurst*, *Edward Brooks, Jr.*, (with them *Rowland Evans*, *George Q. Horwitz* and *Frederick J. Geiger*), for appellee.

April 24, 1899. STERRETT, C. J. This and three other cases were argued at last term with Com-

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monwealth's Appeal in Estate of Juan F. Portuondo, No. 440, January term, 1897, involving substantially the same questions, in which an opinion has just been filed, declaring the act of April 12, 1897, P. L. 56, unconstitutional, etc.

For reasons given in that opinion the decree of the Court below must be sustained.

Decree affirmed and appeal dismissed at appellant's costs.

S. H. T.

Jan. '98, 180. Supreme Court. May 18, 1898.

Eshleman's Estate.

Trust—Will—Direct inheritance tax.

A trust which provides for future contingent interests, which are not represented by any one competent to act cannot be set aside by any form of transfer or agreement.

A., by her will, gave one-half of her estate to her executor in trust for her son D. to be invested by the trustee and applied to the support of D. and his family, during D.'s life. In the event of destitution on the part of D. the trustee was given a discretion to use so much of the principal, as he, the trustee, saw fit, for D.'s benefit; on D.'s death the trustee to pay the income for the support of D.'s widow and children; if D. should leave only a widow then to pay her maintenance, not exceeding $200 per annum during widowhood; on death or marriage of widow the principal to be given to D.'s children, in default of such children or issue then to testatrix's daughter M. M. and D.'s wife executed releases to D., who then, (being thirty-nine years of age, and having no children, his wife being thirty-five) demanded that the corpus of the one-half of the estate be paid to him and not to the trustee:

***Held*, that on account of the possibility of children, the trust must be maintained.**

The Act of May 12, 1897, which imposes a tax upon successions in the direct line of the decedent is unconstitutional.

Appeal of David M. Eshleman, from the decree of the Orphans' Court for Lancaster County, dismissing exceptions filed by him to the report of the auditor appointed to distribute the estate of Anna Eshleman, deceased.

Anna Eshleman died, leaving two children, David M. Eshleman and Annie M. Musser, wife of H. O. Musser. By her will she appointed H. O. Musser, her executor. The provisions of the will are sufficiently set forth in the head note and in the opinion of the Supreme Court, infra. The executor filed his account, which was referred to W. T. Brown, Esq., as auditor. Before the auditor, it was shown that the reason that David M. Eshleman's share of his mother's estate was put in trust, was that during his mother's life he was indebted; that he had since made satisfactory arrangements with all his creditors, with the exception of one small claim amounting to less than $300; that he was fully able and competent to manage his own estate, that he was and had been a sober, industrious and economical man; that he was married, but had no children and never had any; that he was about 39 years old and his wife was about 35 or 36 years old; that at the present time there was no necessity for the existence of the spendthrift trust, as created by the will. Releases were also presented, duly executed and acknowledged, for recording purposes, from Anna Mary Eshleman, the wife of David M. Eshleman, and from Annie M. Musser, the wife of H. O. Musser, to David M. Eshleman, releasing from all liability H. O. Musser, executor and trustee, in paying over to David M. Eshleman the trust fund under said will, and at the same time transferring to David M. Eshleman, his heirs and assigns, all their right, title and interest in the trust fund or trust estate as created by the said will of Anna Eshleman, and also authorizing and directing the auditor appointed to distribute the balance in the hands of H. O. Musser, executor of Anna Eshleman, to award the said share of David M. Eshleman to him direct.

David M. Eshleman asked the auditor to award his share to him absolutely.

The auditor refused to make the award as requested and awarded the share in question to H. O. Musser as trustee, holding that the trust was an active one, and that the possibility of children of David prevented its destruction. He also directed that $192.44, the amount of direct inheritance tax under the Act of May 12, 1897, be deducted from the estate. David M. Eshleman filed an exception to the refusal of the auditor to award to him the sum directed to be paid to the trustee, and, together with the accountant, filed an exception to the allowance of the direct inheritance tax. The exceptions were dismissed by the Orphans' Court. David M. Eshleman then took this appeal, assigning as error the confirmation of the auditor's report.

B. Frank Eshleman, for appellant.

Where all parties interested in a trust, both cestuis que trustent and remainder-men, agree, the Court has power to enter a decree that the trust be terminated.

Thompson's Estate, 10 Pa. C. C. R. 472
Culbertson's Appeal, 76 Pa. 145.

Where the purpose of a trust is simply to protect the remainder-man, the Court will terminate the same upon a joinder of all the parties in the application.

Seipe's Estate, 29 WEEKLY NOTES, 415.

If the cestuis que trustent are sui juris, active trusts will be sustained, where there is an ultimate purpose to protect contingent interests; but where the object of the testator has failed, or the

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reason for the creation of a trust has ceased, not being a spendthrift trust, nor one in contemplation of coverture, even if otherwise active, it will not be continued for the mere benefit or pleasure of the trustee, but the law will execute the use.

Audenreid's Estate, 4 Pa. Dist. 507.

In this case the reason for the trust no longer exists.

The direct inheritance tax should not have been awarded. The Act of May 12, 1897, is unconstitutional.

Blight's Estate, 19 Pa. C. C. R. 426.

John W. Appel and *Appel*, for appellee, were not heard.

April 24, 1899. STERRETT, C. J. This appeal is from the decree of the Orphans' Court dismissing exceptions, confirming the auditor's report and distributing the fund shown to be in the hands of the executor by his duly confirmed account.

The testatrix, Mrs. Eshleman, who died January 5, 1897, by her will, duly probated two weeks after her decease, created an active trust of a moiety of her estate for the benefit of her son, the appellant, as follows:

"The other half of my estate I give to my executor in trust for the use of my son David Eshleman, during the lifetime of my said son. My executor shall put this half of my estate at interest in good real estate security, or he may invest the same or any part thereof in real estate. . . . My executor or trustee of said fund shall annually pay so much of the net interest or income of the trust estate to my son David personally as will be required for the support of my son David and family, during David's life. . . . In the event of sickness or other misfortune befalling my son David, so that he would come to want or destitute circumstances, then in that case said trustee shall have the right to use as much of the principal of the trust fund as will be necessary to supply such want, but the trustee shall be the judge of the necessity, and likewise the amount of principal to be used."

The will then provides that if David dies leaving "a widow and child or children living at his death, the trustee shall pay the interest or income of said trust fund for the support of the widow and child or children annually during the said widow's widowhood."

"Should my son at his death leave only a widow living then said trustee shall pay her maintenance not exceeding two hundred dollars per annum during her widowhood," etc.

The will further provides: "That at the marriage or death of my said son's widow, whichever may first occur, the principal of the said trust fund, whether in money or real estate, shall go and descend to the child or children of my son David, which were living at his death, their heirs and assigns; and should my son not leave a child or children or other descendants living at his death, then the whole of said trust fund, remaining in the hands of the trustee whether in real or personal estate, shall go and descend to my said daughter Annie M. Musser, her heirs and assigns."

It was shown that appellant is now about thirty-nine years of age, and his wife about four years younger, that they have no children and never had any; and that the former is industrious, economical and a man of good habits, etc.

Transfers and releases of their respective interests under the will having been executed and delivered to appellant by his wife and sister, Mrs. Musser, he appeared before the auditor and demanded that the fund embraced in said trust be awarded not to the trustee named in the will, but to himself absqlutely. The auditor's refusal to do so was approved by the Court below and that constitutes the subject of complaint in the first specification.

While appellant's wife and sister—parties in interest now living and able to act—have made a special effort to set aside the trust aforesaid so that appellant may enjoy a share of his mother's estate absolutely and without any restriction, it is very evident that they do not represent all the cestuis que trustent for whom provision is made. As we have seen the will provides that, in certain contingencies, any child, children or other descendants of appellant who may be living at the time of his decease will be entitled to the corpus of the trust or so much thereof as may remain unexpended under the terms of the trust. Although, as yet, appellant is childless, there still exists the possibility of his having children or other descendants who may be living at the time of his decease.

The trust under consideration clearly belongs to the class known as "active trusts," in which active duties, requiring the exercise of sound personal discretion, are enjoined on the trustee: Barnett's Appeal, 46 Pa. 399. It provides for future possible contingent interests which are not now represented by any one competent to act, and hence it cannot be set aside by any form of transfer or agreement. One of its provisions is that, from and after the death or marriage of appellant's widow, whichever may first occur, "the principal of said trust fund, whether in money or real estate, shall go and descend to the child or children of my said son . . . . living at his death," etc. In order to give effect to the full intention of the testatrix, as to the interests that are to be

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enjoyed under this and other provisions of the will, the trust must be sustained. The learned auditor and Court below were therefore right in upholding the trust and awarding one-half of the net fund to the trustee.

The only remaining specification charges error in awarding one hundred and ninety-two 44-100 dollars to the Commonwealth, for direct inheritance tax under the second proviso to sec. 1 of the Act of May 12, 1897, which declares: "And provided further, that so much of the estates of persons heretofore deceased as has not been actually distributed and paid to the persons entitled thereto prior to the passage of this Act shall be liable to the tax imposed by this law as well as the estates of persons who die hereafter."

The enacting clause of the Act preceding the above quoted proviso is manifestly prospective and seeks to impose the tax only on personal property which thereafter passes from the owners thereof to others under the intestate law or by will, etc. The proviso, on the other hand is distinctly and indefinitely retrospective in its operation and is claimed to have been inserted for the purpose of so enlarging the scope of the Act as to bring within its terms and provisions undistributed and unpaid portions of the personal estates of those who died prior to the passage of the Act.

It is needless to say that this is a purpose quite foreign to the office of a *proviso*, as the same is generally understood, but it is impossible to read and consider the Act as a whole without coming to the conclusion that the improper use of the proviso was intended to have the enlarging effect claimed for it by the Commonwealth.

It is also contended in behalf of the appellant that the title of the Act, viz.: "An Act taxing gifts, legacies and inheritances in certain cases, and providing for the collection thereof," is defective and insufficient in that it conveys no notice whatever of a legislative purpose to reach back and impose the tax on personal property which, under the intestate law or by will, etc., had theretofore vested in those entitled thereto, but which was not actually distributed and paid to them at the time the so-called "direct inheritance tax law" was passed.

These and other questions are suggested in considering the retroactive provision of the Act; but, since this case was argued, we have had before us appeals by the Commonwealth in several cases involving the constitutionality of the Act in its entirety and in an opinion just filed in Cope's Estate, No. 390, January term, 1898, we have decided that the Act is unconstitutional and void. It is unnecessary therefor to discuss and dispose of subordinate questions.

It therefore follows that the learned Court below erred in awarding the sum of one hundred and ninety-two 44-100 dollars to the Commonwealth as direct inheritance tax and hence the second specification must be sustained.

The decree is therefore reversed, as to the said item of one hundred and ninety-two 44-100 dollars awarded to the Commonwealth, and it is ordered that the record be remitted to the Court below with instructions to add one-half of that sum to the amount awarded to Annie M. Musser, legatee, and to add the other half of said sum to the amount awarded to H. O. Musser, trustee under the will; costs of this appeal to be first paid out of said sum of $192.44.

H. B.

Jan. '99, 147. Supreme Court. April 4, 1899.

In re License of Umholtz. Umholtz's Appeal.

Liquor law—License—Transfer of—Act April 20, 1858, P. L. 366, sec. 7.

The Court of Quarter Sessions on May 2, 1898, granted a license to one H. to sell liquors at retail on certain premises. On May 14, H. removed from the premises and left the State, without any intention to return and take charge of the business. Subsequently, on petition by U. the license was transferred to him upon payment of a proportionate part of the fee for a year. Upon appeal to the Superior Court the action of the Court below was reversed on the ground that the word "licensed" in the Act of April 20, 1858, sec. 7, P. L. 366, applied only in cases in which the preceding party had absolutely concluded all the things which it was necessary for him to do in order to obtain his license, and the license had been actually issued, and license money paid, before it could be held that he was a "party licensed" within the meaning of the Act:

***Held*, that this is too narrow a construction of the Act, and that the license was properly transferred by the Quarter Sessions.**

The expression "party licensed" in the Act of 1858 does not necessarily mean any more than the person to whom the Court has awarded the right to have a license. When the Court has acted by granting to the applicant the right to have the license, it has performed its whole function. There is nothing more to be done by the Court, hence this action of the Court is always considered and spoken of as granting the license.

It is the clear purpose of the Act of 1858 to protect the owner of the house for which a license is issued from the loss of business which would result from the lapse of the license by the death or default of the licensee.

Appeal of Jonathan A. Umholtz, from the judgment of the Superior Court, reversing the judgment of the Quarter Sessions for the County of Philadelphia granting a liquor license to one Jonathan A. Umholtz.

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The facts of this case are set forth in the report of the appeal to the Superior Court, in 43 WEEKLY NOTES, page 495.

James E. Hood, (with him *Charles Edward Ingersoll* and *Francis I. Gowen*), for appellant.

Similar transfers were made in the following cases:—

Breen's License, 13 Pa. C. C. 141 (1893).
Doyle's License, 6 Kulp, 356 (1890).
Leahy's License, 14 Pa. C. C. 430 (1894).

A remedial statute is to be construed to include all cases within the mischief to be remedied, even where the letter does not include them. The most natural way of construing a statute is by another part of the same. A remedial statute shall be extended by equity to other persons besides those expressly named.

Potter's Dwarris, p. 233 (edition 1871).

The examples given bv Dwarris are where an Act naming only the bishop of Norwich was held to apply to all bishops; a remedy against executors was held to include administrators; and rules for the jailer of the Fleet held to apply to all jailers in England. And in Bridge Company *v.* Navigation Company, 4 Rawle, 9, GIBSON, C. J., held that a statute giving a remedy and taking away the common law remedy must be held to include corporations though not named, otherwise they would have no remedy. So in Com'th *v.* Navigation Company, 66 Pa. 81, while the defendant was not a transportation company, as appeared by its charter and by the principles of several decisions, it was nevertheless held to be within that term as used in the Act construed, which Act did not involve the question of the powers of the corporation. See also—

U. S. *v.* Freeman, 3 Howard, 556.

Lewis D. Vail, (*D. C. Gibboney* with him), for appellee.

Hamburg did file his application in due time and it was granted. But he did not pay the license fee or file his bond, so his grant and application was marked "revoked."

If Hamburg had paid his license fee on May 19, 1898, and presented his bond with sufficient sureties, the Court could not order a license to be granted him.

Wacker's License, 6 Pa. Super. Ct. 323.

Much less could Umholtz have paid the fee and filed his (Umholtz's) bond.

No license for the present license year having been issued to Hamburg or anyone else for 227-229 North Third street, how can a license on July 15, 1898, be transferred or a license be granted for the remainder of the year to a successor of a person licensed to sell at that place? Whom does he succeed?

April 24, 1899. GREEN, J. This case comes before us upon an appeal from an order of the Superior Court reversing the grant of a license to sell liquors at retail, made by the Court of Quarter Sessions of Philadelphia County. In the latter Court the application was for the grant of a license to the present appellant to sell liquors at retail on the premises Nos. 227-229 North Third street, Philadelphia. The special facts disclosed in the petition were that the Court of Quarter Sessions had, at the April term, 1898, granted a license to one Hamburg to sell liquors at retail on the same premises, which order was made on May 2, 1898. That on May 14, the licensee, Hamburg, removed from the premises and left the State without any intention to return and take charge of the business. The petitioner asks for the grant of a license to him for the remainder of the year upon payment of a proportionate part of the fee for the year. The application was made exclusively under the seventh section of the Act of April 20, 1858, P. L. 366. That section contains the following provision: "But if the party licensed shall die, remove, or cease to keep such house, his, her or their license may be transferred by the authority granting the same, or a license be granted to the successor of such party for the remainder of the year, by the proper authority, on compliance with the requisitions of the laws in all respects except publication, which shall not in such case be required." In Blumenthal's Petition, 125 Pa. 412, we said: "The Act of 1887, by which the issue of licenses to sell liquor is now regulated, makes no reference to transfers, and they are therefore still governed by the Act of April 20, 1858, sec. 7, P. L. 366." The same is true for the same reason as to the granting of new licenses. It is necessary, therefore, to look alone to the Act of 1858 in determining all cases of this character. The learned Superior Court in disposing of the present case based its conclusion upon a construction of the word "licensed," in the phrase, "But if the party licensed shall die, remove or cease to keep such house," etc, etc. The Court held that this word "licensed" applied only in cases in which the preceding party had absolutely concluded all the things which it was necessary for him to do in order to obtain his license, and that the license had been actually issued and license money paid, before it could be held that he was a "party licensed" within the meaning of the Act. We think this a too narrow construction of the Act. The very purpose of the Act was to reach cases in which there was an interruption in the active life of the license. If the licensee died or removed, or ceased to keep the house which was the subject of the license, there was a practical

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vacation of the license in its active operation. Another year would have to transpire before a new application could be made, and as this would be a useless hardship to the owner of the property, and a deprivation of the public in the accommodation which the house afforded, it was desirable that a more speedy remedy be provided for the existing difficulty. Hence a method was provided by which the business could go on without serious interruption. It was therefore within the meaning and spirit of the Act to provide a quick means of relief in all cases in which the business of the house would be otherwise suspended by the death, removal or inaction of the licensee. Now the person designated in the Act as the occasion or interruption of the life or activity of the license is "the party licensed." If such a party should die or remove in the interval between the granting or awarding of the license by the Court and the payment of the license fee, there would be just as much of an interruption to the business of the house as if he should live until he had paid the fee and then died. Hence the occasion for the intervention of the Court by the transfer of the license, or the grant of a new one, would be just as urgent in the one case as in the other. Unless we are shut up, therefore, by the language of the Act to the conclusion that the relief can only be given in cases where the fee has been actually paid, we ought not to draw such an inference, and by that means deprive the owner and the public of the needed relief. The expression "party licensed," does not necessarily mean any more than the person to whom the Court has awarded the right to have a license. When the Court has acted by granting to the applicant the right to have a license, it has performed its whole function. There is nothing further to be done by the Court. Hence this action of the Court is always considered and spoken of as granting the license. In this very case the remonstrance filed says, "That a license was granted to William Hamburg for the year beginning June 1, 1898." In all common acceptation the action of the Court in granting the application of the petitioner, is described and treated as the granting of the license. In the petition of the present applicant it is expressly set forth, "That at the session of your honorable Court commencing in the month of April of the present year, an application was presented by William Hamburg for a license to sell liquors at the above-mentioned premises, which petition was duly considered and an order thereupon made granting the prayer of the same and directing the issuance of said license." This statement is not controverted. Now the function of the Court being completely exercised, the only remaining thing to be done is the payment of the license fee, and when that is done the clerk makes out the formal license and delivers it to the applicant. This part of the proceeding is the act of the applicant and follows the grant by the Court as a matter of course. It seems to us quite clear that the words "party licensed" in the Act mean the party to whom the right to have a license has been granted. Such was the manifest understanding of the Court of Quarter Sessions in this case, and such, as we are informed by one of our number who has had a large experience, is the practice and understanding of the Courts of Quarter Sessions in other parts of the Commonwealth. It must also be understood that it is a law we are interpreting and not a contract between private parties. All legislation, especially that which regulates proceedings in the Courts, is of a broader and more comprehensive scope, and is couched in more generic language, than is employed in the drafting of private contracts, and requires an interpretation conformable to its general purpose. Thus statutes are to be construed as best to effectuate the intention of the Legislature, though such construction may seem contrary to the letter: Com'th *v.* Fraim, 16 Pa. 163; Com'th *v.* Monongahela Nav. Co., 66 Pa. 81. All laws must be executed according to their sense and meaning which they imported at the time of their passage: Com'th *v.* Erie & North East R. R. Co., 27 Pa. 339. A remedial statute is to be extended to cases in equal mischief: Lehigh Bridge Co. *v.* Leh. Coal & Nav. Co., 4 Rawle, 9.

We think it was the clear purpose of the Act, also, to protect the owner of the house from the loss of business which would result from the lapse of the license by the death or default of the licensee. The owner would not be responsible for such a result and ought not to suffer from it, and hence he is fairly entitled to relief in just such circumstances as have occurred in this instance. For these reasons we feel obliged to reverse the order of the Superior Court and sustain the grant of the license made by the Court of Quarter Sessions.

The order of the Superior Court is reversed and the decree of the Court of Quarter Sessions granting the prayer of the petitioner and ordering that a license issue to Jonathan A. Umholtz is affirmed, the costs to be paid by the appellee.

STERRETT, C. J., and FELL, J., dissent.

W. C. S.

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Jan. '97, 169. Supreme Court. March 14, 1898.

Commonwealth v. Dunham.

Constitutional law—Peddling—Act April 17, 1846, P. L. 364—Act of April 13, 1854, P. L. 328—Police power.

The Act of April 17, 1846, P. L. 364, (extended by Act of April 13, 1854, P. L. 328, to the county of Lycoming), prohibiting in certain counties the peddling or hawking of any foreign or domestic goods under penalty of $50 for each offence is constitutional as an exercise of the police power of the State.

The proviso in the Act of 1854, "that the manufacture of tin and copperware, hats and confectioneries shall not be embraced within the provisions of this Act," refers to the manufacture of the articles mentioned; it is not an authorization of their sale in violation of the Act of 1846.

Appeal of O. W. Dunham, defendant, from the judgment of the Superior Court of Pennsylvania, affirming a judgment and sentence of the Quarter Sessions of Lycoming County, in the matter of the Commonwealth against O. W. Dunham.

O. W. Dunham was indicted for selling goods in violation of the Act of April 17, 1846, P. L. 364, extended to Lycoming county by Act of April 13, 1854, P. L. 328. On the trial, before METZGER, P. J., the following special verdict was found:

"We, the jury, sworn in the above entitled cause, do hereby render the following special verdict, to wit:

"We find that the defendant, O. W. Dunham, offered and exposed to sale, either for cash or on the instalment plan, so-called, from door to door, in the borough of Jersey Shore, in said county of Lycoming, on or about the first day of October, A. D. 1894, certain goods, to wit, clothes wringers, bed springs, clocks, lace curtains, table spreads, albums, silverware, rugs and lamps. Of such goods so offered he sold silverware, to wit, one butter dish, half dozen table spoons and one cake basket; one bed spring, which said goods so sold were sold upon the instalment plan. That said O. W. Dunham offered the goods as aforesaid for sale, and sold goods as above set forth as an employé and agent of the American Wringer Company, a corporation formed and created under the laws of the State of Rhode Island. Their principal office is in the city of New York, State of New York. Their principal manufacturing works are in the cities of Auburn and Brooklyn, in the State of New York, and in Woonsocket, in State of Rhode Island, and the members and officers of said corporation are non-residents of the State of Pennsylvania. Of the goods so offered for sale and sold, the company manufactures bed springs and clothes wringers. The said company being large dealers in, though not manufacturers of the other goods offered for sale and sold as aforesaid. Which said goods the said company caused to be shipped from the State of New York to their agent, O. W. Dunham, in the State of Pennsylvania, and were sold as aforesaid, and offered for sale by the said O. W. Dunham, on account of the said American Wringer Company.

"That the said defendant had no interest in said goods, nor in the proceeds thereof, but was paid a salary for his services by the said company.

"That the said defendant neither sold or offered for sale any goods other than those of and belonging to the American Wringer Company aforesaid.

"That the said American Wringer Company has complied with the provisions of the Act of Assembly of Pennsylvania approved April 22, A. D. 1874, in reference to foreign corporations doing business in Pennsylvania, the object of said corporation being the manufacture and dealing in clothes wringers and other household articles.

"The defendant was arrested and indicted under the provisions of the Act of Assembly of Pennsylvania of April 17, 1846, P. L., sec. 1, page 364, and extended to Lycoming county by Act of Assembly, April 13, 1854, P. L., page 328.

"If the Court shall be of the opinion that the defendant is liable to the penalty of said Act, then a judgment of guilty to be entered against him; if not, then a judgment of not guilty shall be entered in his favor. In case a judgment of not guilty the county shall pay the costs. Counsel for the Commonwealth and for the defendant admit and stipulate in this case that the sales upon the instalment plan mentioned in this special verdict shall have all the force and effect in the determination of this case as absolute sales."

The Court, after argument, entered a judgment of guilty, METZGER, P. J., delivering an opinion, as follows:

"But it is contended that said Acts are in violation of the Federal Constitution and, therefore, void. The constitutionality of the Acts in controversy is no longer an open question in Pennsylvania. The very Act in controversy was passed upon by our Supreme Court in Commonwealth *v.* Gardner, 133 Pa. 284, and it was then ruled that said 'Act was a valid exercise of the police power of the State,' and that a sale from house to house by an agent of goods manufactured by a corporation chartered in another State where its manufactory is located and whose stockholders are non-residents of Pennsylvania, is not interstate commerce. The case now before us is much stronger against defendant, for he combined with the sale of goods manufac-

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tured in another State by his employers other goods not manufactured by them. There is nothing in the Act which deprives the defendant or his employers of a single privilege or immunity possessed by citizens of our own State. It only subjects the citizens of another State while in Pennsylvania to her police power to the same extent as her own citizens.

"The opinion of the learned Court in the above case, delivered by Justice WILLIAMS, is so conclusive that we could not possibly add anything to make the matter more plain. Defendant's counsel, in answer to the decision, contend that the Supreme Court of the United States has since decided otherwise. After examining the cases cited by counsel, we are of opinion that none of the Federal Supreme Court decisions rule this case. Probably the strongest deliverance on the subject is to be found in the opinion of the Court in the case of Brennan *v.* The City of Titusville, 153 U. S. 289. But an examination of that case convinces us that it does not apply to the facts in this case. The goods in that case were shipped directly to the party to whom sale had been previously made by an agent, and it was held that the requirement of a license in such case was the imposition of a tax upon goods manufactured in another State and it was really taxing interstate commerce.

"In the case at bar no license is required, no tax is imposed or demanded, and no discrimination between citizens of this and any other State is made. The Act prohibits hawking and peddling because the experience of our citizens is, as expressed by the Legislature, and interpreted by our Courts of last resort, that hawking and peddling give rise to fraud and imposition. There is no attempt to impose any burden upon our interstate commerce, as in the case of the City of Titusville *v.* Brennan, supra. The Court in that case recognized the rights of the State to make police regulations which may affect interstate commerce, provided there is no direct burden imposed upon such commerce.

"Since the delivery of the opinion of the Supreme Court referred to, the question of peddling has again been before our Supreme Court in the case of Commonwealth *v.* Harmel, 166 Pa. 89, and although that was under a different Act from the one we are considering, yet a careful examination of the opinion of the Supreme Court in that case convinces us that none of the Acts in controversy affect interstate commerce. That even a license fee may be imposed and collected by the State, from hawkers and peddlers, provided the Act of Assembly is directed against the business of peddling by whomever undertaken.

"'That while goods may be sent into the State in manufacturers' packages and sold in the same packages, under the authority of the interestate commerce clause, yet once in this State and the package opened by the consignee, the disposition of the separate articles at retail is infra-state traffic, and subject to the police regulations that experience may show to be necessary for the protection of citizens in the comfort of their homes and the enjoyment of their property.' In view of the recent decisions of our Supreme Court it is unnecessary to consider the authorities cited, showing the rulings of some of our Courts of Quarter Sessions, especially when such rulings were made prior to the rulings of our Supreme Court to which we have referred. We are, therefore, of opinion that the defendant is liable to the penalty of said Act."

The defendant was accordingly sentenced to pay a fine of $50 and costs of the prosecution. An appeal was allowed to the Supreme Court, which Court remitted the case to the Superior Court, which affirmed the judgment of the Quarter Sessions. This appeal was then taken.

John G. Reading, (*Allen* with him), for appellant.

The Act of 1846 violates the first section of the first article of the Constitution of 1874, which reaffirms the bill of rights of 1838 securing to all the rights "of enjoying and defending life and liberty; of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." Peddling has been recognized as a harmless pursuit, as is shown by the numerous Acts authorizing and regulating it. The Act of 1846 is a positive prohibition of peddling in certain counties only. Any laws which limit one in his choice of a trade or profession or confine him to work in a specified locality are infringements of his liberty.

In re Jacobs, 98 N. Y. 98.
Butchers' Union Co. *v.* Crescent City Co., 111 U. S. 746.
Slaughter House Cases, 16 Wall. 113.

The Act is not a legitimate exercise of the police power. The police power may regulate, but cannot prohibit a lawful business.

Stockton Laundry Case, 26 Fed. Rep. 611.

But the Act of 1854 is more objectionable than that of 1846, and contains a proviso: "That the manufacture of tin and copper ware, hats and confectioneries shall not be embraced within the provisions of this Act."

This must refer to the peddling of such articles or it is absurd. The Act of 1854, therefore, is not an Act directed at the business of hawking and peddling, but is aimed only at certain commodities. It is, therefore, an attempt to regulate trade.

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Sayre Borough v. Phillips, 148 Pa. 482.

The Act of April 8, 1867, P. L. 50, allowing honorably discharged soldiers, residents of this State, to peddle, is a repeal pro tanto of the Act of 1854. The law, therefore, at the time appellant was convicted discriminated against all non-residents and against residents not belonging to a special class. Such an illegal regulation of trade cannot shelter itself behind the "police power."

The Act of June 9, 1891, re-enacts the provisions of the Act of 1867, and extends the same to sailors and marines.

The case of Com'th *v.* Gardner, 133 Pa. 284, was decided upon the Act of 1846, which contained no proviso or exception, and hence does not rule this case, which arises under an Act which clearly discriminates between different kinds of commodities, and as modified by the Acts of 1867 and 1891, between the persons who are engaged in the same pursuit.

The principles of Brennan *v.* City of Titusville, 153 U. S. 289, govern this case.

N. M. Edwards, district attorney, (with him *John J. Reardon* and *W. R. Peoples*), for appellee.

The matter is res adjudicata.

Com'th v. Gardner, 133 Pa. 284.
Com'th v. Harmel, 166 Id. 89.

The principles laid down by the Supreme Court of the United States are in harmony with those laid down by this Court.

Mugler v. Kansas, 123 U. S. 623.
Powell v. Com'th, 127 Id. 678.

April 27, 1899. McCollum, J. The defendant was indicted and tried in the Court of Quarter Session of Lycoming county, for a violation of an Act of Assembly approved April 17, 1846, and extended to said county by the Act of April 13, 1854. In the special verdict rendered by the jury it appeared that he had exhibited and offered for sale, from door to door, in the borough of Jersey Shore, in the county of Lycoming, for cash, or on the instalment plan, certain goods, to wit, clothes wringers, bed springs, clocks, lace curtains, table spreads, albums, silverware, rugs and lamps; and that of the goods so offered, he sold on the instalment plan, silverware, to wit, one butter-dish, half dozen table spoons, and one cake basket; he also sold on the same plan one bed spring. The facts found by the jury were held to be sufficient to constitute peddling, within the provisions of the Act of 1846, supra; a judgment of guilty was thereupon entered against the defendant and he was sentenced to pay a fine of fifty dollars and costs of prosecution. Being dissatisfied with the result of the trial in the Court of Quarter Sessions he applied for and was allowed an appeal to the Supreme Court, in which, upon due consideration, an order was made remitting the case to the Superior Court for hearing and decision. The case, having been fully argued in and duly considered by the Superior Court, resulted in an affirmance of the judgment entered by the trial Court. It is now before us on appeal from the judgment of the Superior Court.

The defence to the suit in the Court of Quarter Sessions and in the Superior Court, was that the Acts of Assembly referred to are in conflict with the Constitution of the United States and the Constitution of this Commonwealth, and are therefore illegal and void. It is the only defence made in said Courts, or on this appeal, and is an admission that if the constitutionality of the Acts is sustained the judgment cannot be successfully assailed.

It must be conceded that if the legislation which prohibits, or restricts, hawking and peddling, within the counties to which it relates, is a proper exercise of the police power of the State, it is not in conflict with any provision of the Federal Constitution. Such legislation was held in Commonwealth *v.* Gardner, 133 Pa. 284, to be a valid exercise of the police power of the State, and not an invasion of the exclusive right of Congress to regulate interstate commerce. In Commonwealth *v.* Harmel, 166 Pa. 89, it was held that the Act of February 6, 1830, forbidding the peddling of clocks without a license was not an interference with interstate commerce or a violation of the Constitution of the United States. In the opinion filed in the case last cited, the late Justice Williams, referred to the legislation above mentioned and said: "This Court has uniformly asserted the validity of such legislation as a reasonable and proper exercise of the police power." In the opinion of Judge Metzger, who presided in the Court of Quarter Sessions on the trial of the case at bar, and in the opinion of Judge Willard of the Superior Court, the case of Brennan *v.* The City of Titusville, 153 U. S. 289, was distinguished from the cases to which reference has been made. As they are clear and satisfactory, we need not add anything to them.

The proviso in the Act of April 13, 1854, relates to the manufacture of certain articles specified in it, not one of which was sold, or exposed to sale, by the defendant. It does not expressly or impliedly authorize the peddling of the articles specified therein, in violation of the Act of April 17, 1846. This is the view taken of it by the Superior Court, as appears in Judge Willard's opinion filed in the case.

Judgment affirmed.

H. B.

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Superior Court.

Feb. '99, 21. Superior Court. February 16, 1899.

Morrison & Co. v. Baker.

Confessed judgment—Execution—Irregularity of, waived.

The issue of execution upon a judgment entered by confession, one day too soon, is a mere irregularity which may be waived by the defendant either by actual agreement or by acquiescence, and where defendant makes no objection to such issue for a considerable time (in this case thirty days) and then only after he has confessed judgment and authorized execution against himself in favor of two other persons, the Court may well refuse to set aside the execution.

Roemer *v.* Denig, 18 Pa. 482, followed.

Appeal of Frank S. Baker, defendant, from the judgment of the Common Pleas of McKean County, in the matter of a judgment confessed by defendant to Morrison & Company, plaintiffs.

On November 4, 1898, Frank S. Baker gave a judgment note payable one day after date to Morrison & Company. Judgment was entered on November 5, and on the same day execution was issued, returnable December 12. A levy was made November 10. Baker confessed two other judgments, and on December 10 obtained a rule to set aside the execution on plaintiffs' judgment. After hearing the Court discharged the rule and the defendant took this appeal.

The only assignment of error is the refusal of the Court to set aside the execution.

J. W. Bouton, (*F. D. Gallup* with him), for appellant.

The execution was prematurely issued.

The defendant is not estopped from setting up that fact.

Silence cannot operate as an estoppel unless the other party has been misled thereby.

Sensinger *v.* Boyer, 153 Pa. 628.
McKnight *v.* Bell, 135 Id. 358.
Railroad Co. *v.* Gazzam, 32 Id. 340.

E. R. Mayo, (*G. B. Mayo* with him), for appellee, cited—

Bredin *v.* Dubarry, 14 S. & R. 27.
Kelsey *v.* Nat. Bank, 69 Pa. 426.
Roemer *v.* Denig, 18 Id. 482.
Shaffer *v.* Watkins, 7 W. & S. 219.
Springer *v.* Brown, 9 Pa. 305.

March 23, 1899. BEEBER, J. On November 4, 1898, the defendant executed and delivered to the plaintiffs his judgment note with warrant of attorney due in one day after date. In the afternoon of the following day, November 5, the plaintiffs entered judgment upon this note and issued execution of which the defendant had notice on November 8. The actual levy was made on November 10. All the property levied upon, except two hogs, was claimed by the defendant's wife or by another person. On December 10, after he had confessed two judgments and authorized execution to issue against him—one in favor of his wife and the other in favor of another person as trustee—defendant filed a petition for a rule to show cause why the execution in plaintiffs' case should not be set aside on the ground that it had been issued one day too soon. The Court below having discharged this rule this appeal was taken.

It must be conceded that the execution did issue one day too soon, but this is a mere irregularity which can be waived by the defendant, either by actual agreement or by acquiescence. In this case defendant made no objection for thirty days and even then only objected after he had confessed judgments and authorized executions against himself in favor of two other persons, one of whom had already claimed part of the goods already levied upon by the first writ as the property of defendant. It is not pretended that he himself has suffered any injury. It is simply a contest between creditors, two of whom defendant seeks to favor to the prejudice of the other. We do not think he should be aided in this effort after he has acquiesced or remained silent thirty days after the first execution was issued. He is trying to do the same thing that was tried in Roemer *v.* Denig, 18 Pa. 482. It is true in this latter case the defendant had executed a paper, after the lien of a second execution had attached, in which he said that the first execution, issued too soon, had been issued with his knowledge and consent, but on the same day he filed another paper in which he asked that the first execution be set aside for irregularity. It was upon such a state of facts that the Supreme Court said: "On such a sharp point of practice as the one involved in this case, any acquiescence of the defendant, after notice that the writ had issued a day too soon, would conclude him. But after his own written acknowledgment that it was issued according to the agreement, to permit him to violate that agreement would be a mockery of justice." In the case under consideration, whilst we have no formal acknowledgment of an agreement that the writ should issue one day too soon, we have an acquiescence for more than thirty days after he knew it had issued, which we think sufficient to justify the discharge of his rule to set it aside.

Judgment affirmed.

W. C. S.

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WEEKLY NOTES OF CASES.

VOL. XLIV.] *FRIDAY, MAY 19, 1899.* [No. 7.

Supreme Court.

Jan. '98, 302. Supreme Court. January 19, 1899.

Rodebaugh v. Traction Company.

Limitation of action—Act June 24, 1895, P. L. 236—Personal injuries.

Sec. 1 of the Act of June 24, 1895, does not bestow a new right of action, it merely sustains the plaintiff's right after the death of the defendant, and the words of the Act are general and there is nothing to indicate that they were not intended to establish a general rule, applicable to all cases within their terms, to wit: "every suit to recover damages for injury wrongfully done to the person."

The second section of the Act merely limits the time within which such actions must be brought. Neither the subject nor the title of the Act can itself constitutionally be attacked. It has but one subject, creates no new right, but provides for the regulation of a class of rights which existed before, and the title is, grammatically as well as to the general intent, neither inadequate nor misleading.

A plaintiff in an action brought two years after the passage of the Act for injuries received before the Act was passed cannot complain of interference by the Act with his vested right. If the right of action had been cut off by the retroactive feature of the statute without a reasonable period for its enforcement, so that under the form of regulation there was really a deprivation of the right, a different question would be presented.

Appeal of Levi Rodebaugh, from the judgment of the Common Pleas No. 1, of Philadelphia County, in an action of trespass wherein the Philadelphia Traction Company was defendant.

On the trial of this cause, before BIDDLE, P. J., the plaintiff showed the following case: The plaintiff, a driver of a "jigger" car on the Ellsworth and Christian streets branch of defendant's lines in Philadelphia, was injured by being pulled over the dasher of the car on the evening of January 12, 1895, by the stumbling of the horses on a loosened or worn plank at the crossing of Seventh street and Washington avenue.

This action was brought on February 16, 1898.

The plaintiff having rested, the Court, BIDDLE, P. J., entered a non-suit on the ground that the action came within the provisions of the second section of the Act of June 24, 1895, P. L. 236, requiring all actions for personal injuries to be brought within two years.

A rule to take off the non-suit was discharged. The plaintiff took this appeal, assigning as error the refusal to take off the non-suit.

D. Webster Dougherty, for appellant.

If the second section of the Act is read in connection with the first section and with the title, it may be held to be constitutional so far as it regulates the time in which actions created or continued by the Act shall be brought. If the word *such* used in the title be read into the second section after the first word "every," the section would mean what obviously was the intention of the framers of the Act that every such action must be brought within two years and not afterwards.

It is a familiar principle of the law that implied repeals of statutes are not favored, and that if two statutes can stand together the subsequent does not abrogate the prior.

Erie v. Bootz, 72 Pa. 196.

The title of the Act is as follows:

"An Act providing that the right of action for injury wrongfully done to the person shall survive against the personal representative of the wrongdoer, and limiting the time within which suit for such injury must be brought."

If it had been the intention of the Legislature that this section should apply to all actions of trespass for personal injury, those which arose under the common law as well as those created by statute, it would have added a proviso that so much of the Act of March 27, 1713, providing a time in which action shall be brought, etc., as is inconsistent with this Act, is hereby repealed.

Every new statute should be construed in connection with those already existing in relation to the same subject matter, and all should be made to harmonize and stand together, if that can be done by any fair and reasonable interpretation, and if the new Act does not expressly declare the repeal of an earlier statute, it will not be considered as effecting such repeal unless there is such a repugnancy or conflict between the provisions of the Acts as to show that they could not have been designed to remain equally in force.

Black on Interpretation of Laws, p. 112.

While it may be difficult to formulate a rule by which to determine the extent to which the title of an Act must specialize its object, it may be safely assumed that the title must not only embrace the subject of proposed legislation, but also express the same so clearly and fully as to give notice of the legislative purpose to those who may be specially interested therein.

Road in Phœnixville, 109 Pa. 44.
Ridge Ave. R. W. Co. v. Phila., 124 Id. 223.
Phila. v. Railway Co., 142 Id. 491.

The Legislature has no power to deprive appellant of a right which had vested in him and to

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which he was entitled at the time of the passage of the Act. At the time the action in this case occurred, to wit, in January, 1895, the plaintiff had six years within which to bring his action.

Act of March 27, 1713.

It was a vested right which the Legislature had no more power to deprive the appellant of than it has to impair the obligation of a contract.

A vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. When it springs from contract or from the principles of the common law, it is not competent for the Legislature to take it away.

Cooley on Constitutional Limitations, 361.
Penrose v. Erie Canal Co., 56 Pa. 46.
McCabe v. Emerson, 18 Id. 111.

Thomas Leaming, for appellee, was not heard.

March 20, 1899. MITCHELL, J. The plaintiff declared for injury received from negligence of defendant on January 12, 1895, but did not bring suit until February 16, 1898. The Court below non-suited him as barred by the Act of June 24, 1895, P. L. 236. This appeal raises two questions, first, the construction of the Act, second, its constitutionality.

First, it is argued that the Act does not apply to the present case. Section first enacts "that any right of action which may hereafter come into being by reason of injury wrongfully done to the person of another shall survive the death of the wrongdoer, and may be enforced," etc., and second section that, "Every suit hereafter brought to recover damages for injury wrongfully done to the person, in case where the injury does not result in death, must be brought within two years from the time when the injury was done and not afterward; in cases where the injury does result in death the limitation of action shall remain as now established by law." It is argued that the Act creates a new right, to wit, of action against wrongdoers who die either before or pending suit, and that the limitation in the second section applies only to such actions as are given by the first and not to those like the present which are under the common law, between parties living. It is further said that as there is no clause repealing the prior statute of limitation, the several Acts must be so construed as to stand together, citing the authorities on the construction of statutes. There is no dispute about this principle. It is not, however, a mandatory rule, but a principle of construction in aid of discovery of the legislative intent. The Legislature expresses its will in any form, affirmative or negative that it pleases, so long as it does not transgress constitutional prohibitions. It is under no obligation in changing the law to use words of express repeal of any previous statute. It is frequently convenient that it should do so to aid the Courts in reaching its true intention, but it is never obligatory. Nor is there any duty on the Courts to so construe a new statute that it shall not affect a prior one on the same subject. It is always a question of the legislative intent. The presumption of course is that the statute expresses the full intent, and when therefore it is sought to extend the provisions beyond what their words express, the extension must appear by strong if not by necessary implication to be within the actual intent. It is in aid of the discovery of such intent that the principle is applied, that a merely affirmative statute shall not be held to repeal a previous one, if by fair and reasonable construction, both can stand consistently together. Where, however, the intent of the latter Act is clear no repugnancy to a prior one will authorize a construction against such intent.

Turning to the Act of 1895, it is an error to say that the first section gave any new right. The words are "any right of action which may hereafter come into being by reason of injury wrongfully done to the person of another." No declaration or definition of any new right is made, for the subject of the section is the previously existing right of action for wrongful injury to the person. And the enactment in regard to the subject is that such rights shall not hereafter be lost by the death of the wrongdoer. By the common law the right of action and the action itself if pending terminated with the death of either party. This Act made a change in favor of the plaintiff or party injured, analogous to an extension of the period of limitation. Under the previous law there were two bars to his action, the expiration of the statutory period of limitation, or the death of the wrongdoer whichever occurred first. This section relieves the plaintiff from the latter bar to the enforcement of his previous right. It has no other effect. The second section provides a new period of limitation. The words are "every suit hereafter brought to recover damages, for injury wrongfully done to the person, in case where the injury does not result in death, must be brought within two years from the time when the injury was done, and not afterward." The words are general, their meaning is plain, and there is nothing in them or in their context to require a different construction. The meaning of an Act is to be gathered primarily from its language, and where that is clear there is no occasion to go beyond it. The rule actio personalis moritur cum persona was changed by

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the Act of April 15, 1851, P. L. 674 as to the death of the party injured and by the Act of April 26, 1855, P. L. 309, the parties who may bring suit in such case are defined, and the time within which it may be brought limited. The Act of 1895 did away with what was left of the common law rule, in actions for personal injuries by providing that the action should not abate, or the right be lost by the death of the wrongdoer, but by way of equalizing this advantage to the plaintiff, required all such actions to be brought within two years from the injury, unless death resulted in which case the limitation was left as under the Act of 1855, to one year from the death. The result of the legislation is that before the Act of 1895 the party injured could bring his suit at any time within six years from the injury, but if he died before suit began his relatives must sue within one year from his death, and in either case his action or the right of his relatives to sue would terminate immediately on the death of the wrongdoer. Since the Act of 1895 the death of the wrongdoer does not terminate the action or the right thereof, but the latter right must be availed of within two years of the injury. As already said the words of the Act of 1895 are general, and there is nothing to indicate that they were not intended to establish a general rule, applicable to all cases within their terms, to wit, "every suit to recover damages for injury wrongfully done to the person."

Secondly, the constitutionality of the Act is attacked on two grounds, first, that it has two subjects the creation of a new right of action, and the limitation of actions on other rights than the one thus created, and secondly, that the second section if construed as making a general limitation, is not clearly expressed in the title. The first ground has already been substantially discussed in considering the proper construction of the language. The Act has but one subject, actions for injuries wrongfully done to the person. It creates no new right but provides for the regulation of a class of rights which existed before. Both sections are germane to that subject and operate in the nature of a statute of limitations, enlarging the period in which the action may be brought or maintained in one respect, and limiting it in another.

Nor is the title open to the objection made. It is "An Act providing that the right of action for injury wrongfully done to the person shall survive against the personal representative of the wrongdoer and limiting the time within which suit for such injury must be brought." The subject of the first member of this sentence, as already said, is the right of action for injury wrongfully done to the person. That is the whole of the subject, and the enactment with regard to it is that it shall survive the death of the wrongdoer. The "suit for such injury" of which the second member of the sentence indicates the limitation, necessarily means the same thing, suit for injury wrongfully done to the person. Grammatically as well as to the general intent it must refer to the subject to be legislated upon and not to the enactment intended to be made in regard to it. There is nothing in the title of the Act either inadequate or misleading.

It is further urged that the Act is unconstitutional at least as applied to the present action because it interferes with a vested right which plaintiff had immediately upon the injury, and before the passage of the Act. But this act, in regard to the present suit is clearly a regulation of the remedy which is firmly settled to be within the power of the Legislature. If the right of action had been cut off by the retroactive feature of the statute, without a reasonable period for its enforcement so that under the form of regulation there was really a deprivation of the right as would have been the case in Byers *v.* Penn. R. R. Co., 18 Co. Ct. 187, cited by appellant, a different question would have been presented. But in this case the suit was not brought for more than the full period of two years after the passage of the Act.

Judgment affirmed.

W. D. N.

Jan. '98, 364. Supreme Court. January 19, 1899.

Peterson v. Delaware River Ferry Company.

Limitation of action—Minor—Act June 24, 1895, P. L. 236.

Under the second section of the Act of June 24, 1895, a suit brought February 4, 1898, for injuries inflicted May 17, 1892, is too late.

A saving from the operation of a statute for disability must be expressed or it does not exist, hence, as the Act is general in its term an infant is bound by the provisions of the statute.

The fact that suit was brought, but not prosecuted, for the same cause of action against another party within the time prescribed by the statute, cannot avail.

Appeal of Annie C. Peterson, by her next friend and father Andrew Peterson, from the judgment of the Court of Common Pleas No. 1, of Philadelphia County, in an action of trespass wherein the Delaware River Ferry Company was defendant.

On the trial, before BIDDLE, P. J., the plaintiff presented the following case: The plaintiff was on May 17, 1892, twelve years of age. On that

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day she received an injury by an effort on the part of the employés of the Delaware River Ferry Company to help her on a ferry boat after the same had been detached from and was leaving the slip. She fell upon the deck and fractured her ankle. It appeared that within two years after the accident an action had been brought on her behalf against the Atlantic Railroad Company, which action was not proceeded with.

On the authority of the second section of the Act of June 24, 1895, the Court entered a nonsuit and discharged a rule to take the same off. The plaintiff took this appeal.

J. A. Culbert, (with him *G. A. Drovin* and *J. B. Rutherford*), for appellant.

The second section of the Act of June 24, 1895, P. L. 236, cannot be construed to apply to any cases other than those cases arising under the first section and much less to the present case which involves disability.

There is no clause in the Act in question repealing prior Acts and the law is that legislation shall be construed, if possible, in such a manner that all acts not expressly repealed shall remain in force, and thus the entire will of the legislature be effected.

1 Blackstone's Commentaries, 89.
Black on Interpretation of Laws, 112.
Erie *v.* Bootz, 72 Pa. 196.
Com'th *v.* Fry, 183 Id. 32.
Beals *v.* Hale, 4 Howard 37.
Mayor, etc., *v.* Magruder, 34 Md. 381.

Cases distinguished.

Warfield *v.* Fox, 53 Pa. 382.
Hunt *v.* Wall, 75 Id. 413.
Cochran *v.* Young, 104 Id. 333.
Broe *v.* Boyle, 108 Id. 76.
Williams *v.* Ivory, 173 Id. 536.

The Act of June 24, 1895, P. L. 236, gives a right where before there was none, and the obvious intention of the Legislature was to limit the time within which such new right could be exercised by suit.

Act of April 26, 1855, P. L. 309.
Stuart's Appeal, 168 Pa. 210.
Legislative Record, 1895, p. 964.

If the Act of June 24, 1895, P. L. 236, is not construed in the manner contended for by the appellant then the Act is unconstitutional.

The Act has two subjects and thus offends Article III., section 3, of the Constitution of Pennsylvania.

Com'th *v.* Jones, 4 Pa. Super. Ct. 368.

First. The creation of a new right thus altering the subtantive law.

Pollock on Torts, 5th English Edition (1897) p. 57.
Act of April 26, 1855, P. L. 309.

Second. The limitation of actions on rights other than the new right created, thus altering the general remedial law.

Union Passenger Railway Co.'s Appeal, 81* Pa. 91.
Phila. *v.* Market Co., 161 Id. 522.
Evans *v.* Willistown Twp., 168 Id. 578.

Thomas Hart, Jr., (*Gavin W. Hart* with him), for appellee.

Both the Act and the title are, it is submitted, abundantly clear. There is no room to doubt what they mean.

The title contains two clauses, the first relating to the right of action for "injury wrongfully done to the person," the second to "such injury."

The first section provides for the survival in case of death of the wrongdoer, of any right of action coming into being after the passage of the Act by reason of injury wrongfully done to the person of another.

The second section, that which is involved in the present case, refers to "every suit hereafter brought to recover damages for injury wrongfully done to the person, in case where the injury does not result in death."

The plaintiff is not saved from the bar of the Act of reason of the fact that she was a minor in 1892 when the cause of action arose, and that she is still a minor.

A saving from the operation of statutes for disabilities must be expressed or it does not exist. A law general in its nature binds minors and femmes covert.

Warfield *v.* Fox, 53 Pa. 382.
Cochran *v.* Young, 104 Id. 333.
Broe *v.* Boyle, 108 Id. 76.
Way *v.* Hooton, 156 Id. 8.
Williams *v.* Ivory, 173 Id. 536.
Lehigh Co. *v.* Meyer, 102 Id. 479.

March 20, 1899. MITCHELL, J. The plaintiff brought suit February 4, 1898, for injuries from the alleged negligence of defendant's employés on May 17, 1892, and was non-suited on the ground that her action was too late. The case raises the same questions as to the construction and constitutionality of the Act of June 24, 1895, P. L. 236, as those which have been discussed and decided in Rodebaugh *v.* Phila. Traction Co., opinion filed herewith. It is not necessary to do more than refer to that opinion [page 105].

The only additional points in the present case are that the plaintiff was at the time of the injury and still is a minor, and that a suit was brought in her behalf, within the statutory period against the Atlantic Railroad Company, which is alleged to be operating "to a certain extent" the boats of the present defendant.

The Act of 1895 as held in the case referred to, is a general Act in the nature of a statute of lim-

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itations. Its terms are general, and make no exceptions in favor of persons under disability. The settled rule is that infants as well as all others are bound by the provisions of such statutes. "A saving from the operation of statutes for disabilities must be expressed or it does not exist": Warfield *v.* Fox, 53 Pa. 382. "There is no limitation in the Act which excludes persons under disabilities. 'Any person' means every person. If persons who are minors should be excluded by reason of their disability to make contracts they would be deprived of the benefit of the Act, and that would be a hardship to which they ought not to be subject without express words of exclusion": Williams *v.* Ivory, 173 Pa. 536. It was accordingly held in this latter case that as the Act of 1842 made no distinction of persons in providing for discharge from arrest for fraudulent indebtedness, on making a general assignment for the benefit of creditors therefore a deed of assignment for such purpose was valid notwithstanding the general disability of the grantor by reason of infancy. It would be difficult to find a stronger illustration of the force of general statutes with regard to persons under disability.

The second point has no basis. A prior suit against another party cannot help this one. If the right party was there sued the issue should be fought out there, and if the wrong party was sued there the right one cannot be brought in by amendment, still less can he be sued by a new writ and deprived of the benefit of the statute of limitations by making it relate back to a former writ to which he was not a party. The present suit must stand or fall on its own merits, and not only was there no evidence of the identity of the defendant and the Atlantic Railroad Company as to liability to the plaintiff, but such evidence even if it had been given would have been of no avail.

Judgment affirmed.

W. D. N.

Superior Court.

Oct. '98, 18. Superior Court. December 12, 1898.

Hine's Estate.
Hine's Appeal.

Marriage—Proof of—Reputation—Widow's exemption.

Reputation and cohabitation are not marriage, but they are facts from which marriage is presumed. Where the facts, coupled with the repeated declarations of the parties, and their actions, which were equivalent thereto, have the additional effect of corroborating testimony as to the contract of marriage and of showing the sense in which words were used, that they intended a present marriage, the interpretation is within the principle of Richard *v.* Brehm, 73 Pa. 140, and Comly's Estate, 185 Pa. 208, and a Court is justified in finding that a marriage has taken place.

Appeal of Elizabeth R. Hines, from the decree of the Orphans' Court of Philadelphia County, dismissing her exceptions.

Laura Hines filed her petition for the allowance of $300, widow's exemption, from the estate of Louis B. Hines, deceased. Exceptions were filed by Elizabeth R. Hines, the mother of decedent, setting up that the petitioner was not the wife of the deceased.

The facts of this case developed by the testimony before the examiner are set forth in the opinion of the Court, ASHMAN, J., granting the petition for exemption, as follows:

"The petitioner, at the age of sixteen, made the acquaintance of the decedent while working along with him in his father's factory. He visited her at the houses where she successively boarded, and during a period of about a year took her at intervals to places of amusement. At the end of that time, in April, 1892, he rented a house and opened a cigar store, and two weeks afterwards his relations with the petitioner as her ostensible husband began, and continued uninterruptedly to the day of his death, in December, 1896. The petitioner was the only witness who swore to a contract of marriage. She said that after repeated requests from him to marry, which she had declined, she consented to keep house for him, upon his statement that his mother would reside with them. Upon going to the house, he asked her if she would stay and become his wife, and she refused because the mother was not there. He then said: 'I will take you for my wife,' and asked if she was satisfied, to which she replied 'yes.' He added that he would have a ceremony performed, but had no money at that time, and, to use his words as quoted by the witness, 'no minister could make us any happier than what we would be by what he said to me.' These words of contract, even though they were not in the present tense, if they were immediately followed as they were by the living together of the parties, constituted a valid marriage: Richard *v.* Brehm, 73 Pa. 140. In the course of a year a child was born, and was reared by the decedent as his own. He introduced the petitioner as his wife to friends and neighbors, and the neighborhood recognized the relation. His mother brought presents to the child, and when, shortly before his death, he removed to another part of the city, she came to live with him. When very ill and within a few days of his end, he

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spoke to his mother of his marriage to the petitioner. At his funeral the petitioner rode in the leading carriage with his brother, and when a subsequent visit was made to the cemetery, she was accompanied by his mother. At the mother's instance, she formally renounced her right to administer the decedent's estate.

"These facts were conclusive proof of a valid marriage. They were sought to be overcome by counter-declarations of the parties and by proofs of a prior existing marriage of the petitioner to one Weber. The alleged first husband denied the charge in toto. He had married another woman after the time of his alleged marriage to the petitioner, and the charge therefore, if true, would be as fatal to that union as to the present. It is enough to say that it was unsupported. The decedent, however, it was sworn, declared to his brother and to another witness that the petitioner was simply his housekeeper, and that the child was Weber's. But a man cannot rid himself of a marriage otherwise proven by asserting that it never took place. The declarations of the petitioner were more serious. According to the mother's story, the petitioner, when kneeling by the body of the decedent, turned to her and said: 'I am not his wife; we were not married, but I lived with him as his wife.' When confronted with this, the petitioner declared that what she said was that no marriage ceremony had been performed, but that she was Louis's wife. A witness who was an intimate friend of the decedent, to whom the petitioner conveyed the news of the death, corroborated this version. In speaking to him of the incidents connected with the last sickness, she remarked: 'You know Lou and I were never married by a minister, and we lived together by mutual agreement.'

"As an addendum to the theory of a prior marriage, a strenuous effort was made to show that improper relations existed between the decedent and the petitioner before they actually lived together. The answer to all that was offered on this subject is, that when the decedent was lying ill at the house of his mother and wrote to the petitioner to visit him, his mother herself ushered the petitioner into her son's bedroom. The evidence showed that the parties lived entirely apart from each other; it did not show criminality in their conduct, and taking it at its worst, and assuming that it disclosed positive vice, it was not effective to overcome the presumption of innocence, with which, in the eye of the law, they afterwards entered upon a permanent home life. After errors worse than the witness narrated, the home which they established was still a locus penitentiæ. Their motive in making this move must be determined by their subsequent and not by their prior acts. Says a text-writer: 'The living together of marriageable parties a single day as married, they meaning marriage, and the law requiring only mutual consent, makes them husband and wife, for here are all the elements of a contract of present matrimony. And in the nature of this proposition, it cannot be varied by their antecedent conduct': 1 Bish. on M., D. & S., sec. 975.

"One other circumstance may be noted. The mother complained to her counsel that her son had deceived her by telling her that he had been married at some place in New Jersey by a formal ceremony. A marriage certificate, which the petitioner declared she had never seen, was found among the decedent's effects and was produced at the hearing, which set forth that Louis Hines and Laura Schaffer were married at Burlington, New Jersey, on October 16, 1896, by Jonas Geiger, D. D. This date was just after the decedent had agreed to sell out his business and while he was arranging to live with his mother, and it is not a far-fetched inference that he intended to use the paper, if an inquiry was started, in confirmation of his story.

"This is a brief compend of 900 pages of testimony, but it exhausts everything in the shape of evidence which was material to the issue. It is true that a mass of evidence was offered by way of what was called rebuttal, the purpose of which was to show that the house of the petitioner and the petitioner herself were held in bad repute. It threw scarcely a ray of light upon the question of her marriage, unless the theory can be accepted that no married man or married woman will keep a cigar store with a speak-easy attachment. The testimony, however, was interesting because it gave to the case the sprightliness of a variety show. The witnesses had evidently been selected with care, and they formed a procession whose members can only be described as mottled. They came from a quarter of the city, 70 per cent. of whose inhabitants, according to one witness, could not speak English; a circumstance which, in the light of this case, we do not regard as a misfortune for the foreigners, although it must have made the task of the witnesses who swore to the general reputation of the petitioner among those people very difficult. To say nothing of other peculiarities, the witnesses appear to have been engaged in occupations more or less diversified in character. One, for instance, had gone from the piano business into the coal trade, and then, to use his own words, 'was associated with a gentleman who prescribed medicine;' and we dislike to add what he candidly admitted, 'I may have written some prescriptions on my own account.' Another, after serving in some capacity

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for the board of health, by a happy transition, glided into a soap factory. These gentlemen had different standards by which they judged the reputation of the petitioner, but they all agreed upon one point, that when she waved her hand to a car conductor who was an acquaintance and customer of her husband, she hopelessly overstepped the line of decorum which protects her sex. We do not think it essential to give the other facts which the witnesses detailed to support their belief in the petitioner's depravity. Whatever may have been the extent of her sinfulness, it was fully matched by that of her husband; and this congeniality of temperament and conduct, so far from disproving a marriage, was, in our judgment, the best possible reason why two souls so harmoniously attuned should have joined themselves in wedlock.

"The petition for widow's exemption is granted."

Elizabeth R. Hines took this appeal.

The errors assigned on appeal were, among others, that, the Court below erred in dismissing, and not sustaining, appellant's first exception, as follows: 'That the said Laura Schaffer, calling herself Laura Hines, in said petition, is not the widow of the late Louis B. Hines, as alleged in said petition, and she denies that the said Laura Schaffer, calling herself Laura Hines, is the lawful widow of decedent, or that the relation of husband and wife ever existed between them during the lifetime of decedent.'

Horace M. Rumsey and *Alexander Simpson, Jr.*, for appellant.

The findings of fact by the lower Court are not conclusive.

The testimony in the case was taken by an examiner. The learned Judge who wrote the opinion in the lower Court did not see or hear the witnesses. The decree was entered upon the examiner's report of the testimony.

When the lower Court has based its findings of fact upon the written testimony adduced before it, without hearing or seeing the witnesses, the appellate Court, having equal advantage in arriving at the truth, will not be bound by said findings of fact, but will examine the testimony and determine the facts for itself.

Mirkil *v.* Morgan, 134 Pa. 144.
Middleton *v.* Middleton, 43 WEEKLY NOTES, 33.

The rule forbidding the disturbing of a finding of fact by the lower Court does not apply where the finding is not really one of fact but an inference drawn from the facts.

Beale *v.* Kline, 41 WEEKLY NOTES, 265; 183 Pa. 149; 186 Pa. 381.

It was proven that the relations of appellee and decedent were illicit from the beginning of their acquaintanceship in 1890.

How diligently appellee must have studied Comly's Estate, the decision of the lower Court being then reported in 6 Dist. Rep. 120 (1897). The decision of the Supreme Court, subsequently published, will be found in 185 Pa. 208 (1898).

Appellee repeats, as her own, its identical language as to the minister not being necessary.

Is it likely that a young man and a young woman, each seventeen years of age, would have known sufficient of the law as to know what constituted a legal contract of marriage?

The question of her credibility must determine whether the story she tells can be seriously received.

There is not a line of evidence that decedent gave her a ring and in the absence of such testimony, it may be fairly presumed, he did not give her a ring. The case is rare, indeed, when such an omission is made and especially among the class to which these parties belong. There is a superstition as to it and its use in making the marriage compact. Its absence is a serious matter.

The controlling question in this case is not whether there might or ought to have been a marriage, but whether, in fact, there was a marriage. The alleged marriage contract is founded upon the story of a prostitute, without a line of direct substantial proof to support it, and in the face of continued prostitution during the whole period of the marriage. The statement of facts and application of law by Judge BIDDLE, in his charge in Brinckle *v.* Brinckle, 34 Leg. Int. 428, is a forcible presentation of the case.

Assuming the words spoken to be true, it is contended:

(*a*) That the words spoken did not constitute a valid contract.

(*b*) That if they were sufficient in the law, because followed by cohabitation, yet illicit intercourse having preceded, they did not establish a valid marriage.

Hantz *v.* Sealy, 6 Binn. 408.
Comm. *v.* Stump, 53 Pa. 136.
Tholey's Appeal, 93 Id. 36.
Green's Estate, 45 Leg. Int. 174.
Richard *v.* Brehm, 73 Pa. 140.
Comly's Estate, 185 Id. 208.

It is also contended that unless the alleged contract can be positively sworn to, as to time, place and words, it is not worthy of belief.

Comm. *v.* Stump, supra.
Barnum *v.* Barnum, 42 Md. 295.
Walls's Appeal, 111 Pa. 471.

It is not enough that the oath of the plaintiff stands uncontradicted by circumstances—it must be corroborated by circumstances.

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Smith *v.* Ewing, 151 Pa. 256.
Bailie *v.* Bailie, 166 Id. 472.
Comm. *v.* Cronin, 13 WEEKLY NOTES, 76.

It is true that marriage is regarded in this State as a civil contract provable by cohabitation, reputation, acknowledgment of the parties and any other circumstances from which it may be inferred.

Railroad Co. *v.* Hall, 61 Pa. 366.
Nathans's Case, 2 Brews. 149.
Physick's Estate, Id. 179.
Bicking's Appeal, Id. 202.

Cohabitation and reputation are necessary to ground a presumption of marriage. Proof of cohabitation alone is insufficient.

Comm. *v.* Stump, supra.

Cohabitation and reputation are not marriage. When conjoined, they are evidence from which a presumption of marriage arises. Partial reputation is not sufficient. It must be a general reputation and must come from the neighborhood and domicile of the parties.

Yardley's Estate, 75 Pa. 207.

Allen H. Gangewer, (*James B. McCarron* with him), for appellee.

The claim that the illicit origin of the relation can only be overcome by a subsequent actual marriage is not sustained by any of the authorities.

In Hunt's Appeal, 86 Pa. 294, cited by appellant in support of the above proposition, petitioner married a man and lived with him about two years before he became divorced. The husband survived the divorce only about two months. The origin of the relation was illicit, and two months' cohabitation could not make a presumption of marriage.

In Richard *v.* Brehm, 73 Pa. 140, the husband testified: "The marriage ceremony never was performed only by mutual consent; we lived as man and wife; I promised to marry her."

In Comly's Estate, 185 Pa. 208, ASHMAN, J., said in delivering the opinion of the Court below: "The contestants admit that if she had said to the decedent 'I take you,' she would have become his lawful wife. They aver that she said instead, 'I will be willing to take you,' and thereupon she actually took him at his word and be came a profligate. This is a narrow distinction on which to hang the character of a woman and the legitimacy of her children. Just the opposite rule, however, prevails. Where words in futuro in an agreement to marry are followed by cohabitation, the contract is executed and the marriage is valid."

2 Kent's Com., 87.
Dumaresly *v.* Fishly, 3 A. K. Marshall (Ky.) 368.
Richard *v.* Brehm, 73 Pa. 140.
Divoll *v.* Leadbetter, 4 Pick. 220.
Hunt's Appeal, supra.

April 17, 1899. RICE, P. J. This is an appeal from a decree allowing the petition of Laura Hines for the "widow's exemption." The question raised by the exceptions, all of which were overruled is, whether the petitioner and the decedent were married. The learned Judge of the Court below has concisely stated the circumstances under which these parties came together, and their ostensible relations thereafter up to the time of the death of Louis B. Hines as follows. He says: "The petitioner at the age of sixteen, made the acquaintance of the decedent while working along with him in his father's factory. He visited her at the houses where she successively boarded, and during a period of about a year took her at intervals to places of amusement. At the end of that time, in April, 1892, he rented a house and opened a cigar store, and two weeks afterwards his relations with the petitioner as her ostensible husband began, and continued uninterruptedly to the day of his death, in December, 1896. The petitioner was the only witness who swore to a contract of marriage. She said that after repeated requests from him to marry, which she had declined, she consented to keep house for him, upon his statement that his mother would reside with them. Upon going to the house, he asked her if she would stay and become his wife, and she refused because the mother was not there." He then said, (we now quote the testimony of the witness verbatim): "I will take you for my wife; and asked me if I was satisfied, and I said, 'yes,' and he said he would have a ceremony performed, but he did not have any money at the time; he was in bad circumstances at that time, and said he would have money later on. Q. Did he give any explanation that that would be all right? A. He asked me if it would suit me for the present time, and I said, 'yes.' Q. What did he say in reference to it? A. He said no minister could make us any happier than what we would be by what he said to me. Q. Did you finally consent? A. Yes, sir." She continued to live with him from that time. The opinion, which we take as the findings of the Court below upon the questions of fact, proceeds: "In the course of a year a child was born, and was reared by the decedent as his own. He introduced the petitioner as his wife to friends and neighbors, and the neighborhood recognized the relation. His mother brought presents to the child, and when, shortly before his death, he removed to another part of the city, she came to live with him. When very ill and within a few days of his end, he spoke to his mother of his marriage to the petitioner. At his funeral the petitioner rode in the leading carriage with his brother, and when a subsequent visit was made

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to the cemetery, she was accompanied by his mother. At the mother's instance, she formally renounced her right to administer the decedent's estate." From these facts the Court found that there was a marriage. As the assignments of error are to this general conclusion and not to the specific findings of fact upon which it was based, our discussion will be directed to the points made on the oral argument and in the printed brief of counsel.

1. It is argued that if the words of this contract were sufficient in law, because followed by cohabitation, yet illicit intercourse having preceded, they did not establish a valid marriage. We need not review the cases upon this subject, because taking any statement of the rule that can be deduced from them, there is no sufficient evidence to warrant its application here. There is evidence, but not uncontradicted, that the decedent took, and the petitioner permitted him to take, indecent liberties with her. This is as far as the competent evidence goes. It should be observed also that at this time the parties lived entirely apart, and that the acts testified to were in the presence of many other persons. The evidence, if true, does not raise a prima facie presumption even, much less establish the fact, that the cohabitation after the alleged contract of marriage was the mere continuation of an illicit relation that had existed before. The latter fact must first be proved by clear and satisfactory testimony before the principle of Hunt's Appeal and kindred cases can have any application. Drinkhouse's Estate, 151 Pa. 294.

2. The fact, even if it were conclusively shown, that during their cohabitation at Fourth and Catharine streets the parties kept an unlicensed place for the sale of liquor where men were permitted to resort for card playing, or even gambling, would throw little if any light upon the question of marriage. The fact that they kept an assignation house or that the petitioner had immoral relations with others either with or without the knowledge of the decedent, might have some significance. It is urged that "the alleged marriage contract is founded upon the story of a prostitute, without a line of direct substantial proof to support it, and in the face of continued prostitution during the whole period of the marriage." We suppose that the testimony as to the reputation of the house and of the petitioner was introduced with a view to sustain this allegation. We shall not attempt to recite it nor comment on the sources from which it came. We have examined it all, and our conclusion is, that the allegations that the house was an assignation house and that the petitioner was a prostitute before the alleged marriage, and lived the life of a prostitute afterwards are not sustained. We do not believe that any jury taking a fair view of all the legitimate evidence pro and con, and having proper regard for the presumption in favor of innocence, would find that they were established. It may be said, that, although the evidence fails to establish these facts fully, it does show a course of conduct which is quite as consistent with the exceptant's allegation that the relation between these parties was a meretricious one, as with the petitioner's allegation that it was the lawful and honorable one of marriage. We have considered it in that view and have given it proper weight, but cannot agree that, taken by itself or in connection with the other testimony introduced by the exceptant, it is sufficient to overthrow the petitioner's positive testimony as to the marriage contract and the presumptions arising from cohabitation and reputation, and the repeated admissions and declarations of the parties.

3. Four of the witnesses who testified as to the character of the house and of the petitioner were also called to testify as to the repute of marriage. One of them testified that some thought they were married and others not; that the general feeling through the neighborhood was that they were not married; and that this impression was created to some extent by the conflicting statements the decedent made as to the place where the marriage had taken place. (It would seem, therefore, that, at all events, the decedent claimed that there was a marriage.) This witness admitted, moreover, that the petitioner was addressed by the majority of people, both in and out of the decedent's presence, as Mrs. Hines; that the witness so addressed her; that the child called the decedent "pop"; and that the latter spoke to and of the child as his own. Another witness testified that many of the neighbors doubted whether they were married; "others did not speak their minds on it; as it was not material"; that many of the neighbors thought she was simply his housekeeper. This witness gave the singular reason amongst others for his belief that she was not his wife that he had "seen many men treat their housekeepers better than he treated her." After testifying "candidly" as he asserted, that he had never heard her spoken of as Mrs. Hines the witness admitted that he called her by that name, and finally that "she was generally spoken to, or of, as Mrs. Hines"; also that the child spoke to the decedent as his father. No comment upon the testimony of this witness is called for. The third witness went no farther into the subject of the repute of marriage than to say, that some of the people there called her Mrs. Hines, and others Laura. The next witness summed up the matter thus: "There was a variety of opinion; the ma-

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jority said she was not, or she would not have behaved in the manner she did if she was his wife. There seems to be a variety of opinion among the neighbors." The witness admits, however, that he sometimes called her Mrs. Hines. The foregoing is, we believe, a fair summary of the testimony introduced by the exceptant pertaining strictly to the speech of the people in the neighborhood as to the marriage of the parties. Before speaking of the testimony introduced by the petitioner upon the same subject we will briefly refer to the alleged declarations of the decedent.

4. His brother, his aunt and four or five other witnesses, testify to declarations more or less positive made by the decedent at different times to the effect that he was not married. These declarations did not deter the aunt and the mother from visiting the decedent's home, and receiving visits from the petitioner, nor the brother from permitting the petitioner to ride with him as chief mourner at the funeral, nor the mother from taking up her home with them when they moved to Euclid avenue; and notwithstanding them, it was thought advisable by those interested to obtain from the petitioner a formal renunciation of her right to administer. This was drawn for her to sign and was signed, "Laura Hines." To say the least, the conduct of these relatives did not show a very positive reliance on the decedent's alleged assertions to them that he was not married. Indeed, the mother admits that in November, 1896, her son told her he had been married to the petitioner in New Jersey. None of these declarations of Louis B. Hines that he was not married were made in the presence of the petitioner, and while we do not say that the evidence was wholly inadmissible—see Greenawalt *v.* McEnelley, 85 Pa. 352—yet, as the learned Judge of the Court below well says, a man cannot rid himself of a marriage otherwise proven by asserting that it never took place. If he can, then the oftener he asserts it, after he has tired of the duties and obligations he has assumed, the stronger the case made out for himself.

5. A half-dozen witnesses living in the neighborhood testified either that they had the reputation of being husband and wife among their neighbors or that they never knew or heard anything else but that they were married. This negative testimony, coming from near neighbors and acquaintances, is entitled to about as much weight in proving the speech of the people in such a matter as positive testimony that the neighbors said they were man and wife. If two young people living as these did are not cohabiting as man and wife and holding themselves out to the world as living in that relation, the neighbors would be very likely to speak of it. The same witnesses, as well as seven or eight more, testify that the decedent uniformly spoke of and addressed the petitioner as his wife, and the child as his child. The petitioner did the work of the house, helped him in his business, attended the store and during some of the time earned money by sewing to keep the house. When her child was about to be born, the decedent summoned the physician to deliver "his wife;" the bill was made out in that way; and the fact that the child was his son was recognized in the certificate of birth, and in the application for the policy of insurance which later, the decedent took out on the child's life. When the decedent sold out to one Shapiro the former said that his wife must sign, and accordingly the petitioner witnessed the paper as "Mrs. Hines." We need not attempt further to marshal the evidence upon the subject of repute. Probably we have gone into it further than was needed already. It cannot be said that all the facts upon which the decree was based are proven beyond the possibility of a doubt; we are, however, clearly of the opinion that the preponderance of the evidence, whether considered with reference to the number or to the credibility of the witnesses, favors the conclusion, that during all the period of their cohabitation these people had the general repute among their neighbors and acquaintances, of being husband and wife, and that they recognized and treated each other as persons living in that relation.

The counsel for the appellant admit that it is useless to attack the competency of the petitioner to testify: Greenwalt *v.* McEnelley, 85 Pa. 352; Drinkhouse's Appeal, 151 Pa. 294; Luce's Appeal, 3 Pa. Super. Ct. 289; Comly's Estate, 185 Pa. 208. They do assert, however, with much vigor, that her testimony as to the alleged contract is unworthy of belief; and in support of their contention refer to the fact that the reason alleged to have been given her by the decedent for not having a ceremony performed was not true. But that does not contradict her. The evidence, if believed, simply tends to show that he did not tell her the truth. Allusion is made also to the absence of proof that he gave her a ring; to the contradiction of her testimony as to the precise date of the contract, as to her age, as to her engagement with Weber—he swearing that it was broken off by him, and she that it was broken off by her—and other minor matters. As we have said, the case is not absolutely one-sided. The testimony must be weighed. But we are unable to conclude that these discrepancies and contradictions are in such vital matters as to

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outweigh the facts corroborating her, and to compel the rejection of her testimony in toto, even if we were convinced that she was in each of these instances incorrect. The dispute as to what she said at the deathbed of the decedent is more serious, as the learned Judge of the Court below says, but we are not convinced that he did not reach the correct conclusion upon that question of fact and we approve it, as well as what he says upon the subject of her relations with Weber and the marriage certificate, without further comment.

Did the cohabitation begin in the agreement testified to, and did the parties intend a present marriage and not a mere executory contract to marry? These are the great questions in the case. Reputation and cohabitation are not marriage, as has frequently been said; but they are facts from which marriage is presumed. In the present case, these facts, coupled with the repeated declarations of the parties and their acts which were equivalent thereto, have the additional effect of corroborating the testimony of the petitioner as to the contract and of showing the sense in which they used the words. The testimony convinced the Court below that they intended a present marriage, and in this conclusion we concur. Interpreting the words of the contract in the light of the intention and acts of the parties as found by the Court upon ample testimony the case is fairly within the principle of Richard *v.* Brehm, 73 Pa. 140, and Comly's Estate, 185 Pa. 208.

The decree is affirmed and the appeal dismissed at the cost of the appellant.

W. C. S.

Oct. '98, 180. Superior Court. December 14, 1898.

Sergeant v. Fleckenstein et al.

Ground rent—Sheriff's sale—Act June 12, 1878 P. L. 205—Act April 25, 1850, P. L. 571—Lien.

The purchaser at a sheriff's sale of land charged with a ground rent, takes the land free from the lien of arrears, and a judgment subsequently obtained against the covenantor for arrears of ground rent, acquires no lien on the property which will support a sheriff's sale and carry the title; and such a purchaser is entitled to an extinguishment of the rent under a covenant in the deed reserving the same (that the rent should be extinguished upon payment of the principal and arrearages), by paying the principal and arrearages from the time he took title to the land.

Appeal of J. Dickinson Sergeant, from the judgment of the Common Pleas No. 4, of Philadelphia County, in an action of assumpsit sur ground rent deed in which Isaiah H. Fleckenstein and Harry B. DeHaven were defendants.

The facts of the case appearing from the record were that the plaintiff was the owner of a yearly ground rent of $57 charged upon a lot of ground at the southeast corner of Sepviva and Pepper streets, in Philadelphia.

The deed reserving the ground rent contained a covenant on behalf of the grantor that if the grantees or their heirs and assigns should pay the sum of $950, "lawful money aforesaid in one entire payment, and the arrearages of said rent to the time of such payment," that the rent should cease and be extinguished and the covenant for payment become void.

James Wiley purchased the property on November 2, 1896, at a sheriff's sale on a judgment for the rent then due. On August 29, 1898, Wiley, the terre tenant, made tender of the principal, together with the ground rent accrued since he took title to the property and requested an extinguishment of the rent. This was refused by the plaintiff on the ground that the judgment for arrears had been obtained on February 20, 1897, and claimed this should be included in the tender. The terre tenant refused to pay the prior rent on the ground that it had been discharged by the sale at which he took title to the land. Plaintiff then brought this action for the arrears of ground rent accrued since Wiley had taken the title and Wiley filed an affidavit of defence setting forth the tender of principal and ground rent for which the suit was brought and averring that the plaintiff's demand for the payment of the judgment for arrears prior to deponent's title had been discharged by the sale at which deponent took title.

A rule for judgment for want of a sufficient affidavit of defence was discharged by the Court. The plaintiff appealed and assigned as error the refusal of judgment.

J. M. Pile, for appellant.

Frederick J. Shoyer, for appellee.

The arrears of ground rent were discharged by the sheriff's sale at which Wiley took title.

Mather *v.* McMichael, 18 Pa. 301.
Foulke *v.* Millard, 108 Id. 230.

March 23, 1899. RICE, P. J. By the 8th section of an Act of April 25, 1850, P. L. 571, if not before, an action of covenant would lie against the assignee of a grantee in a deed reserving a ground rent for arrears which accrued before the assignment, and a purchaser at sheriff's sale was an assignee within the meaning of the rule. But this personal liability was removed by an Act of June 12, 1878, P. L. 205, and in Foulke *v.* Millard, 108 Pa. 230, it was decided that a purchaser

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at sheriff's sale takes the land free from the lien for arrears, and in consequence a subsequent judgment for the same against the covenantor acquires no lien on the property which will support a sheriff's sale and carry the title. When, therefore, a purchaser at sheriff's sale pays the principal and all arrearages that have accrued since his purchase, all liability, so far as he or the land is concerned, is extinguished. Because the acceptance of the tender made by the terre-tenant would have had this effect was the reason, doubtless, why it was refused. Certainly, the plaintiff had no reason to fear that it would discharge the original covenantor. The latter's liability for the rent that accrued before the sheriff's sale, so far as the proceeds of said sale were insufficient for the payment thereof, would not have been affected. But we do not think the plaintiff could refuse to accept the principal from the terre-tenant and thus indirectly compel him to pay arrearages for which neither he nor the land was liable, as the price of freeing the land from the encumbrance to which it was subject. Under a fair construction of the covenant he had the right to free the land from the encumbrance by the payment of the principal and all arrearages for which either he or the land was liable.

We decide this case upon the facts set forth in the statement and the affidavit of defence. If the sheriff's sale was brought about by fraud or collusion, or if the tender was coupled with a demand for the execution of a deed of extinguishment broader in terms than the terre-tenant was entitled to, it does not clearly appear in the pleadings. The only question before us is, whether the tender of the arrears for which this suit was brought was vitiated and rendered ineffectual by the fact that it was coupled with a tender of the principal. We decide that it was not.

Appeal dismissed at the costs of the appellant, but without prejudice, etc.

W. D. N.

April, '98, 151. Superior Court. May 12, 1898.

Hazlett v. Mangel.

Landlord and tenant—Rent—Distress—Appraisement—Act March 21, 1772—Constable.

The right of a landlord to sell the chattels on the leased property, distrained for rent in arrears, is bestowed by the statute of March 21, 1772, which requires an appraisement of the goods before the sale.

Where, without appraisement, the goods are sold by the constable making the distraint, he is liable to the tenant in trespass.

Appeal of Charles Mangel, from the judgment of the Court of Common Pleas of Butler County, entered in an action of trespass, wherein James Hazlett was plaintiff.

On the trial, before RAYBURN, P. J., the facts of the case appeared as follows: The plaintiff was a minor and lived with his father, Louis Hazlett, who was lessee of a property under a lease which specified certain improvements to be made and that the lessee should pay the taxes assessed against the property for each year. Under the lease the lessee went into possession, sub-let certain portions of the premises and collected the rent therefor, but failed to perform his covenant as to improvements and the payment of the taxes, which the lessor was obliged to pay. For the arrears distraint was made by the defendant, a constable, on August 19, 1890, upon the goods and chattels found upon the premises. All this personal property was claimed by the plaintiff, but the defendant executed the landlord's warrant and sold the property as that of the lessee.

The plaintiff asked the Court to charge that as the defendant has shown no compliance with the Act of Assembly as to the making of an appraisement of the goods and notice thereof that the defendant was a trespasser and the sale was illegal. Affirmed. (First assignment of error.)

The Court also affirmed the plaintiff's point for charge that: "There is no question of the rights of creditors in this case. If the father emancipated his son James, the plaintiff, and allowed him to do business on his own account, his earnings and the property purchased therewith belonged to him as against the father or his creditors. (Second assignment of error.)

The defendant asked the Court to charge:

"Where a father takes a lease of demised premises for a term of years, has a wife and minor children, and they all work together on the farm, the proceeds of the farm and property accumulated from the work and labor of himself and family belong to the father, and where his creditors levy upon the personal property found on the premises, the claims of such creditors cannot be defeated by a minor son claiming the property levied upon, without showing the son purchased the property with money earned outside the family and the demised premises, to hold otherwise would be a fraud on creditors of the father the law will not allow, and the verdict should be for the defendant." Answer—"That point is affirmed, but if you find that this young man earned this property, purchased it and paid for it, that shows title in him and he would be entitled to recover." (Fifth assignment of error.)

"Where a landlord's warrant is issued and placed in the hands of an officer for execution, the property of the lessee levied upon, notice given, and public sale made of the same, the law pre-

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sumes the officer did his duty, and this presumption remains until the regularity of the sale is questioned by the claimant of the property in cross-examination of the officer who made the sale, or other evidence, and if not so objected to the sale remains as made, and the verdict should be for the defendant." Which was refused. (Sixth assignment of error.)

Verdict for plaintiff and judgment thereon. Defendant appealed, assigning error as stated.

Newton Black, for appellant.

Where there is a contest between a minor son and creditors of a father there must be more than the mere declaration of the son and father as to the ownership of the property.

When a father and wife and minor children are living as one family the presumption of law is the personal property belongs to the father and so continues till otherwise proven, the burden of proof being on the party opposing this presumption.

Adams v. Heitner, 140 Pa. 166.
Kingsbury v. Davidson, 112 Id. 383.
Pier v. Siegel, 107 Id. 502.

In the execution of a writ of any kind, execution, landlord's warrant, or the like, the law presumes the officer did his duty, and the presumption stands until the validity of the same is attacked in some form either in the pleadings or cross-examination of defendant when on the witness stand, or in the evidence adduced in the case.

H. H. Goucher, for appellee.

The failure of the defendant to show a compliance with the directions of the Act of March 21, 1772, on which the remedy by distress for arrears of rent by warrant, sought to be enforced in this case, rests in this State, rendered him a trespasser ab initio.

Esterly Machine Co. v. Spencer, 147 Pa. 466.

A constable or any person who undertakes to execute a warrant of distress as bailiff or agent of the landlord may be sued in the same manner as any other trespasser. The person who undertakes to execute the warrant is made liable by the statute.

Wells v. Hornish, 3 P. & W. 30.
McElroy v. Dice, 17 Pa. 163.
Davis v. Davis, 128 Id. 100.
Murphy v. Chase et al., 103 Id. 260.

A landlord's warrant is entirely void unless the provisions of the Act of Assembly under which it issues are fully complied with.

Davis v. Davis, 128 Pa. 100.
Esterly Machine Co. v. Spencer, 147 Id. 466.
Wyke v. Wilson, 173 Id. 12.
Snyder v. Boring, 4 Pa. Super. Ct. 196.

December 15, 1898. SMITH, J. This action of trespass was brought to recover the value of goods distrained and sold under a landlord's warrant. The plaintiff was a son of the tenant and claimed to be the owner of the property sold, and the defendant acted as constable or bailiff in executing the warrant. The property was on the demised premises and in the joint possession of the tenant and the plaintiff, when the rent fell due and the distress was made. The defendant proceeded to sell as if on an ordinary writ of execution. No appraisement of the property was made or waived by the tenant or the owner.

At common law, while the landlord might distrain for rent in arrears, and keep it impounded for an indefinite period, unless replevied by the tenant, he could not sell or dispose of property thus detained. The right to sell the property seized and apply the proceeds to the payment of the rent was given by statute. Its exercise, therefore, must be in strict conformity with the statutory provisions. A failure to comply with these, on any point is, unless performance be waived, fatal to a sale under a landlord's warrant.

Passing the question of the legality of the seizure and detention, there can be no doubt about the illegality of the sale in this case for want of an appraisement. It has uniformly been held in a long line of cases, from Kerr v. Sharp, 14 S. & R. 399, to Wyke v. Wilson, 173 Pa. 12, that a sale of chattels under a landlord's warrant, without an appraisement as required by the Act of March 21, 1772, is unauthorized and void, and that the person making such sale is a trespasser ab initio. The cases cited also show that a tenant may maintain trespass for the sale of his own property when thus unlawfully disposed of, and in many of the cases the action was directly between the tenant and the landlord. It is, therefore, quite immaterial to the defendant here, whether the property embraced in this action was owned by the tenant or by the plaintiff. In either event the defendant committed a trespass in selling it, for the redress of which an action of trespass is the proper remedy. The evidence seems to warrant the finding of ownership of the property in the plaintiff, and the tenant, by his testimony in this case, would be estopped from successfully prosecuting any further proceeding therefor, in his own behalf.

What has been said sufficiently meets all that is material in the specifications of error; they must be overruled.

Judgment affirmed.

W. D. N.

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Oct. '98, 66. Superior Court. October 19, 1898.

Worthington v. Schuylkill Electric Railway Co.

Corporations — Officers — Power of president to bind company — Consideration — Benefit.

A., a construction company, agreed to erect and equip a plant for an electric railway company, B., in consideration of certain stock and bonds which were duly delivered to A. Subsequently, A. applied to C. for certain pumps, which C. agreed to sell to A., and further agreed to take in payment a note of A., provided the latter would procure a satisfactory endorser. A. thereupon had its note endorsed by the president of B., and the pumps were delivered. In a suit by C. against B. on this note:

Held, (1) that in the absence of any by-law or resolution of the board of directors to that effect the president of B. had no authority to bind B. by this endorsement; (2) that C. having accepted the note without any inquiry into the authority of the president of B. to make the endorsement, B. was not estopped from setting up the defence that its president had no authority to pledge the credit of the company as security for a debt of its contractor when the latter had received full consideration for the work and materials it was to do and furnish; (3) the fact that the president had endorsed other notes of A. and that these had been paid did not establish "a course of dealing" under which B. could be held liable, when it did not appear when and how the other notes were paid or that any of B.'s officers, other than the president, knew of these transactions.

Appeal of the Schuylkill Electric Railway Company, from a judgment of the Common Pleas No. 4, for Philadelphia County, in an action of assumpsit brought by Henry R. Worthington upon a promissory note upon which said railway company appeared as an endorser.

On the trial the plaintiff offered in evidence the note as follows:

$656.00 PHILADELPHIA, June 19, 1895.

Three months after date we promise to pay to the order of The Schuylkill Electric Railway Company, six hundred and fifty-six dollars, at 635 Drexel Building, with interest, without defalcation for value received.

THE PHILA. CONSTRUCTION CO.
W. W. HESS, Pres.

Due Sept. 19-22, 1895.

Endorsed:

SCHUYLKILL ELECTRIC RAILWAY CO.
CHARLES H. BARRATT, Pres.

Objected to unless followed by other evidence showing authority for the above endorsements. Overruled. Exception.

Additional facts as they appeared on the trial are stated in the opinion of the Superior Court, infra.

Defendant requested the Court to charge the jury as follows:

"1. That the jury must find a verdict for the defendant, because the plaintiff has shown no authority on the part of the president of the defendant corporation to endorse the said note, nor any value received by the said defendant corporation by reason of such endorsement." Answer—"Refused." Exception.

"2. That under all the evidence in the case the verdict must be for the defendant." Answer—"Refused." Exception.

The Court charged the jury, inter alia, as follows:

"That if, however, the officer is not authorized by the by-laws to sign or endorse the note, but does it in the conduct of its business for the benefit of the company and the company gets the benefit of it, then the company is bound to pay the note. . . . .

"The question for you to determine in this case is, did the company get any benefit from this endorsement? . . .

"The main pinch of the case is whether the company received any benefit for the endorsement. If it did receive a benefit the company is responsible. If it did not it is not responsible. That is all there is in the case."

Verdict for plaintiff and judgment thereon.

Defendant appealed, assigning for error (1) the admission of the note in evidence; (2, 3 and 4) the portions of the charge quoted above, and (5 and 6) the refusal of defendant's points.

John J. Ridgway, for appellant.

Plaintiff had notice that the authority of the president to endorse the note was denied, and the note should not have been admitted until there was proof of such authority.

Bank *v.* Henning, 171 Pa. 399.

There was no benefit to the railway company in this case within the rule that a recovery can be had on such a note when an actual benefit has been received.

What constitutes such a benefit is a question of law, and in this case the Court should have instructed the jury to find for defendant.

S. G. Birney, (*Francis G. Taylor* with him), for appellee.

1. The evidence showed that the Schuylkill Electric Company was itself paying for the materials furnished the construction company, which went into the erection of its road, in this way, viz., the electric company deposited with a trust company, which was merely its trustee, certain securities, which were, as money was needed, sold, and the proceeds directed to the payment of the construction company's bills.

2. The evidence also showed that the electric company had in other cases endorsed the construction company's paper, and that this was a continued course of dealing, of which the au-

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thorities of the electric company must have known.

3. The evidence further showed that the electric company did benefit by the endorsement; that the pump for which the note in suit was given, was at the time delivered to, and is now in use by the Schuylkill Electric Company. There could be no clearer evidence of benefit by the endorser of the paper, and it is just such a benefit as estops defence on the part of the endorser.

April 17, 1899. RICE, P. J. The Philadelphia Construction Company entered into a contract with the Schuylkill Electric Railway Company in which the former agreed to erect, construct and equip the extensions of the electric road of the latter company in strict accordance with the terms and conditions of the specifications annexed to and made part of the contract, for the consideration of "five hundred thousand dollars par value in stock, and five hundred thousand dollars, par value in 6 per cent. gold bonds of said party of the second part," which was to be accepted "in full payment and satisfaction of this contract." The specifications of "the power house equipment" included "all necessary pumps."

The construction company, through its president, applied to the plaintiff for the purchase of two pumps, and the sale was made under the following circumstances, as detailed by the plaintiff's agent who made it: "The pumps were sold to the Philadelphia Construction Company, Mr. W. W. Hess, president, and before the sale was effected, Mr. Hess told me that in making payment for those pumps he would pay for it with a note, and that he would give us a satisfactory endorser, and before we accepted and before we credited the payment from him, we were advised by him that the Schuylkill Electric Railway Company would be the endorser for the note. Upon that representation and the signing of the notes by Mr. Hess, and the endorsement of Mr. Barratt, we accepted them as payment for the pumps." The pumps were duly delivered and one of them is in use in the power house at the present time, the other having been returned through an arrangement made between the plaintiff and the construction company.

It is fairly to be inferred from the testimony of Mr. Barratt—who was president of the defendant company at the time—that he knew of this understanding between the plaintiff and the president of the construction company before he placed the company's endorsement on the note, and that his purpose in endorsing the note was to facilitate the sale. It should be observed, however, in order to prevent confusion, that the sale was to the construction company and not to the defendant company. It is not intimated that any of the parties regarded it otherwise.

The question is as to the liability of the latter company upon the endorsement.

It is not alleged that there was any by-law, or resolution of the board of directors, which authorized the president of the defendant company to endorse the note of the construction company given for purchases made by the latter. The uncontradicted evidence shows affirmatively that he had not such authority. It is claimed, however, that the defendant is liable for certain reasons which will be considered in the order in which they were presented by the plaintiff's counsel.

The contention that the defendant company was paying bills of the construction company by advancing them cash through the medium of a trust company, is not sustained by the evidence. All that the evidence upon this subject distinctly shows is, that the bonds and stock called for in the contract between the two companies were delivered to the construction company, and deposited with a trust company, and that upon these bonds and stock, advances were made by the trust company to the construction company to enable them to pay their bills. I quote all of the testimony upon that subject: "Q. At the time that this note was given was your company indebted to the construction company? A. The Schuylkill Electric Railway Company had delivered to the construction company all the bonds and stock under that contract Q. There were then unsettled balances? A. Under the contract of the Electric Railway Company with the Philadelphia Construction Company the railway company delivered a certain amount of bonds and stock to the construction company. The bonds and stock were deposited with the trust company. That trust company made advances on those stocks and bonds, and that is the way the construction company got their money to pay their bills." It is impossible to see how it could be found as a fact from this evidence that the construction company was a mere figure-head and that the defendant company was paying the bills through the medium of a trust company. The truth is, that the defendant company had discharged its obligation to the construction company when the bonds and stock called for in the contract, were delivered and so far as we can discover there is nothing in the evidence to impeach the bona fides of the transaction.

Nor can it be contended that the defendant was bound by this endorsement by a "course of dealing." True the president of the defendant company had endorsed notes given by the construction company to other parties, and these

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had been paid. How or by whom they were paid does not appear. It does not appear that they were paid by the defendant, and there is no evidence that any of the officers or directors, excepting the president, knew of these transactions. But the important fact is, that the giving of this note was not in accordance with a course of dealing with the plaintiff. So far as appears it was the first and only note he had received thus endorsed. As between him and the defendant a course of dealing had not been established from which he had a right to presume that when the president endorsed this note he was acting within the scope of his authority. This distinction was recognized in Millward Cliff Cracker Co.'s Estate, 161 Pa. 157, and in consequence a large number of claims based on notes made or endorsed by the treasurer, but not countersigned by the president as required by the by-laws were rejected.

It is argued that where a corporation receives and retains the benefits of the unauthorized action of its president, it may be and ordinarily is, estopped to deny his authority, and upon this principle the Court submitted to the jury the question whether the defendant had received any benefit from this unauthorized endorsement. We do not dispute the principle. It has been applied or recognized in many cases amongst which—to illustrate its scope—may be mentioned: Dougherty *v.* Hunter, 54 Pa. 380; Penn. Natural Gas Co. *v.* Cook, 123 Pa. 170; Manhattan Co. *v.* Phalen, 128 Pa. 110, 119; MacGeorge *v.* Chemical Co., 141 Pa. 575; Millward Cliff Cracker Co.'s Estate, supra; Ins. Co. *v.* Brownback & Co., Limited, 1 Pa. Super. Ct. 183. The point upon which we differ from the learned Court below is as to the applicability of the general principle to the facts as disclosed by the plaintiff's evidence. We cannot agree that there was any evidence that the defendant received a "benefit" from the endorsement within the meaning of the rule recognized in the above cited and other cases. For example, the services of the broker in the case of Twelfth Street Market Co. *v.* Jackson, 102 Pa. 269, were remotely instrumental in bringing about the reduction of the ground rent, and indirectly the company received a benefit from them, it was held, nevertheless, that it was not bound by the unauthorized act of the president in employing him. We refer to this case to show, that not every indirect benefit, however remote, is meant in the statement of the general rule under consideration. Unquestionably it was a benefit to the defendant in the case at bar to have the pump, but if that is the sole test, then the president could have bound the company for the entire cost of the construction of the road, by endorsing the notes of the construction company, or otherwise guaranteeing the payment of the bills the latter contracted. Certainly this could not be so. It should be constantly kept in mind that the pump for which the note was given was not delivered to the defendant under a contract with it, but to the construction company, which purchased it, and put it upon the defendant's premises, in fulfillment of its contract. The defendant received the benefit, which it contracted for, but for this it has paid the party with which it contracted. Possibly the plaintiff would not have delivered the pump to the construction company except upon condition that the latter would give its note with an endorser, but there is no evidence that the only endorser he would accept was the defendant, nor that this latter condition, even if the plaintiff had insisted upon it, was made known to the defendant or even to its president. No communication whatever took place between the plaintiff and the defendant. The construction company, through its president, simply offered the plaintiff to obtain the endorsement of the defendant company upon the note to be given for the price of the pump sold to the construction company by the plaintiff, and the latter accepted the offer without inquiry as to the authority of the president of the defendant company to endorse the note, or as to the business arrangements between the two companies. How then can it be held that the defendant received a benefit from the transaction which estops it to deny the authority of the president to bind it by the guaranty of another's debt. We do not see how it could be so held without assuming contrary to the evidence, that the construction company was the mere agent of the defendant and ignoring the fact that the consideration for the note moved directly to the former and not to the latter company. As the majority of the Court view the case, the president undertook to pledge the credit of the company as security for the debt of its contractor, which contractor had received the full consideration for the work and material it was to do and furnish; this was beyond his authority to do; and the plaintiff who took the note for the debt of the maker without inquiry as to the president's authority, must be deemed in law to have taken it with notice. Therefore the defendant's points should have been affirmed. This conclusion renders it unnecessary to pass upon the question of evidence raised by the first assignment of error. (But see Bank *v.* Henning, 171 Pa. 399; City Electric R. Co. *v.* First National Bank, 31 L. R. A. 535.)

The fifth and sixth assignments of error are sustained and the judgment is reversed.

W. M. S., Jr.

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WEEKLY NOTES OF CASES.

VOL. XLIV.] *FRIDAY, MAY 26, 1899.* [No. 8.

Supreme Court.

Jan. '98, 219. Supreme Court. March 6, 1899.

Fisler v. Stewart.

Sheriff's sales—Realty—Lien—Release.

In the absence of countervailing equities, a debtor whose land has been taken in execution has a right to insist on the regular process of law, with its regular and usual result, the discharge of liens and their payment out of the proceeds, according to their legal priority, and of this right he cannot be deprived at the will of the first lien holder.

A release is a matter of contract, and cannot be forced upon an unwilling debtor, and while its acceptance may ordinarily be presumed, yet a refusal to accept deprives it of all effect.

A. held a judgment which was a first lien on land of B., on which A. also held a mortgage; this land was taken in execution on a third lien held by C. A. filed a release of his judgment as to said lot; B. on the same day filed a refusal to accept the release:

***Held*, the mere filing of the release did not render the mortgage the first lien on the land and save it from discharge by the sheriff's sale.**

Appeal of Samuel L. Fisler, trustee, from the judgment of the Common Pleas of Northampton County, in a proceeding by scire facias sur mortgage, against Edward F. Stewart, with notice to William Laubach, terre tenant.

On the trial of this cause, before YERKES, P. J., the facts appeared as follows: The mortgage in suit was dated September 14, 1893, but not entered of record until December 30, 1893, owing to the request of the mortgagor, Edward F. Stewart, to the parties in interest that the same should not be entered promptly, as he believed it would impair his financial credit.

On December 27, 1893, Mrs. Margaret K. Stewart, and Edward F. Stewart, her husband, gave a mortgage accompanied by a bond and warrant of attorney to secure the payment of $11,000 to Henry Fulmer on a property of Mrs. Stewart situate on the north side of Northampton street, near Front street, in the city of Easton. On the same date Henry Fulmer entered a judgment, No. 109, December term, 1893, on said bond against Edward F. Stewart and Margaret K. Stewart.

On January 25, 1894, Henry Fulmer entered a judgment, No. 235, December term, 1893, upon a judgment note of Edward F. Stewart, dated April 1, 1893, for $5500.

On January 30, 1897, Mrs. Margaret K. Stewart entered judgment to No. 110, January term, 1897, against her husband, Edward F. Stewart, for $3716.25, and the writ of fieri facias No. 33, March term, 1897, was the writ, under which the property described in the mortgage in suit on North Second street was sold February 27, 1897, to William Laubach, the terre tenant.

On February 26, 1897, Henry Fulmer under agreement with Samuel L. Fisler, trustee, plaintiff, filed in the office of the prothonotary of Northampton county a release of the judgment, No. 109, December term, 1893, for $11,000, by which the property described in the mortgage was released from the lien of this judgment. At the same time he also sent to Edward F. Stewart a duplicate copy of this release. A few hours after he had received this duplicate copy Edward F. Stewart returned to Henry Fulmer the duplicate with this endorsement:

"We do not ask for this. We do not wish it. We refuse to receive or accept the same.

(Signed) "MARGARET K. STEWART.
"EDWARD F. STEWART.

"Witness:
"F. W. EDGAR,
"February 26, 1897."

Prior to the sale of the sheriff on the morning of February 27, 1897, public notice was given in the sheriff's office by counsel for Samuel L. Fisler, trustee, that a release of the judgment had been filed and that in consequence the mortgage in suit would remain a lien upon the property and would not be discharged by the sale of the sheriff. In reply, counsel for Margaret K. Stewart gave notice that the release had been repudiated. Thereupon counsel for Henry Fulmer announced that Henry Fulmer insisted that the release which had been filed of record was valid and that the property about to be sold was released from the lien of his $11,000 judgment. William Laubach, the terre tenant who purchased at said sale, was present and heard all these notices.

The plaintiff submitted the following point:

"Under the law and evidence the verdict must be for plaintiff for amount claimed." Answer—"Not affirmed." (First assignment of error.)

The Court instructed the jury as follows:

"For these reasons, gentlemen of the jury, we instruct you to render a verdict in favor of the defendant." (Second assignment of error.)

Verdict for defendant. The plaintiff took this appeal and assigned error, inter alia, as above indicated.

Edward J. Fox and *H. J. Steele*, for appellant.

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F. W. Edgar and *W. S. Kirkpatrick*, for appellee.

May 8, 1899. MITCHELL, J. This is a scire facias on a mortgage and defence by the terre tenant that the mortgage was discharged by the judicial sale at which he purchased. One Fulmer was the holder of a judgment which was the first lien on the land in question, and also on other land of the mortgagor and the latter's wife; the mortgage in suit was the second lien on the land in question, which was also subject to a third lien upon which it was taken in execution. Pending this execution Fulmer filed of record with the prothonotary a release of this land from the lien of his judgment, with intent to make the mortgage in suit the first lien and thereby save it from discharge, but on the same day the mortgagor filed a refusal to accept the release, and at the sale, notice was given both of the release and of the refusal to accept. This is the case, stripped of all minor and collateral matters, as it was by the learned Judge below, so as to present the clear question of law, whether the holder of the first lien can release land of his debtor, taken in execution on a junior judgment so as to preserve his lien for its full amount against other land of the debtor, against the latter's will. The learned Judge below was of opinion that he could not, and he was clearly right.

The argument of appellant is really comprised in the claim that a man may do what he likes with his own, and as a release of any of a debtor's property is pro tanto a surrender or gift of part of the creditor's right, the debtor has no standing to object. But you cannot give a man what he will not take. It may be imposed upon him by superior force, as for instance his assent to a judgment against him, is imposed by the law without regard to his assent in fact. But it cannot be called a gift.

A release is usually matter of contract, and in this instance it was expressly put in that form, reciting a consideration moving from the debtor, and covenanting in return not to levy upon the land, etc., provided that the lien of the judgment upon the other lands of the debtor and his wife, should not be invalidated. This was in substance as well as in form a contract which required the assent of the other party. As a release is usually an advantage to the debtor, his assent may be presumed, as the assent of a legatee to a legacy is presumed, but subject to his right to reject it: Tarr *v.* Robinson, 158 Pa. 60.

It is urged by appellant that the moment the release was filed, the status of the mortgage in suit as the first lien became fixed, and that being the state of the record the purchaser at the sale was bound by it, and the status of the property could not be altered by any act of the debtor. But this is assuming the very point in controversy. If the release alone appeared on the record it might, as already said, be presumed to have been accepted, and under the principles illustrated by Saunders *v.* Gould, 134 Pa. 445; Meigs *v.* Bunting, 141 Pa. 233, and similar cases, the purchaser would be bound by the record without regard to the conflicting notices given at the sale. But the release did not appear alone, the same record contained the repudiation of it. It is argued by the appellee in opposition to this aspect of the claim, that the release did not appear in the ad sectum judgment index, which is kept in Northampton county, in lieu of a judgment docket under the act of 1827, and that the purchaser was not bound to look elsewhere. We need not, however, go into this question. The same record, the appearance docket, which gave notice of the release, gave notice also of its repudiation, and if the intending bidder found one he necessarily found the other. The record, therefore, concluded nothing in appellant's favor, and we come back again to the starting point of the necessity of the debtor's assent.

The question, so far as we are advised, is new. We have not been furnished with any authority directly in point nor have we found any, although the case of Fritsch's Assigned Estate, decided at the present term, involves somewhat similar principles. As in that case so in this we rest the decision on the broad ground of legal rights as to liens when not controlled by special equities. The principle that a man may do what he likes with his own has its limitations. A judgment creditor has the right to make his debt out of any or all of the property of his debtor, but he cannot proceed altogether at his own will. He cannot, for instance, pass over the personalty and proceed first against real estate, he cannot divide his debt so as to collect only part at a time, if he takes several parcels of land in execution he cannot prevent the debtor from requiring the sheriff to sell them in a certain order, and on obtaining sufficient funds from part to satisfy the execution, to refrain from selling the rest. The underlying principle is that a debtor may protect his own interests so long as he does not embarrass the creditor in obtaining payment. And for such protection the debtor may rely on rights fixed by the general rules of law, or on the special equities arising on the facts. The law fixes certain orders of procedure and the debtor has rights and equities growing out of them.

When the property in suit was levied upon and exposed to sale under a junior judgment, it was subject to encumbrances whose standing was

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fixed by law both in respect to priority and also in respect to the effect of the sale upon them. In the absence of any equity to prevent him, the debtor had the right to insist on the regular process of the law with its regular and usual result, the discharge of the liens and their payment out of the proceeds according to their legal priority. Of this right he could not be deprived and the legal effect of the sale be changed at the whim of the first judgment holder, by a release attempted to be forced upon him without his consent. If there were any equities in the judgment creditor which would justify his interference, they should have been shown and, to affect the purchaser, the aid of the Court invoked before the sale. What the equities were we do not know, and it is now too late to inquire. The purchaser's rights were fixed by the sale.

The third and fourth specifications of error cannot be sustained. The evidence offered as to the mortgage of plaintiff was wholly outside of the records, and could not affect the rights of the terre tenant purchaser.

Judgment affirmed.

H. B.

Jan. '98, 427. Supreme Court. February 1, 1899.

Tyson's Estate.

Jurisdiction — Orphans' Court — Trust — Will — Realty.

Where the assets of an estate are claimed by the executor of the testator and also by the executor of one to whom it is claimed that they have passed under the same will, the Orphans' Court has jurisdiction to determine which of the two is entitled to possession and control, and its jurisdiction to enforce the right of the proper party is not ousted by the fact that a portion of said assets is realty.

The rule that bequests of a life estate in personalty with a power to consume gives an absolute estate, is subject to the rule that the real intent of the testator, ascertainable from the will, is to be carried out.

A bequest to M., testator's wife, of personalty "to have the same and use it at pleasure for her sole use as fully, largely and amply to all intents and purposes as I myself could or might have done in my lifetime with full power at any time to sell or dispose of any part or the whole of the same and also power and authority to collect all outstanding monies of whatsoever nature or kind and to be exclusively for her use and disposal," with a provision that on the death of M. the executors shall sell "all my personal property if any shall remain" and distribute the proceeds thereof, together with the proceeds of testator's realty, among his brothers and sisters, and the brothers and sisters of M., does not give to M. an absolute estate in the personalty, but a life estate with the right to consume the principal for herself, but not the right to transfer the estate with the purpose to defeat the intent of the testator as to the distribution of the residuum after M.'s death. The power to consume is ample, but it must be exercised in good faith in accordance with testator's purpose in giving it.

Appeal of Jacob Tyson, surviving executor of Charles Tyson, deceased, from the decree of the Orphans' Court of Montgomery County, in the matter of a petition in the nature of a bill for an injunction filed by said Jacob Tyson against the executors of Mary Tyson, deceased.

Jacob Tyson filed a petition setting out that Charles Tyson, died July 15, 1886, leaving to survive him a widow, Mary Tyson, no children, but collateral heirs; that testator by his will, dated November 16, 1872, and duly probated July 22, 1886, appointed as his executors the petitioner and H. R. Rittenhouse, of whom petitioner alone survived, and gave to his widow, Mary Tyson, the possession and use of all his estate, real and personal, with power of sale, and also the management, control and proceeds thereof during her natural life, with bequest over to testator's brothers and sisters and to his widow's brothers and sisters, or their issue, share and share alike; that testator also by a codicil dated March 13, 1875, bequeathed at the death of his widow $2000, in trust for the erection of a chapel in a certain cemetery and also the annual interest of $1000 for keeping the chapel and cemetery in order and repair; that another codicil, dated November 12, 1877, changed the absolute bequest of a certain legatee under the will to a trust estate for life, with remainder over to the legatee's brothers and sisters, or their legal representatives, but not to her heirs generally; that the appraised value of testator's personalty aggregated $5982.11, embracing, inter alia, 5 Perkiomen Railroad bonds @ $100=$500; and 34 shares Spring City National Bank stock @ $145=$4930. The personal property was assigned and delivered by the executors to testator's widow "to be held and enjoyed by her according to the provisions in said will contained"; that testator's realty at his death, comprised, besides a messuage and about four acres of land which his widow sold soon after his decease, a messuage and three tracts of land in Montgomery county containing about 100 acres; that this mentioned realty the widow on March 27, 1897, nearly eleven years after testator's decease, deeded to her brother, Jacob Rittenhouse, for $14,000; $2500 in cash and $11,500 in purchase money mortgages, one for $1500, secured on part of said realty and the other for $10,000 secured on the remainder; said mortgages were duly recorded and still stood in the name of Mary Tyson, unsatisfied of record; that three weeks afterward the same real estate was reconveyed in two deeds, for the aggregate considera-

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tion of $14,000, to Mary Tyson, in fee; that about seven weeks after said reconveyance, on June 6, 1897, Mary Tyson died, testate, in said county, appointing as her executors Henry Rittenhouse and Josiah R. Bechtel; that by her will, dated March 28, 1896, and duly probated, she directed her executors to convert all her real and personal estate, expressly including her late husband's realty, and after making several pecuniary bequests, gave the remainder of her estate equally to her brothers and sisters alone, naming them, but including one sister of her late husband; that the executors of Mary Tyson, deceased, sold some or all of the personalty late the property of Charles Tyson, deceased, and prepared to sell and assign the railroad bonds and bank stock, and the messuage and 100 acres of land, aforesaid, in contravention of petitioner's legal rights; that said conveyances, mortgages and reconveyances were executed and delivered in fraud of the petitioner's rights and privileges and to defeat the will of Charles Tyson, deceased; that Mary Tyson had only a life estate in her husband's property and what remains thereof, or the proceeds of its sale, are not assets of her estate, but of her husband's estate, and should be converted and distributed by petitioner.

The petition prayed a citation to the executors of Mary Tyson to show cause why they should not (1) be restrained by order in the nature of a writ of injunction from selling any part of the personal estate of the late Charles Tyson, deceased, which remained in the possession of the said Mary Tyson, deceased, or stood in her name at the time of her decease; and why they should not be ordered and directed to deliver and transfer the same to your petitioner for the purposes of his said trust; (2) be restrained from selling or offering to sell, and conveying and transferring said real estate, late the property and estate of said Charles Tyson, deceased; (3) be compelled to convey by good and sufficient deed, all the right, title and interest of the said Mary Tyson in the said real estate to the petitioner for the purposes of his trust; (4) enter satisfaction upon the margin of the records of said mortgages and cancel and surrender the same to petitioner; (5) account for any and all proceeds of the sales of any and all real and personal property late the estate of Charles Tyson, deceased, and sold and disposed of by said Mary Tyson in her life time, or by the said executors, since her decease, and pay the same to the petitioner for the purpose of his trust.

A copy of the will of Charles Tyson was attached to the petition, the portion thereof necessary for the consideration of the present case was as follows:

"In case I should depart this Life before my wife Mary I give and bequeath unto her the whole of my estate Real and Personal and to have the same and use it at pleasure for her sole use as fully largely and amply to all intents and purpouses as I myself could or might have done in my Lifetime with full power at any time to sell or dispose of any part or the whole of the same and also power and authority to collect all outstanding monies of whatsoever nature or kind and to be exclusively for her use and disposuel and also for the selling of any personal property or transfering of any stock of whatsoever nature or kind, and to do all and whatsoever may be necessary to be done in the selling and transfering of any stock or personal property and to vest full title theirof in the purchaser or purchasers.

"If my wife Mary should think at any time that it would be to her advantage to sell any part or the whole of my Real estate during her nateural Lifetime, she can do so, either at public or private sale and make and execute good and lawful deed or deeds of conveyance to the purchaser or purchasers theirof, to be as valued good and as effectual in Law as if I had made and executed the same in my Lifetime and to vest full title in the purchaser or purchasers theirof, and my wife Mary shall have the proceeds of such sale at her own desposuel.

"Their shall be no desposal made of my estate or any part theirof by my executors hereinafter named during the Lifetime of my wife Mary. The management, controle and proceeds theirof shall be reserved for and to the sole use of my wife Mary during her natural Lifetime—after the decease of both me and my wife Mary, I order my executors hereinafter named or the survivors of them to sell my personal property if any shall remain and also to sell my Real estate if any shall remain either at public or private sale—vesting in them full power and authority to execute and deliver good and Lawful deed or deeds to the purchaser or purchasers theirof, to vest full title in the purchasers theirof and to be as good and effectuael in Law as if I myself had made and executed the same in my Lifetime, and after payment of my just debts and expences as aforesaid I order and direct that one equal one half of my estate shall be devided among my Brothers and sisters share and share alike, one equal one half of my estate shall be devided among my wife Mary's Brothers and sisters share and share alike.

"In case any of my Brothers or sisters or of my wife Mary's Brothers or sisters should be deceased at the time of making said distribution and having Left issue such distrebutive share

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shall be devided among such issue, share and share alike."

An answer was filed which denied the jurisdiction of the Court, denied allegations of fraud, and set up that Mrs. Tyson's estate under her husband's will was absolute. The Court, SWARTZ, P. J., delivering the opinion, dismissed the petition, holding that Mrs. Tyson took an absolute estate in the personalty and as to the real estate, saying:

"As to the real estate it is quite evident that the proceeding is an ejectment bill and cannot take the place of an action in ejectment: Fox's Appeal, 99 Pa. 382. We have before us the identical bill that was filed in the Common Pleas. The answer of the respondent indicates that they will not attempt to do anything that is prejudicial to the interests of the petitioner. One of our purposes in going so fully into the case was to indicate to the parties our opinion as to their respective rights, in the hope that some plan might be suggested whereby this property both real and personal could be sold and the proceeds invested or deposited to await the final adjudication of the controversy. We are well aware that property is apt to be wasted or neglected where ownership is in dispute."

The petitioner took this appeal and assigned as error the decision that Mary Tyson took an absolute estate in the personalty and the dismissal of the petition.

N. H. Larselere, (*William L. Dannehower* with him), for appellant.

The Orphans' Court had jurisdiction in this case.

Tyson *v.* Rittenhouse, 186 Pa. 137.

Every question involved under the petition arises under the will of Charles Tyson, whose estate is declared to be exclusively within the grasp of the Orphans' Court as well as are all the persons claiming rights by virtue of his will.

The most ample powers and authority are conferred upon the Court to protect the estates of decedents and minors, and retain the same within its own control.

Dundas's Appeal, 64 Pa. 325.
Johnson's Appeal, 114 Id. 182.
Lowry's Appeal, Id. 219.
Odd Fellow's Savings Bank's Appeal, 123 Id. 356.
Mulholland's Estate, 154 Id. 491.
Lafferty *v.* Corcoran, 180 Id. 309.

Mrs. Tyson did not take an absolute estate. Every will must be construed by itself.

Byers's Estate, 186 Pa. 406.

If the earlier clauses in the will stood alone, unquestionably the widow would have taken both personal and real estate absolutely, because the language was broad enough to cover an absolute gift. But when we take the latter clauses, together with the codicils, it is so evident that testator only intended an estate for life in his widow, and that she should not be restricted to income alone, if insufficient to keep her, as to be beyond question. He did not intend her to create an estate in herself to will away at her death. The careful provision made to equalize the remaining estate at her death between her relatives and his own, manifestly shows that was not his intention.

The law is, the last expression of a man's intention is his will, and if repugnance exists between earlier and later clauses in a will, whereby they cannot be reconciled, the earlier must give way to the latter.

Newbold *v.* Boone, 52 Pa. 167.
Sheetz's Appeal, 82 Id. 213.
Heistand *v.* Meyer, 150 Id. 505.

The case at bar falls within Gross *v.* Strominger, 178 Pa. 64, and Byers's Estate, 186 Pa. 404, and as to the bank stock being all of the personal estate that is claimed by appellant as part of his testator's estate, is ruled directly by Hinkle's Appeal, 116 Pa. 490, and Kennedy *v.* Kennedy, 159 Pa. 327.

Montgomery Evans, (*Louis M. Childs* with him), for appellee.

Mrs. Tyson's estate was absolute as to the personalty only.

Lininger's Appeal, 101 Pa. 161; 110 Id. 398.
Mercur's Estate, 151 Id. 49.
Heck's Estate, 170 Id. 232.

As to the realty.

Jauretche *v.* Proctor, 48 Pa. 466.
Reformed Church *v.* Disbrow, 52 Id. 219.
Good *v.* Fichthorn, 144 Id. 287.
Fisher *v.* Wister, 154 Id. 65.
Evans *v.* Smith, 166 Id. 625.

When a power of sale is annexed to a devise, with limitation over if not sold, a transfer of title for a nominal consideration and immediate reconveyance to devisee, vests an absolute estate.

Barnet *v.* Deturk, 43 Pa. 92.

When the power is general to the donee to appoint to whomsoever he may choose, the donee has absolute control as if he had the fee and can appoint as well to himself as to any other person.

Lawrence's Appeal, 136 Pa. 354, 364.
Beck's Appeal, 116 Id. 547.

May 1, 1899. MITCHELL, J. This is in form a petition for a citation to account, but in substance it is a bill in equity by the surviving executor of Charles Tyson against the executors of Mary Tyson for the conveyance and transfer of property real and personal held by the respondents as part of the estate of their testatrix, but claimed by plaintiff as part of the estate of Charles Tyson. The Court below dismissed the petition on the ground that as to the realty it was an eject-

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ment bill and not within the jurisdiction of the Court, and as to the personalty that the title was in Mary Tyson in her lifetime and passed by her will to her executors.

The distinction as to jurisdiction between real and personal estate is not well taken. While ejectment for the real estate as such is the remedy in ordinary cases for heirs or devisees, yet in the present case the executors are charged by the will of Charles Tyson with the administration of his real estate as well as his personalty, and the jurisdiction of the Orphans' Court to assist executors and administrators in obtaining possession and control of the decedent's assets, is very extensive: Brooke's Appeal, 102 Pa. 150; Odd Fellows Bank's Appeal, 123 Pa. 356; Lafferty *v.* Corcoran, 180 Pa. 309. In Mulholland's Estate, 154 Pa. 491, the very basis of the order to pay over or secure the money, was that it was the proceeds of decedent's real estate and must be dealt with as such.

In the present case the property in controversy admittedly had been Charles Tyson's. At his death it passed into the possession of his widow, Mary, under his will. At her death her executors took possession of it as part of her estate, and appellant claimed it as part of Charles Tyson's. The title to it depends on the will of Charles Tyson, and both parties are in the Orphans' Court for supervision and control of their management of their respective trusts under his will and hers. It is a case for the jurisdiction of the Orphans' Court, and such was the decision when the case was here last year: Tyson *v.* Rittenhouse, 186 Pa. 137.

It is quite true that the Courts of Pennsylvania have no jurisdiction to declare the construction of a will and rights under it by way of advice in limine, and without adverse litigants actually before them. It is not desirable that they should have. Notwithstanding some convenience, as remarked by SHARSWOOD, J., in Willard's Appeal, 65 Pa. 265, such practice would be contrary to the whole fundamental theory of our law under which Courts do not advise but decide, and for decision there must be an actual contest. No man and no Court can foresee the state of facts that may occur in the future, and ex facto oritur jus. In no class of cases is this truer than in those arising under wills. It is the unexpected, the condition of facts unforeseen and therefore unprovided for, that gives rise to most of such litigation. And no Judge can have failed to observe not only in will cases but in all others, how the knowledge and self-interest of parties actually contending for success conduces to precision and accuracy in the judicial result. Hence the very noticeable fact that with all the disadvantages of inexperience, want of learning, etc., on the part of counsel that sometimes embarrass a case, it is only in the rarest of instances that the true ground of determination fails to be developed in the argument. Nothing sharpens the wits for the presentation of every possible view like the interest of opposing parties, dealing with known facts in a genuine contest for victory. It is that which gives the superior value to the decision of a Court of even moderate ability, over the ex parte opinions of the most learned and experienced counsel.

The jurisdiction of the Orphans' Court in the present case is not contrary to these principles. What the petition seeks is the aid of the Court to the executor in obtaining possession of the assets of his testator's estate. If his title were admitted, the cases already cited show that this is the proper Court for him to come to. If the property were held on a clearly adverse and unconnected title, the holder could not be deprived of it except by the judgment of the ordinary common law tribunals. But here it is admitted that the property was Charles Tyson's, but it is claimed that it passed to his widow under his will. As already said, both estates are in the Orphans' Court, and that is the tribunal to settle this title. What the petitioner asks is not a construction of the will in advance and by way of advice, but the assistance of the Court to obtain what he claims as the property of his testator. That is the jurisdictional fact, though in showing title the petitioner must as an incident rely on his construction of the will. It has been already held that his bill will not lie in the Common Pleas and that he must come into the Orphans' Court for his remedy. In so doing he is not obliged to wait until property that may be finally adjudged to be his, is sold and turned into an account by the executors of Mary Tyson. If his claim is valid he should have the assistance of the Court to get the property now, and not be turned over to a surcharge of the other executors hereafter.

Secondly, the Court below held that by the will of Charles Tyson the personalty passed to his widow absolutely, on the ground that a bequest of personalty with power to consume, sell and dispose of, carries an absolute and unrestricted title to it. That such is the general rule cannot be disputed. It is not, however, a rule of law, but a rule of construction in aid of reaching the intent of the testator, and where a different intent is clear the rule cannot be applied to defeat it. It was said by SHARSWOOD, J., in Fox's Appeal, 99 Pa. 382, that "every will is to be construed from its four corners to arrive at the true intention of the testator. Decisions upon

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other wills may assist but cannot control the construction." This is but one of the hundreds of expressions of the cardinal rule in the interpretation of wills, to find the testator's intent, and by that is meant his actual, personal, individual intent, not a mere presumptive conventional intent inferred from the use of a set phrase or a familiar form of words. With the desire to reduce to a minimum the perplexity and uncertainty inseparable from the subject, Courts have established certain artificial and arbitrary canons of construction, by which certain forms of expression are presumed to have certain meanings, and in doubtful cases these presumptions are held to be decisive. But all these canons are subservient to the great rule as to intent, and are made to aid, not to override it. As in all such cases care is required that tools shall not become fetters, and that the real end shall not be sacrificed to what was intended only as the means of reaching it: Woelpper's Appeal, 126 Pa. 562. This Court has in numerous cases pointedly indicated its determination to restore or preserve the cardinal rule as to intention in its original and proper prominence, and to let every will stand on its own terms, as every contract has always been construed to do.

Of the actual intent of Charles Tyson in his will the Court below had no doubt, nor have we. The learned Judge says: "He contemplated that she (his widow) might make uses of the estate which would exhaust the whole, but he never intended that her appropriation of all the property and retention of it to the time of her death should give her the right to will it away, and defeat his disposition to the brothers and sisters." But notwithstanding this clear view of the intent, the learned Judge held that as the testator had given an absolute estate in the first place, his intent to dispose by his own will of the unconsumed residue must fail. In this conclusion we think he gave too much weight to the form instead of the principle of the precedents. The testator's intent to give the personalty absolutely and without restriction is an inference or presumption from his use of language similar to that which in other cases has been held to have such meaning, and if the meaning here were doubtful this presumption would prevail. But looked at by itself to ascertain this individual testator's intent it is perfectly clear that he did not mean to give the whole without restriction. On the contrary his intention was to give her so much, and only so much, though possibly amounting to the whole, as should be necessary for her own comfort and enjoyment of life, and the residue, be it much or little, was to pass under his will. This disposition of his estate violated no rule of law. If he had left it to trustees with directions to sell and pay over to the widow from time to time such portions as she should in her own judgment require for her own use, there would have been no difficulty at all in its administration. But the purpose being clear and lawful it is the duty of Courts to see that it is carried out and not defeated for mere inconvenience of form. The extent of the widow's consumption of the estate was within her own control. Her decision was without appeal, but it must have been honestly reached in accordance with the purpose the testator intended and not merely colorably to defeat his will. She had power to carry out his intention by sale, transfer and consumption of the proceeds in such a way as to leave nothing at her death. But a transfer with intent not to consume for herself, but to preserve for others after her death, and to change the beneficiaries after her, from those chosen by her husband to others of her own selection, would be a fraud on the testator and his will. This is a question of fact to be determined by the Court on the circumstances and the evidence in each case as it arises.

This result does not conflict with any of our decisions. They are very numerous and we have examined them all with care. It is not necessary to go over them in detail, but is sufficient to say that they all rest on the single and indisputable principle of carrying out the intention of the testator. The intent being ascertained it is not to be restrained or diverted by merely precatory words, as in Heck's Estate, 170 Pa. 232; or by a particular intent repugnant to the general intent, such as an effort to control the legal incidents of the estate given, as in Jauretche *v.* Proctor, 48 Pa. 466, and Levy's Estate, 153 Pa. 174.

The general rule deduced in these cases is undoubtedly that a bequest of personalty with power to consume is presumed to be an absolute gift. But as already said this is not a rule of law but a rule of construction in aid of discovery of the testator's intent. The language of our brother McCollum in Gross *v.* Strominger, 178 Pa. 64, is very appropriate here: "Whatever was necessary for her support he intended she should have. If the income of the estate was sufficient to afford her a suitable maintenance it was his intention that the principal should go at her decease to the children and grandson. A construction of the privilege (to use the principal if necessary for her comfort) which makes it operate as an absolute gift to the wife of the residue of the estate would defeat the plain purpose of the testator. . . . . The mere fact that the securities which represent the balance of the estate were taken in her name has no particular significance. It is

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not within her power to defeat his intention respecting the remainder of the estate by any such act." In that case the money in controversy was originally the proceeds of real estate sold for payment of debts, but the principle of law is equally applicable in cases of personalty and was so applied in the recent cases of Hinkle's Appeal, 116 Pa. 490, and Byers's Estate, 186 Pa. 404. It is always a question of intent.

The subject of the perversion of the power given, by the use of the form but with the purpose of defeating or evading its intent, has not been directly discussed in our books heretofore, but the principle applicable plainly appears in two recent cases. In Lejee's Estate, 181 Pa. 416, testator left a sum to trustees to pay the interest to E. for life and at her death the principal to her children, or in default of children, over, but added that if E, "should at any time desire to increase her income by an annuity the trustees shall at her request invest the whole or any part of the said sum in an annuity for her." E. demanded the principal of the sum at once, and the Court below decreed it to her on the ground that a gift for life with power of disposal amounted to an absolute gift, and as E. could direct the whole sum to be turned into an annuity for her benefit she could at her option take the money instead. But this Court reversed the decree, saying: "It is obvious that this award if sustained will defeat the unmistakable purpose of the testator in creating the trust. . . . It was his beneficiary who was to determine whether there was occasion for increasing her income. . . . . Certainly this was a concession to her by the testator of a liberal discretion, in full confidence, however, that she would exercise it in conformity with his clearly expressed intentions. . . . The possibility that the beneficiary may exercise the discretion given to her in regard to the purchase of an annuity, and thus wholly or partially destroy the interests in remainder is not sufficient ground for dispensing with the exercise of it and awarding the whole sum to her. The exercise of the discretion in good faith may destroy these interests, but the mere existence of it cannot."

The other case, LaBar's Estate, 181 Pa. 1, is to the same effect, though there the discretion of the beneficiary was less absolute, the testator's language being: "If at any time she needs any part of the principal of the bank stock she is at liberty to receive it for her support and maintenance." She demanded the whole of it at once, and the Court awarded it to her on the general principle hereinbefore discussed. But this Court reversed, the present Chief Justice saying the provision "was never intended to be used as a pretext for demanding and appropriating to her own use the entire corpus of the estate; . . . . if such an unconscionable demand as that were acceded to it would not only defeat the manifest purpose of the testator, but would operate as a fraud on his residuary legatees."

The test in all such cases is the good faith the action of the beneficiary. If it is an honest exercise of the discretion with which the testator has clothed him, his action is conclusive, but he cannot be permitted to make use of the mere form to defeat or evade the true intent, and pervert the gift to a different purpose.

The decree is reversed with directions to reinstate the petition and proceed with the case in accordance with the principles expressed in this opinion. Costs to be paid by the appellee.

H. B.

Jan. '98, 384. Supreme Court. February 22, 1899.

Keator v. Scranton Traction Co.

Damages—Negligence—Electric railways—Passenger—Who is.

An electric railway company owned and operated two lines running out of a city, S., the termini being about a block apart. A passenger on one line was entitled to receive a transfer from the conductor, good for a ride on the other within a limited time. A. got on a car on one line with the intention of going to a point on the other, and was given a transfer ticket when she reached the terminus of the first line, and, while walking from the curb to the second car, was struck by the trolley pole, which broke while being changed from one end of the car to the other. In an action for damages for the injury thus received:

Held, **that A. was, at the time of the injury, a passenger of the railway in the legal sense, which makes it the duty of said company to exercise extraordinary care over its appliances.**

Appeal by the Scranton Traction Company, from a judgment of the Common Pleas of Lackawanna County, in action for damages by Susan Keator and J. B. Keator, her husband, for injuries by the former through the alleged negligence of said traction company.

The facts of the case are stated in the opinion of the Supreme Court, infra.

The defendant requested the Court to charge as follows:

"6. That plaintiff was not a passenger upon defendant's car at the time of the accident, and no presumption of negligence arises from the fact of the accident against the defendant."—"Refused."

The Court, McPherson, J., specially presiding, charged the jury, inter alia, as follows: "Therefore we instruct you that the defendant has not come up to the measure of its obligation, and regarding the plaintiff as a passenger, there-

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fore, we say to you that the plaintiff is entitled to a verdict."

The Court reserved the defendant's first point, which was as follows:

"That under all the evidence the verdict must be for the defendant," and asked the jury to return a special finding on the question whether the plaintiff's injury was caused by want of ordinary care on the part of the defendant in its use of the trolley poles.

The jury specially found that the injury was caused by want of ordinary care on the part of the defendant in its use of the trolley pole and found a verdict for the plaintiff, assessing the damages at $4670.83.

Defendant moved for new trial and for entry of judgment for defendant non obstante veredicto.

The Court refused these, and judgment was entered on the verdict.

Defendant appealed, assigning for error, this action of the Court.

Everett Warren, (with him *Edward N. Willard* and *Henry A. Knapp*), for appellant.

S. B. Price, for appellees.

April 24, 1899. DEAN, J. Appellant operates two lines of electric passenger cars running out from the city of Scranton, one north, the other south; the terminus of the one running north was at the corner of Penn and Lackawanna avenues; of that running south, in front of the Wyoming House, a block distant; the company provided a continuous passage on both lines by transfer tickets. On August 30, 1894, Susan Keator, plaintiff, got upon a car of the north line to go to Mountain Lake, a pleasure resort on the south line. She paid her fare, and when the car stopped at the corner of Penn and Lackawanna avenues, got off; before she left the car, the conductor gave her a transfer ticket which read: "Good upon next south side car within thirty minutes from nine o'clock." She then walked to the starting point of the south side car in front of the Wyoming House. While standing on the pavement, the trolley car pulled up and stopped; as it would proceed to its destination in an opposite direction, the motorman attempted to change the trolley pole to the other end of the car; in doing so, it broke, and a piece of it struck Mrs. Keator on the head and shoulder, inflicting a severe injury; when stricken, she had moved from the pavement to a point midway between the curb and car; the distance from car to curb was about ten feet; at the time the seats had been reversed in the car, which was an open one, and she was approaching it to get on. On the trial in the Court below, two questions arose, one of law for the Court, and one of fact for the jury. On the undisputed facts was plaintiff, at the time of the injury, in a legal sense, a passenger on defendant's road? If so, then she was entitled to recover, for defendant adduced no evidence of that high degree of care, such as is incumbent on a common carrier of passengers, when one has been injured by any of the machinery or attachments of the car or other vehicle in which the passenger is being transported. If she was not a passenger then did the company exercise that ordinary care in manipulating its machinery which it owed to others occupying and using a common highway? The Court decided the first question in favor of plaintiff, but to save a second trial, if such ruling should be error, it submitted the evidence bearing on the second question to the jury, directing them to make a special finding as to that branch of the case. On this question, the jury answered that defendant had not exercised ordinary care in changing the trolley, consequently there was a finding for plaintiff on both grounds; her damages were assessed at $4670.83. Afterwards, in a very full opinion filed, the Court overruled a motion for a new trial, and entered judgment on the verdict.

The case turns here, on whether the Court below was correct in holding on the undisputed facts, that plaintiff, at the time she received the injury, was a passenger. We think grave injustice might have been done defendant by the method of trial, if its liability had depended on the answer of the jury to the second question. The Court pointedly decided and explicitly announced, as matter of law, that defendant owed to plaintiff, as a passenger extraordinary care, and then submitted to them the evidence to determine whether it had exercised towards her, as a traveler on the highway, ordinary care. A jury of lawyers, would doubtless have clearly perceived the distinction so perspicuously pointed out by the Court; but with the large majority of laymen it would not be comprehended, and if comprehended, would in many cases not be heeded. In considering the second question, the jury would start with the conviction, that defendant had violated its lawful duty to its own passenger, and probably, therefore, had neglected a less rigorous one to the general public. In the face of the law, as declared by the Court on the first question, a corporation's chance for a favorable verdict on the second, was a very remote one with the ordinary jury. We would hesitate to sustain the Court's method of reaching a verdict, however commendable the motive, if the correctness of the judgment depended on the jury's answer to the second question; de-

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fendant was entitled in fairness, to an answer on the second from a jury, unprejudiced by a decision against it on the first.

But, taking the undisputed facts, was the plaintiff's relation to defendant at the time of the injury, that of a passenger? If so, then the burden was on defendant to show it had exercised a high degree of care towards her because of that relation. It offered no evidence as to the strength of the trolley pole; whether it had been subject to inspection at any time; whether age and constant use had destroyed the tenacity of its fibre, or even whether it was ever safe for its purpose. The fact stood out undisputed, that in manipulating the pole in the usual way, it broke and injured plaintiff. Unquestionably defendant failed in its duty to her, if she was a passenger. It must be conceded, we think, that the transfer ticket, on its face, was an undertaking to carry her from the point where the car started, in front of the Wyoming House, to her destination on the south side line. She was not a passenger, while on the side-walk, going from one point to the other. Thus far the construction of the carrier's contract, from the undisputed circumstances and the ticket, is palpable. When did the obligation of the contract end with regard to her at this interval? It must be borne in mind, as so clearly pointed out by the learned Judge of the Court below, that the injury to her was from a defect in an indispensable attachment of the very vehicle in which defendant had undertaken to carry her. It was not a side-tracked car, or an unused one, which she had no right to get on, but in the common phrase, it was "her car," that had been provided by defendant to carry her to her dstination which caused the injury. There is no definition of the duty of defendant to plaintiff, which fits the facts of this case. That cited and relied on by appellant: Fetter on Carriers and Passengers, Vol. 1, page 233, applies to a different state of facts. The author says: "When he (a passenger) steps from the street-car to the street, he ceases to be a passenger when he alights. The street is in no sense a passenger station for the safety of which the street railway is responsible. When a passenger steps from a street-car upon the street, he becomes a traveler upon the public highway, and terminates his relation and right as a passenger and the railway company is not responsible to him as a carrier for the condition of the street, or for his safe passafe from the car to the side-walk." And again, on page 229 of same book: "The special duty of carrier to exercise a high degree of care, begins only when by coming upon his premises, or in the act of entering his vehicle, the actual relation of the passenger to the carrier is assumed."

The cases cited by the author, amply sustain the text, but not one of them is a case, where the passenger was injured by a defective attachment to the vehicle from which the passenger alighted or which he was about to enter. Unquestionably, the carrier is not answerable for the condition of the highway on which the passenger alights, or from which he stands or steps before entering the car; nor is it answerable for the conduct of third persons, who, by neglect, cause injury in such situation to the passenger. But in the case of these particular conveyances, electric cars, necessarily and immediately on the car stopping at the end of the route, the motorman proceeds to reverse the trolley; ordinarily this is attended with no danger to any one; the act is performed while some of the passengers have alighted and are on the side-walk out of reach of the trolley pole; some are between the curb and the car, and probably some yet in the car. Can it be argued with any plausibility that in changing the trolley pole, the carrier owes no duty to its passengers, who are not out of reach of danger from a part of the very vehicle in which they have been carried? Clearly the duty to the passenger under such circumstances, with that kind of vehicle, does not end the moment the passenger's foot touches the street. And so with the next starting car. She has traversed the sidewalk and is on the pavement in front of the Wyoming House; the car moves up to the end of the line in front of her and stops; she steps outside the curb and moves towards it; the seats are being reversed; two or three passengers are already in the car; when within four or five feet of it she is struck by the broken pole, which of necessity is being changed. Why is she within reach of this peril? She is not a traveler on the highway, is not a resident who desires to cross the street; is not a mere spectator, who from curiosity or idleness, stands in that situation with reference to the car; she is there because under the stipulations of the contract then in her possession, she has a right to take passage on that particular car at that point. In no sense is she one of the general public on the highway, she is at that point, at that particular juncture, because she could not receive the consideration of her contract, a passage to Mountain Lake, if she were anywhere else. If it were not for her contract, she would not be there at all. Surely, in such situation, under such circumstances, the carrier's duty to her was what it owed to a passenger, as much so, as if her injury had been caused by a rotten step on the car. When she came within reach of the vehicle provided for her transportation the carrier's duty was that she should not be injured by the vehicle, if the highest degree of care could

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prevent it. Such care, appellant was bound to show affirmatively; it did not attempt to show it. Therefore it is answerable in damages for her injury.

The judgment is affirmed. W. M. S., Jr.

Superior Court.

Oct. '98, 173. Superior Court. November 23, 1898.

Irving's Executors v. Borough of Media.

Water and watercourses — Riparian owner — Water Works—Party to action in double right —Prescription—Measure of claims.

It is the right of a riparian owner to have the water flow as it was wont without material diminution or alteration.

The ownership of riparian land does not include ownership of the water which flows over a part of it; the owner has, however, for certain purposes connected with the land, a right to divert and consume water, but this gives him no right to divert or consume it for purposes unconnected with the land; a borough or company, authorized to carry on the business of the distribution and sale of water, cannot, therefore, draw water from a stream for such purposes, to the injury of a lower riparian owner without liability to make compensation for the same.

Where a claim to take water rests upon prescription, the extent of the claim is the amount of water taken for twenty-one years before action was brought.

Where a borough diverts water, for the purposes of distribution among its citizens, to the injury of a lower riparian owner, it is liable to be made to account therefor in a common law action.

Where a plaintiff has distinct interests in the same thing he may recover in the same action for an injury affecting both.

I. owned a mill and the land on which it stood. His executors brought action to recover for the diversion of a stream and were allowed to recover on the basis of the cost of supplying power to the mill to take the place of that of which he was deprived during the time covered by the action: *held*, the fact that W., a son of I. and one of his executors, had an interest in the profits of the mill business was no bar to a recovery in view of the fact that W. was an executor of I., and that he, at the end of the trial, renounced all claim to recover for himself.

Appeal of the Burgess and the Town Council of the Borough of Media, defendant, from the judgment of the Common Pleas for Delaware County, in an action of trespass brought by William A. Irving, Charles N. Worthington and William B. Broomall, executors of James Irving, deceased.

This was an action to recover for an unlawful diversion of water by the defendant to the injury of the plaintiff.

The defendant pleaded, inter alia, the statute of limitations.

On the trial, before CLAYTON, P. J., the facts appeared as follows:

The borough defendant was incorporated under a special Act of Assembly approved March 11, 1851. Prior to the borough's incorporation the county of Delaware was the owner of a large tract of land within the limits used in connection with the alms house, and had more recently purchased another tract upon which the court house and jail were being erected. Passing through these tracts were two tributaries of Ridley creek. By the thirty-second section of said Act of incorporation, the county commissioners "were authorized and empowered for the convenience and protection of the county buildings about being erected within the limits of said borough for the accommodation of the new seat of justice of said county to construct upon any property within the said limits belonging to said county, such water works and basin as they may deem sufficient for raising and containing, with an ample head, all the water a certain stream passing through the western end of said property is capable of supplying." "And the said county commissioners are hereby further authorized to lease or sell the said works and appurtenances, together with the right to use and consume the whole quantity of water supplied by said stream, at a fair annual rent or price to the said burgess and town council for the use of the inhabitants of said borough, reserving the right to take so much water on said county property as may be necessary for the county property for domestic and cleansing purposes, or the extinguishment of fires." By a subsequent Act of Assembly, approved April 6, 1854, P. L. 301, etc., the thirty-second section of the Act of incorporation was construed to authorize the county commissioners and directors of the poor, to grant and convey to the burgess and town council of said borough and their successors all such land, water rights and privileges belonging to or held for the use of the county, as may enable the borough authorities to erect, put in operation and forever maintain such water works and basin as may be of sufficient capacity to raise and contain with an ample head, all that the water of a certain stream passing through the western end of the farm now held by the said county commissioners and directors aforesaid is capable of supplying and such water as may be procured elsewhere, and also to lay such pipes or mains as the borough authorities may deem requisite to conduct the water to any and every part of such borough. Section 4

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of the last named Act provided: "That it shall be lawful for the said burgess and town council to construct such water works and appurtenances, and forever maintain the same, as may be found adequate to furnish the requisite quantity of water for the full supply of the necessary demands of the inhabitants and public buildings within said borough and to use the water from any streams or springs within the limits of said borough hereinbefore named, or other or elsewhere found, paying to those interested a just and equitable compensation for any damage by them sustained, to be adjusted by mutual agreement or in the case of disagreement by application to the Court of Common Pleas of said county as in cases of public road or bridge damages. Provided, that nothing herein contained shall authorize the borough authorities as aforesaid to enter on lands or appropriate the property of persons with whom an agreement cannot be effected without first giving adequate security for any damage they may occasion to be approved by one of the Judges of the Court of Common Pleas of Delaware county."

Pursuant to the power given under this Act of Assembly the defendant erected water works on the stream mentioned, a tributary of Ridley creek, in the year 1854, or 1855, and continued to pump from this stream, for the purposes aforesaid, up to 1872; during the latter part of the time taking all the water of the stream.

A supplement to said Act of Assembly of April 6, 1854, was passed April 18, 1857, P. L. 253, wherein it was enacted, "That whenever the present works became inadequate to furnish a sufficient supply of water for the use of the inhabitants of said borough, it shall be lawful for the burgess and town council thereof to erect such other works as they may deem necessary at such place or location as will best procure the requisite supply of water."

On December 26, 1871, the borough defendant purchased a mill site on Ridley creek, with its water power and rights and with land extending on both sides of the creek, and in 1872 erected a pumping plant, and also a reservoir of very much larger capacity. The pumps were completed in October of 1872, and the borough was supplied with water from the creek continuously after that date for drinking and other purposes.

The riparian land belonging to the borough is outside of the borough limits. The amount of water pumped by the borough in 1872 was comparatively small. It increased continuously from that time.

The borough lately began to furnish water to a district outside of the borough, some of which was within the water shed of Ridley creek, and some of it in another water shed. In 1894 when the water taken from the creek by the borough became markedly noticeable and injurious to the plaintiff, he brought the present action, claiming compensation for the injury sustained by him as riparian owner, and mill owner. The statute of limitations being interposed, he was restricted to a recovery for six years antedating his writ.

Verdict for plaintiff, $1605.85, reduced by a remittitur to $1000. The defendant took an appeal to the Supreme Court, which was by that Court certified to the Superior Court.

The matter involved in the assignments of error sufficiently appear by the argument of counsel and the opinion of the Court, infra.

George E. Darlington, (with him *V. Gilpin Robinson* and *E. H. Hall*), for appellant.

The stream here was a public one, water does not belong to a riparian owner, it belongs to any one who can take it from the stream and has attained access thereto.

Haupt's Appeal, 125 Pa. 224.
Mayor *v.* Commissioners, 7 Id. 348.

The defendant as a riparian owner had the right to take the water for drinking purposes, even if it left the lower owner without any.

Pa. R. R. *v.* Miller, 112 Pa. 41.
Clark *v.* R. R. Co., 145 Id. 449.

All the inhabitants of Media have the right to drink the water if they can get it, the defendant represents them and gets the water for them.

The plaintiff cannot treat the defendant as a trespasser and recover in this form of action—if their decedent had any right to compensation it must be enforced by having the damages assessed in the way presented by statute where property is taken by the exercise of the right of eminent domain.

Pa. R. R. *v.* Montgomery Co. P. Ry. Co., 167 Pa. 72.
Hankey *v.* Phila. Co., 5 Pa. Super. Ct. 148.

Or, if the defendant was allowed to make an entry without security, by ejectment.

Oliver *v.* R. R. Co., 131 Pa. 409.

Or by an action on the case.

Hankey *v.* Phila. Co., supra.

The lapse of twenty-one years from the beginning of the pumping is a bar to the present action.

Wallace *v.* Fourth Presbyterian Church, 111 Pa. 170.
Wheatley *v.* Chrisman, 24 Id. 304.
Messinger's Appeal, 109 Id. 285.

But twenty-one years were not required as, under the Act of April 6, 1854. P. L. 301, the riparian owner was barred in one year.

In re Louis Palmer, 1 Del. Co. 269.

W. B. Broomall, for appellees.

A supra-riparian owner is liable to the owner

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of the land below for every material diminution of the flow of the water by a diversion from the stream, whether for irrigation or other purposes; and this, though no actual injury may have been suffered.

Hartzall *v.* Sill, 12 Pa. 248.

A proprietor of land over which a stream of water runs, has, as against a lower proprietor, the use of only so much of the stream as will not materially diminish its quantity or corrupt its quality. His right is not to be measured by the reasonable demands of his business.

Wheatley *v.* Chrisman, 24 Pa. 298.
Messinger's Appeal, 109 Id. 285.
Penna. R. R. Co. *v.* Miller, 112 Id. 34.
Clark *v.* Pa. R. R. Co., 145 Id. 438.

The right to take water assumed by the defendant to belong to the inhabitants of Media, belongs to them because they are natural persons. The same right belongs to natural persons wherever they may live.

If such right exists it is the end of the property rights in the creek of all riparian owners. Such a right is without limit in its use, and would go to the extent of the entire absorption of the creek.

The cases cited by appellant apply only to riparian towns and creeks. The borough in this case while a natural person might have the right to take water from the creek for domestic uses, it does not follow that it could take water from the creek to sell to others. In this case the borough, in furnishing water to its inhabitants is a vendor of water.

Philadelphia *v.* Gilmartin, 71 Pa. 140.

And its actions in such capacity are to be treated as those of a private corporation.

Bodge *v.* Philadelphia, 167 Pa. 492.

The prescription covers only the use of water in the particular way and extent that have existed for twenty-one years.

Strickler *v.* Todd, 10 S. & R. 63.
Hoy *v.* Sterrett, 2 Watts, 327.
Darlington *v.* Painter, 7 Pa. 473.
Chestnut Hill, etc., Turnpike Co. *v.* Piper, 77 Id. 432.

The statute runs from the time when the owner is, or with proper attention to his own property should be warned of the adverse claim set up.

Hughesville Water Co. *v.* Person, 182 Pa. 454.

April 17, 1899. Rice, P. J. This was an action of trespass to recover damages for the diversion of the waters of a private stream called Ridley creek. The defendant's water works are located on land which it bought for the purpose outside the borough limits. The main stream from which the water is taken, does not run through the borough, but one of its tributaries does. The plaintiff's mill is located on the stream about four miles below the defendant's pumping station. Other facts will be referred to as we proceed.

Without discussing each of the assignments of error separately, the principal questions in the case will be considered under the following heads: First, the defendant's right to divert the water, (*a*) as an upper riparian owner; (*b*) as a borough authorized by law to supply its inhabitants and those living in the vicinity with water for domestic and other ordinary uses; (*c*) by prescription; second, the plaintiff's remedy:

1. It is not pretended that the defendant's ownership of riparian land at the point where the water is pumped by it from the creek would, of itself and without more, be a defence to the present action. The counsel say they do not stand on the rights of the defendant growing out of riparian ownership, but on the rights of the inhabitants within the limits of the territory drained by the creek and its tributaries, to take as much of the waters of those streams as they may at any time need for domestic uses, without being liable in damages to those below. They say that the borough is simply the agency through which the collective rights of the inhabitants are being exercised. The argument in support of the main proposition proceeds along these lines. There can be no ownership of flowing water; the right to take it for one's needs is a natural right; all that prevents any person from taking it is that he cannot have access to the stream without trespassing upon the lands of others; if he can have access to it where it crosses a highway, he may take as much as he needs for ordinary uses; the same must be true if he can get to the stream by permission of a riparian owner,—the logical result of holding, without qualification, that all inhabitants of a particular district, who can obtain access in any lawful way to a private stream, may take as much water as they need for ordinary uses, would be that the riparian owner may grant to non-riparian owners the same rights that he has. If this be so, he may admit as many to the same privileges as he pleases, and upon such terms as he pleases, even to the exhaustion of the stream. He may permit a water company, or a borough having the same powers, to erect its pumping apparatus and reservoir upon his land, and if the water company or the borough confine its distribution of water for pay to inhabitants of the district drained by the stream, lower riparian owners cannot complain. If the needs of the inhabitants of the borough should now, or at any future time, require all the water that comes to its plant, all might be taken, if the position of counsel be correct. The establishment of this doctrine, instead of conserving the natural rights of all the inhab-

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itants of the district, would enable a part of the inhabitants, namely, those dwelling in the borough, to appropriate the water to the exclusion of dwellers further down, whose natural rights, the counsel must concede, are equally as sacred. It would, moreover, be destructive of the rights of lower riparian owners to have the stream that washes their land "flow as it is wont without material diminution or alteration." The defendant's counsel defended their position with earnestness and ability but we cannot avoid the conviction that a process of reasoning which leads to such results must have a fallacy in it somewhere along the line. Ownership of riparian land does not include ownership of the water which flows over or past it, it is true. The right which the owner has is to the reasonable use of it as an incident to the land. For some purposes connected with the enjoyment of the land to which the right is incident, (for example for domestic use and for watering cattle), the riparian owner may divert, detain and even consume the water. The lower owner's right is subject to this well understood qualification. But the upper riparian owner has not in all respects an equal right thus to divert, detain or consume the water for purposes, which, although the same in kind, are in no way connected with the use of the land past or over which it flows. These are elementary principles and scarcely is it required that authorities should be cited in support of them. It is sufficient to refer to one of the latest decisions of the Supreme Court involving a consideration of riparian rights in a private stream, where the language of Chancellor KENT, in Gardner *v.* Newburgh, 2 John. Ch. R. 162, is quoted with approval: "A right to a stream of water is as sacred as a right to the soil over which it flows. It is a part of the freehold, of which no man can be disseized, but by lawful judgment of his peers or by due process of law." Speaking of Haupt's Appeal, 125 Pa. 211; Lord *v.* Water Co., 135 Pa. 131, and Clark *v.* R. R. Co., 145 Pa. 452, Justice DEAN said: "In substance they hold that the riparian right is not an absolute ownership of the water of the stream. This is not pretended. The riparian owner could not sell the water to a non-riparian owner, nor could he possess himself of the whole of it; such is not his right; his right is qualified by the rights of the lower riparian owners. But this qualified right appertaining to his property along the stream adds to the value of the property." Rudolph *v* Penna. R. R. Co., 186 Pa. 541. The riparian owner has in addition to the natural rights which every one possesses, a property right which non-riparian owners do not possess. In conferring upon this borough the power to transact the business of a vendor and distributor of water and for that purpose "to use the water from any streams or springs within the limits of said borough . . . . or elsewhere found," the Legislature was careful to provide that it should pay "to those interested a just and equitable compensation for any damage by them sustained," and further, "that nothing herein contained shall authorize the borough authorities . . . . to enter on lands or appropriate the property of persons with whom an agreement cannot be effected, without first giving adequate security for any damage they may occasion to be approved by one of the Judges of the Court of Common Pleas of Delaware county": Act of April 6, 1854, P. L. 301. The Act was intended, and is adequate to provide for the necessities of the general public, and also to protect the property rights of individuals owning riparian lands. If the right of the riparian owner to the natural flow of a private stream is a property right, as it clearly is under all the authorities, he cannot be deprived of it lawfully by the appropriation of the stream by an upper riparian owner for the purpose even of supplying the natural wants of members of a community not having equal riparian rights, without compensation being first made or secured. The fact that the upper riparian owner is an incorporated water company or a borough authorized to carry on the business of a vendor and distributor of water cannot affect the principle: Craig *v.* Shippensburg, 7 Pa. Superior Ct. 526, and cases there cited.

2. The defendant's second position is, that it having entered upon the creek and commenced the diversion of the waters more than twenty-one years before suit was brought, the law presumes that compensation was made for any damage sustained by the plaintiff, or was adjusted by mutual agreement. Whilst refusing to affirm this proposition, the Court instructed the jury that the continuous user of the water for the period of twenty-one years raised the presumption of a grant, but differed from the defendant's counsel as to the extent of the presumed grant. We cannot better state the ruling than by quoting from the charge: "I can only say that if you find that the defendants take no more water from this stream than they took twenty-one years ago, then it would be a defence. If you find that they have taken more water and by different means and by additional and more powerful pumps, and by an extension of their works, than they did twenty-one years ago, and that has resulted in an injury to the plaintiff, then it is only a defence so far as a reasonable allowance should be made for what they took twenty-one years ago is concerned." We are of opinion that this was a substantially

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correct statement of the law applicable to the facts of the case being tried. The general rule of law is, that although the stream be either diminished in quantity, or even corrupted in quality, as by the means of the exercise of certain trades, yet if the occupation of the party so taking and using it have existed for so long a time as may raise the presumption of a grant, the other party, whose land is below, must take the stream subject to such adverse right: Bealey *v.* Shaw, 6 East. 208; Hoy *v.* Sterrett, 2 W. 327. "It is well settled, that if there has been an uninterrupted exclusive enjoyment, above twenty-one years, of water, in any particular way, this affords a conclusive presumption of right in the party so enjoying it, and this is equal to a right by prescription": Strickler *v.* Todd, 10 S. & R. 63; Messinger's Appeal, 109 Pa. 285. There is no difference of opinion as to this; there is a right in the defendant based on the presumption of a grant, or (to state the proposition in another form) of an appropriation for which compensation was made. The question is as to the extent of the right. The defendant's counsel contend that it is commensurate with the powers of the borough under the statute; the plaintiff's counsel contend that it is to be measured by the user twenty-one years before suit brought. The borough, it is true, could have acquired the right to the whole of the flow of the stream by condemnation proceedings or by agreement with the riparian owners, but it was not required by the Act of 1854 to take and pay for the whole, or none. So that it cannot be said that the lower riparian owners were bound to presume that, when the borough located its works on the banks of the stream and began to pump the water, this was an appropriation of all of the water of the creek. See Glass Co. *v.* Water Co., 5 Pa. Super. Ct. pp. 578-9. They were affected with notice of its acts and after twenty-one years, are presumed to have granted the right claimed by the borough as evidenced by them. The owner is not affected by the acts that do not bring to his knowledge, either actually or constructively, the assertion of a right adverse to him: Hughesville Water Co. *v.* Person, 182 Pa. 450, 454. Upon the same principle is it not correct to say, that in the case of a diversion or of a pollution of a private stream, the lower riparian owner is not affected with notice of the assertion of an adverse right, greater in extent than the acts of the adverse claimant indicate? If, at the beginning, the latter take but one hundred thousand gallons daily, is the lower owner bound to take notice of the assertion of the right to take all the water of the stream? Our examination of the authorities has led us to a different conclusion from that reached by the defendant's counsel. "The extent of the presumed right is determined by the user on which is grounded the presumed grant; the right granted being commensurate with the right enjoyed": Angell on Watercourses (7th ed.) 389. "The extent of the prescriptive right is measured by the extent of the enjoyment, and is confined to the right as exercised originally": 28 Am. & Eng. Ency. of Law, 1012. "The user which originated the right" (to pollute a stream) "must also be its measure, and it cannot be enlarged to the prejudice of any other person": Crossley *v.* Lightowler, L. R. 2 Ch. 478, quoted in Gould on Waters, par. 345. This doctrine is recognized in our own cases, and we discover no reason for refusing to apply it here: Darlington *v.* Painter, 7 Pa. 473; Mertz *v.* Dorney, 25 Pa. 519; Jones *v.* Crow, 32 Pa. 398; McCallum *v.* Germantown Water Co., 54 Pa. 40, 48; Chestnut Hill, etc., Turnpike Co. *v.* Piper, 77 Pa. 432. See also Bealy *v.* Shaw, supra, and Prentice *v.* Geiger, 74 N. Y. 342; Hogg *v.* Bailey, 5 Pa. Super. Ct. at p. 435. If, originally, the defendant had changed the course of the stream by turning it away from the lower owners, or by some other act, of which the lower owners had notice, had indicated a present purpose to permanently appropriate so much of the water of the creek as might not only then, but in the future, be required to supply the wants of the inhabitants, a different question would be presented.

3. The next question is as to the plaintiff's remedy. We suppose it will not be denied that if this were a dispute between two private individuals and during the period for which damages were claimed the defendant had diverted the water in excess of his right under a presumed grant, successive actions ex delicto would lie. But such diversion of the water is none the less a tort because the defendant has the right of eminent domain, if the conditions upon which this right may be exercised have not been complied with. See Glass Co. *v.* Water Co., 5 Pa. Super. Ct. 563, and cases there cited, and especially the cases of Lord *v.* Water Co., 135 Pa. 122, and Bethlehem Water Co. *v.* Yoder, 112 Pa. 136. The plaintiff's laches might be a bar to relief in equity, but it would not be a bar to a common law action. The measure of damages is another question. It was upon this question that the case of Hankey *v.* Philadelphia Co., 5 Pa. Super. Ct. 148, turned; the right of the plaintiff to maintain a common law action was distinctly upheld. Nor can the defendant complain that the damages were not assessed upon the same basis as if the defendant had appropriated the stream in the exercise of the right of eminent domain, for two reasons. First, the defendant persists in the

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claim (to quote from brief of counsel) that it has "the right to take the water out of the creek and its tributaries to supply the needs of its inhabitants and the public buildings, not under the right of eminent domain, but under the right which all of its inhabitants had and have to take water from the creek for domestic purposes." Second, after the verdict was rendered the Court gave the defendant an opportunity to file a bond and to specify the extent of its appropriation and ordered, that, if this was done, the verdict be set aside and a new trial granted. The defendant did not avail itself of this opportunity to have all the damages, retrospective as well as prospective consequent upon a permanent appropriation, assessed in one proceeding. Therefore, the principle upon which Hankey *v.* Philadelphia Co., and kindred cases were decided has no application.

This disposes of all of the questions raised by the assignments of error, excepting the first four and the seventeenth.

4. Where a plaintiff has different interests in possession and reversion, he may recover in one action for an injury affecting both: Gould on Waters, par. 480. Especially is this true where the separation of the interests is a mere business arrangement, made for his own convenience, as, for example, charging one department of his business with so much rent. James Irving was the owner of the mill and the land upon which it was situated. He was, moreover, in possession and conducting the business during the period covered by the action. His executors claimed to recover damages for the loss of power to run the mill, consequent upon the defendant's tortious diversion of the water. They were allowed to recover upon the basis of the cost of supplying power to take the place of that of which he was deprived during the period covered by the action. This was a proper method of arriving at the damages in such a case: Hogg *v.* Water Co., 168 Pa. 456; Glass Co. *v.* Water Co., 5 Pa. Super. Ct. 563; and see Hart *v.* Evans, 8 Pa. 13. The fact that William A. Irving, his son, had an interest in the profits of the business was not raised as an objection to the plaintiff's right to recover all the damages for the entire injury to the freehold as well as to the possession, until after the testimony was closed. The plaintiffs then offered to show that William A. Irving had no such interest in the possession as would entitle him to maintain an action; in other words, that he was a mere employé compensated by a percentage. This was a discretionary matter and as the Court refused to permit the evidence to be given, probably we ought not to assume the facts alleged in the offer. The fact remains, however, that William A. Irving was a party to the suit as one of the executors of James Irving and pressed for a recovery in accordance with the claim as above stated. This taken in connection with his further stipulation given at the close of the trial will fully protect the defendant against a second suit for the damages accruing prior to the bringing of the present suit. Under all the circumstances, therefore, we conclude that the Court committed no error in the rulings complained of in the fourth and seventeenth assignments. We remark further with regard to the former assignment that the bill of exceptions does not distinctly show an offer to prove the rental value and a rejection of that offer.

5. It was necessary for the plaintiffs to prove the quantity of water taken during the period covered by the action—1888 to 1894. This could only be done approximately because no record was kept prior to July, 1895. For the purpose of comparison the plaintiffs were permitted to prove (first assignment) by the record kept by the defendant, the quantity taken during the year beginning July, 1895. This, in connection with other evidence going to show whether the quantity was more or less than that taken in the immediately preceding years, was a proper and reasonably certain mode of proving the fact directly in issue.

Neither of the remaining assignments to the admission of evidence requires particular notice.

All of the assignments of error are overruled and the judgment is affirmed.

H. B.

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WEEKLY NOTES OF CASES.

VOL. XLIV.] *FRIDAY, JUNE 2, 1899.* [No. 9.

Supreme Court.

Jan. '99, 136. Supreme Court. April 12, 1899.

Martha A. Case v. The Delaware, Lackawanna & Western Railroad.

Common carrier—Negligence—Proximate cause—Passenger—Authority of conductor.

The acts of a conductor in charge of a train, so far as concerns the recognition of the status of a person, presenting a ticket, as a passenger, are the acts of the railroad company, and are binding upon it.

Where an intending passenger applies to the ticket agent of a railroad company for a ticket to A. via the agent's road and a connecting railroad, and is told that such ticket cannot be sold, but that one to B., on the same connecting road, and more distant than A., can be sold to her, whereupon she purchases a ticket to B., and is carried to the point of connection between the two roads and proceeds by a train of the second road to C., a station on the way to A. and B., the train going no further, and, after waiting at C., takes the next train for A., presents her ticket and informs the conductor that, although it reads to B., she wishes to go to A., and asks to have her trunk put off there, whereupon the conductor takes her ticket, punches and returns it to her and, later, takes from her her trunk check and ticket, assuring her that it is all right, the company cannot contend that, having broken her journey at C., she could not be considered as lawfully riding on the ticket presented, and is bound to treat her in all respects as a passenger; and hence, if the train overrun A., and is then stopped and the passenger, on being told to get off and walk back to the station at A., does so and, it being night, falls, through not being able to distinguish obstructions in the way, and is injured on her way to the station, the company is liable in damages.

Appeal of Martha A. Case, plaintiff, from the judgment of the Common Pleas of Columbia County, in an action of trespass, in which the Delaware, Lackawanna & Western Railroad Company was defendant.

This was an action to recover for injuries suffered by Martha A. Case through the alleged negligence of the defendant railroad company. An action was also brought by William Case, husband of the said Martha A. Case, to recover the damages resulting to him through the injury to his wife. The two cases were tried together under the provisions of the Act of May 8, 1895, before HERRING, P. J. The facts appear in the opinion of the Supreme Court, infra. The Court directed a verdict for the defendant. Verdict accordingly and judgment thereon. The plaintiff took this appeal, assigning as error, inter alia, the direction to the jury to find for the defendant.

H. M. Hinckley and *Charles G. Barkley*, for appellant.

Mrs. Case was, at the time she was told to leave the car, a passenger, and was entitled to the care of the company due to her as such.

A passenger in the legal sense of the word is one who travels in some public conveyance, by virtue of a contract, express or implied, with the carrier, as the payment of fare or that which is accepted as an equivalent therefor.

Bricker v. Railroad Co., 132 Pa. 4.

A carrier owes a duty to every passenger, who in good faith purchases a ticket and enters into its conveyances. If the conveyance is not going in the direction the passenger wants to go, or is one which by the contract the passenger has no right to take, its duty is to inform the passenger and put him off at a proper place.

Railroad Co. v. Rosenzweig, 113 Pa. 539.

If Mrs. Case's ticket was not good, it was the duty of defendant's agent, the conductor, to so inform her. By accepting the ticket without question, and allowing her to ride on it, he accepted her as a passenger, and owed her all the obligations due from a carrier to a passenger.

Van Kirk v. Penna. R. R., 76 Pa. 66.
Kent v. B. & O. R. R., 12 Northeast. Rep. 798.
Auerbach v. N. Y. C. & H. R. R. R. Co., 89 N. Y. 281.

A railroad company, carrying passengers, in order to afford them an opportunity to leave their trains at the place of destination, is bound to have the name of the different stations announced upon the arrival of the train, and then to stop the train for sufficient length of time for passengers to get off with safety, and a railroad company is liable for loss or injury which may result to a passenger, for violation of the duty.

Passenger Ry. Co. v. Stutler, 54 Pa. 378.

The implied contract to carry safely, includes the duty of giving reasonable opportunity to alight in safety from the car, and if the company violate this part of their duty, it is culpable negligence for which an action will lie.

Railway Co. v. Mask, 2 South. Rep. 360.

A railroad company carrying passengers is bound to provide reasonably safe means for their getting on and off the car.

Neslie v. Pass. Ry. Co., 113 Pa. 303.

The questions of negligence and contributory negligence in this case were for the jury.

Everett Warren, (with him *George E. Elwell*, *Frank Ikeler*, *E. R. Ikeler*, *H. A. Knapp* and *E. N. Willard*), for appellee.

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The ticket gave to Mrs. Case the right of a safe passage according to its terms. Arriving in Scranton in the afternoon, without asking for a train to Berwick, Mrs. Case takes a local to Kingston, uses her ticket for this purpose and stops off there for several hours, resuming her journey on the evening train. She was then a mere trespasser on the company's train. She presents this same ticket to the conductor, and even though he accepted it and allowed her to ride, the defendant was under no obligation to announce the station at Berwick to her, as her rights as a passenger had been forfeited. The conductor had no power to vary or alter the terms of her contract; from Kingston on, therefore, she was riding by the grace of the conductor and not by right.

Dietrich v. Railroad Co., 71 Pa. 432.
Railway Co. v. Clark, 72 Id. 231.

May 15, 1899. STERRETT, C. J. This action, brought by the plaintiff in her own right to recover damages for personal injuries negligently caused by the defendant company, was consolidated with a similar action brought by her husband, and both were tried together under the provisions of the Act of May 8, 1895. At the close of the trial, the case was withdrawn from the jury and a verdict directed for defendant in the following brief charge:

"We will affirm the first point of the defendant, which makes it unnecessary to dispose of the rest. All the points of the plaintiff, involving the submission of the case to the jury, are, of course, denied or disaffirmed for that reason. Take the verdict of the jury in favor of the defendant."

The point thus referred to by the Court below is: "Upon the whole case, the verdict must be for the defendant."

Passing, for the present at least, the specifications complaining of the Court's action in refusing to continue the cause, and afterwards refusing to withdraw a juror, etc., the instruction above quoted was wholly unwarranted, unless there was no evidence tending to prove that defendant company was guilty of negligence which was the proximate cause of plaintiff's injury, or unless it was admitted or proved by undisputed evidence that plaintiff herself was guilty of negligence which contributed to her injury. A careful consideration of the record discloses nothing to justify the Court below in concluding, as matter of law, either that there was no evidence to go to the jury on the question of defendant's negligence, or that, as a matter of undisputed fact, the plaintiff herself was guilty of contributory negligence. On the contrary, there was an abundance of evidence tending to prove that defendant company's negligence was the proximate cause of the injury complained of,—evidence which, if believed by the jury, would have warranted them in rendering a verdict in plaintiff's favor; but there was also some rebutting testimony on the same subject; so that the question of defendant's negligence was clearly and necessarily for the exclusive consideration of the jury. As to the question of contributory negligence, the testimony was also conflicting, and therefor for the jury and not for the Court. As presented by the evidence sent up with the record, we are satisfied that the case should have been submitted to the jury with proper instructions as to the law applicable to the facts which it tended to prove.

It is not our purpose, nor is it necessary, to review the evidence at length, but it will not be amiss to refer to some of the facts upon which plaintiff relied. On her behalf, it was shown in substance that on August 27, 1894, she applied to the ticket agent at Hillsdale, on the line of the Lake Shore & Michigan Southern Railroad, for a ticket, via that road and the defendant company's road, to Berwick, Pennsylvania. Being informed by him that he could not give her a ticket to Berwick, but could sell her one to Bloomsburg, Pa., about twelve miles beyond, she purchased the latter, and had her trunk checked to Bloomsburg, to correspond with her ticket. Having arrived at Buffalo, N. Y., same night, after waiting some time for next connecting train over defendant company's road, she resumed her journey and arrived at Scranton, Pa., about half-past three oclock P. M., on August 28. She then took next train (a local train not running as far as Berwick) by which she was carried to Kingston. Remaining at Kingston depot until 6.55 o'clock P. M., she took a seat in the rear car of the next train for Berwick, her destination. On the train from Scranton to Kingston her ticket was accepted by the conductor, who punched and returned it to her. After leaving Kingston, the conductor of that train took her ticket, looked at it, saw it had been previously punched on his division of the road, punched it and handed it back to her. At that time, she informed him that, while her ticket called for Bloomsburg, she wished to get off at Berwick, and requested him to have her trunk set off there. Shortly thereafter, he returned, took up her ticket and asked her for her trunk check. To this latter request, she at first objected on the ground that she would then have nothing to show for the trunk, but upon his assuring her that the ticket and the check must both go to the same destination, she gave him the check with the understanding that

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both she and her trunk would be set off at Berwick. During these interviews between her and Mr. Hoy, the conductor, not a single intimation was given that her ticket was not good for passage to Berwick, but she was given to understand when her ticket was taken up that her right of passage would terminate at Berwick. Indeed, the conductor frankly admitted that he recognized her right as a passenger on his train from Kingston to Berwick.

The plaintiff testified, in substance, that after having arranged with the conductor for having her trunk set off and put in charge of the agent at Berwick station, etc., and when she supposed she was nearing her destination, she was watching for the station, but it was not announced, and she was not aware it had been reached until the train was moving away. She immediately sought the conductor and told him that no announcement of "Berwick" had been made on her car. Without any request from her, he stopped the train, and in her own language (Apx. 49): "He opened the door and went out on the platform, and I says, 'This need not have been, the station was not called.' He ran down the steps ahead of me, lifted the lantern to throw light on the steps for me to come down, and helped me off the car. When I got down off the car, I said, 'Well, I don't know where I am or where to go.' He says, 'I will show you,' and lighted me around the end of the car, and pointed to a light and says, 'You see that light yonder?' I said, 'Yes;' 'Well, go for that light, that is the depot,' and I says, 'There is no need of this, I don't feel as if I was able to go any further,' and he turned and went back to the car. . . . I stood there a few minutes and then started to walk towards the depot." What then happened is described, in plaintiff's own words, thus: "I started to walk towards the light, towards the depot, and walked a short distance when I got tangled into something, stepping over something, it seemed like bars or something, and my foot slipped between something and I got a fall right over forward. . . . . I got up and tried to walk, as I found I was lame and badly hurt, but I started on towards as fast as I could, towards the depot, when I came in sight of the platform, I suppose it was a boardwalk, it did not look elevated to me, it occurred to me there might a train come and I thought I would get off the railroad. . . . I attempted to get from the railroad to the platform, and in some way, I cannot tell quite how, I stumbled and fell, striking my stomach across the platform, and when I came to, Mr. Dickson, to ticket agent, had raised me up and said to me, 'Are you hurt?'" She further testified: "I did not see the platform clearly, for the light blinded me."

As to what occurred, after the train arrived at Berwick, started therefrom and stopped again some distance below the southern end of the station platform, etc., witnesses in corroboration of plaintiff's testimony were called. One of them (Mr. Rhodes) testified that immediately after the conductor helped plaintiff off the train he asked him, "What was the matter, and his reply was: 'That lady was not well; she had a ticket for Bloomsburg, and was to be left off at Berwick . . . . and that he had forgot it.'" On the other hand, some rebutting testimony was introduced by the defendant.

We have thus referred—perhaps at unnecessary length—to some of the salient facts which the evidence tended to establish, for the purpose of showing that if there ever was a case, involving disputed questions of fact, et cetera, and therefore exclusively for the consideration of the jury, this is certainly one of that class.

The duties of common carriers of passengers, under circumstances such as the evidence in this case tends to establish, are too plain to require either comment or citation of authorities. If the failure of the defendant to perform its duty to the plaintiff as a passenger, was the proximate cause of the undoubtedly serious injury which she sustained in attempting to reach the station platform, she is entitled to recover adequate compensation in damages, unless she was guilty of negligence which contributed to her injuries.

As to the defendant's contention, that it owed no duty to the plaintiff as a passenger, because she had forfeited her right to use her ticket on any train from Kingston to Berwick, that cannot be sustained. Aside from the incompetency and insufficiency of the evidence relied on to prove forfeiture of her right to use the ticket for passage on the train that carried her to Berwick, the undisputed evidence is that the conductor of that train recognized her as a passenger, received her ticket, treated it as valid, and took it up as such before his train arrived at Berwick. These acts of the company's conductor, in charge of its train, were each, pro hac, the acts of the company itself. No reputable carrier of passengers should attempt to repudiate the act of its own agent for the purpose of impaling one of its patrons on such a sharp point as is presented here—especially in circumstances such as the evidence in this case discloses.

In view of the fact that this case must go back for a new trial, it is unnecessary to consider the specifications of error relating to the refusal of the Court below to continue the case and to withdraw a juror. As to the remaining specifications,

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so far as they are in accord with the views herein expressed, they are sustained, and in so far as they are not in accord therewith they are dismissed.

Judgment reversed and a venire facias de novo awarded. H. B.

Jan. '98, 87. Supreme Court. February 27, 1899.

Assigned Estates of T. L. Fritch et al.

Principal and surety — Debtor and creditor — Equity — Marshalling equities — Tacking.

The principle of tacking has never been recognized in this State.

The right of a surety to have the property of the principal applied in his relief accrues the moment his position as surety is established; he does not have to wait until he has actually paid the principal's debt.

A. held a judgment against X., Y. and Z., Z. being a surety only; B. a judgment against X. and Y.; C. a judgment against Z., the legal priority of the liens being in the order given. The assignee for the benefit of creditors of X., Y. and Z. sold four pieces of real estate, one the joint property of all the debtors, one the joint property of X. and Y., one the individual property of X., and the other the individual property of Y.:

***Held,* that, as against A., B. had an equity to compel a resort to individual property before the joint property, and C. an equity to compel a resort to the joint property before the individual, and that, therefore, the equities being counter-balanced, the fund as a whole should be distributed to the judgments in order of legal priority.**

***Held,* further, that a purchase by B. of the lien of A. could not give to B. any additional rights or deprive C. of her equity.**

Appeal of Levi L. Fritch and Sarah S. Fritch, from the decree of the Common Pleas of Berks County, in the matter of the assigned estates of T. L. Fritch, M. L. Fritch and L. L. Fritch.

On April 19, 1894, T. L. Fritch, M. L. Fritch and L. L. Fritch, brothers, made an assignment of their estates to M. S. Long for the benefit of their creditors. The assignee sold realty held in common by the three brothers, realty held in common by Tilghman L. Fritch and Manoah L. Fritch, and the individual realty of Tilghman L. Fritch and Manoah L. Fritch. The real estate held by Levi L. Fritch in severalty remains unsold.

The assignee's account was referred to Horace Roland, Esq., as auditor.

Before the auditor, the following claims were presented:

Judgment of Tilghman L. Fritch, Manoah L. Fritch and Levi L. Fritch as individuals to the Second National Bank of Reading, No. 75, April term, 1894, J. D., entered April 16, 1894, for $10,000. This judgment was executed to secure promissory notes, the proceeds of all of which went to the credit of Tilghman L. Fritch and Manoah L. Fritch, and the auditor has consequently found that as between the three brothers, Levi was the surety for Tilghman and Manoah.

Judgment of Tilghman L. Fritch and Manoah L. Fritch to the Citizens' Bank of Reading, entered April 17, 1894, to No. 76, April term, 1894, for $30,000.

Judgment of Tilghman L. Fritch and Manoah L. Fritch to Robert E. Wright in trust for the Allentown National Bank, entered April 17, 1894, to No. 77, April term, 1894, for $10,000.

Judgment of Tilghman L. Fritch and Manoah L. Fritch to the Allentown National Bank, entred April 17, 1894, to No. 81, April term, 1894, for $950.

Judgment of Tilghman L. Fritch and Manoah L. Fritch to R. E. Wright, president of the Allentown National Bank, entered April 18, 1894, to No. 84, April term, 1894, for $5000.

Judgment of Levi L. Fritch to Sarah S. Fritch, entered April 19, 1894, to No. 96, April term, 1894, for $4950.

The auditor found that as to the first lien, Levi L. Fritch was a surety for his brothers. Levi L. Fritch and Sarah S. Fritch insisted that the proceeds of the real estate of Tilghman L. Fritch and Manoah L. Fritch should be appropriated to the payment of the first judgment of $10,000, whereon Levi L. Fritch was but a surety, in relief of the surety, and in order that Sarah S. Fritch's judgment against Levi L. Fritch individually might be advanced to a first place with respect to the real estate of Levi L. Fritch, upon which it was a lien. The auditor refused so to appropriate the said fund, and, at the request of the Citizens' Bank and the Allentown National Bank, who had become the purchasers of the first judgment of $10,000, omitted the said judgment from the distribution as to the property of Tilghman L. Fritch and Manoah L. Fritch, who were the principal debtors upon said judgment, but appropriated the proceeds of Levi L. Fritch's individual interest in the property held by the three brothers in common towards the payment of said judgments.

Levi L. Fritch and Sarah S. Fritch filed exceptions, inter alia, to this distribution made by the auditor, which the Court (Ermentrout, P. J., delivering the opinion,) dismissed.

Levi L. Fritch and Sarah S. Fritch took this appeal, and assigned error, inter alia, as follows:

"2. The Court erred in dismissing the seventh exception to the auditor's report, viz.:

"'7. The learned auditor erred in not distributing the real estate funds of the estates of Tilghman L. and Manoah L. Fritch in payment

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of the $10,000 judgment given by the three Fritch brothers to the Second National Bank, No. 75, April term, 1894, J. D.'

"3. The Court erred in dismissing the eighth exception to the auditor's report, viz.:

"'8. The learned auditor erred in distributing any portion of the real estate fund of Levi L. Fritch in payment of judgment given to the Second National Bank, No. 75, April term, 1894, until the real estate of Tilghman and Manoah Fritch was exhausted in favor of the said judgment, Levi being but a surety upon the said judgment for Tilghman L. Fritch and Manoah L. Fritch.'

"4. The Court erred in dismissing the tenth exception to the auditor's report, viz.:

"'10. The learned auditor erred in not disregarding what is called the pooling arrangement between the Allentown National Bank and the Citizens' Bank of Reading; the judgments held by the said banks bear different relations to the funds in question, and distribution should be made upon them separately in order that the rights of others may be determinable both in this and in subsequent proceedings.'"

Cyrus G. Derr, (*D. Nicholas Schaeffer* with him), for appellants.

Where there is a judgment against a principal debtor and a surety, which is a lien upon the real estate of both principal and surety, and the property of the principal debtor is converted into money by a judicial sale and to be distributed, the surety has a standing and a right to demand that the judgment be paid out of the fund produced by the sale of the property of the principal debtor, so that the surety's property may be divested of the lien of the judgment and be personally relieved from liability.

Irick *v.* Black, 17 N. J. Eq. 195.
P. & R. R. R. Co. *v.* Little, 41 Id. 529.
Moore *v.* Topliff, 107 Ill. 249.
Wright *v.* Simpson, 6 Ves. 734.

Applying the principle outlined in the above authorities to the case in hand, we have the following result: That the proceeds of the property of the principal debtors, Tilghman L. and Manoah L. Fritch, are before the auditor for distribution. The creditor may have it by virtually stretching forth his hand and laying hold of it. The surety has the right to insist upon his taking the money in payment of the debt and relief of him as surety.

When a creditor has in his hands the means of paying his debt out of the property of his principal debtor, and does not use it, but gives it up, the surety is discharged. It need not be actually in the hands of the creditor; if it be within his control, so that by the exercise of reasonable diligence he may have realized his pay out of it, yet voluntarily and by supine negligence relinquished it, the surety is discharged.

Fegley *v.* McDonald, 8 Norris, 128.
Commercial Nat. Bank *v.* Henninger, 105 Pa. 501.

Where there is a judgment against a principal and a surety, and a subsequent judgment against the surety alone, and the real estate of the principal debtor has been converted into money by a judicial sale and is before the Court for distribution, the creditor whose judgment is against the surety alone has a standing and a right to insist that the holder of the judgment against the principal and surety shall take the proceeds of the sale of the property of the principal debtor, leaving the property of the surety to be made available for the payment of his own proper judgment.

Simmons *v.* Cates, 56 Ga. 609.
MacVeagh *v.* Darlington, 1 Chester Co. 150.

R. E. Wright, (with him *Stevens* and *Stevens*), for appellees.

Unless restrained by some clear, unquestioned and superior equity, the creditor has the right to pursue his remedies and apply his securities in such a way as will most effectually secure his debt.

"The equity of subrogation is one which the surety is entitled to exercise against the debtor, but it does not give him the right to control the action of the creditor. The creditor may pursue any of his remedies which he sees proper to use, and the surety cannot, as a general rule, compel him to resort to any particular securities in the first instance."

Bispham on Equity, sec. 338.
Burk, Thomas & Co.'s Appeal, 89 Pa. 398.

Considering their judgments as separate claims the appellees had the right to insist that the judgments against Manoah and Tilghman, and which were liens on the real estate of but two of the assignors should be paid out of the real estate of the two (Manoah and Tilghman) in preference to the judgment against Tilghman, Manoah and Levi, which was a lien on the real estate of the three assignors (and the holder of the judgment against the three assenting to this application), unless this equitable right is interfered with by the existence of some higher equity.

Appeal of D. E. Robeson, 117 Pa. 628.
Lloyd *v.* Galbraith, 32 Id. 103.
Bruner's Appeal, 7 W. & S. 269.

The claim of a surety to control the process and securities of the creditor by subrogation being based entirely on considerations of benevolence and equity, can never be applied to the injury of the creditor, and the right to subrogation can only arise after the creditor has been fully satisfied and paid.

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Bispham on Equity, 449.
Hoover v. Epler, 52 Pa. 522.
Forest Oil Co.'s Appeal, 118 Id. 138.
Ins. Co. of N. A. v. Fidelity Co., 123 Id. 523.
Kyner v. Kyner, 6 Watts, 221.
Bank v. Potius, 10 Id. 148.
Musgrave v. Dickson, 172 Pa. 632.
Allegheny National Bank's Appeal, 19 WEEKLY NOTES, 78.

May 8, 1899. MITCHELL, J. To avoid confusion from the somewhat complicated facts presented by this appeal, it is well to look first at the strict legal rights of the parties, and then to any special equities that may affect the enforcement of such rights.

The fund for distribution arose from the sale of real estate held in four different ways: (1) as the individual property of T. L. Fritch; (2) as the individual property of M. L. Fritch; (3) as the joint property of T. L. and M. L. Fritch, and (4) as the joint property of T. L., M. L. and L. L. Fritch. It is not clear whether some part of the fund was not also derived from the sale of personal property of T. L. and M. L. Fritch. If so it should be set apart and distributed according to its own rules. As to this, however, the facts are not sufficiently presented to call for any further remark.

Outside of some small claims for dower, etc., not in contest, the liens on this fund in the order of their priority were: (1) Judgment of the Second National Bank for $10,000 against all three of the debtors, jointly and severally; (2, 3 and 4) judgments of the Citizens' Bank for $30,000, the Allentown Bank for $10,000, and the Allentown Bank for $950, all entered on the same day against T. L. and M. L. Fritch; (5) judgment of the Allentown Bank against T. L. and M. L. Fritch for $5000; and (6) judgment of Sarah S. Fritch against L. L. Fritch for $4950.

On this schedule the legal distribution would have been, first, to lien No. 1, the judgment of the Second National Bank, in full, which would have exhausted all of the fund arising from L. L. Fritch's land held in common; and, secondly, to liens 2, 3 and 4 pro rata, which would have exhausted the balance of the fund. The first equity presented was by L. L. and Sarah S. Fritch, claiming that as L. L. Fritch was only a surety in lien No. 1, the judgment of the Second National Bank, and as there was enough money from the estates of the principal debtors to pay this lien in full, therefore so much of the fund as represented L. L. Fritch's individual estate should be reserved for his individual lien creditor. The auditor found the fact to be that L. L. Fritch was a surety only, but refused to reserve that part of the fund, for reasons which will be noticed later on. The holders of liens 2, 3 and 4, having purchased lien 1, requested the auditor to confine his distribution to it to that part of the fund which was derived from the share of L. L. Fritch in the undivided land held by the three brothers, and to leave the rest of the judgment as a continuing lien against his individual estate. This the auditor did.

This course was a clear and substantial error, to the injury of L. L. Fritch as surety and S. S. Fritch as his lien creditor, by taking the surety's property to pay the debt of his principal while there was property enough of the latter available for that purpose.

The equity of the surety to have the principal debtor's property first exhausted is indisputable, but the auditor was of opinion that neither he nor his creditor were yet injured or in such peril as to be entitled to relief, and further that "the party whose rights are claimed to be used must be fully satisfied before an equity will arise to the party claiming to use them." This is quite true, but it does not reach the present case. There is money enough to pay lien 1 in full out of the funds of the principal debtors to it, and were the Second National Bank and this appellant the only parties concerned, there could be no possible question of the right of the appellant to the relief asked. And this right accrued to him the moment his position as surety was established. He was not bound to wait until he had actually paid the principal's debt. On the other hand, liens 2, 3 and 4, being restricted to the fund from T. L. and M. L. Fritch's estate, have an equity to compel lien 1 to take satisfaction out of L. L. Fritch's portion, and if these were the only parties concerned, this equity would be indisputable. But with all the parties being claimants it is equity against equal equity and neither can prevail. To put it in compendious form, the Second National Bank has a lien on the joint fund and on the individual fund of L. L. Fritch, the Citizens' Bank has a lien on the joint fund only. Sarah S. Fritch has a lien on the individual fund only; as against the Second National Bank each of the others has an equity to compel it to seek satisfaction out of the fund which the intervener cannot reach. It is clear that neither can have an advantage as against the equal equity of the other. And so in general wherever the application of this equity in the ordering of execution or distribution to liens, is met by a countervailing equity of equal force in favor of another lien, the strict rule of legal priority must be followed.

The purchase of the first lien by the holders of the second, third and fourth, and the pooling of their claims, gave them no additional rights. The equity of Sarah S. Fritch against the Second Na-

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tional Bank could not be taken away by the sale of the latter's claim to the intervening lien holders. They must stand on their own rights. As between themselves they may pool their claims and modify their rights at will, but as against others their rights remain unchanged. No principle analogous to tacking has ever been recognized in this State. Burk, Thomas & Co.'s Appeal, 89 Pa. 398, does not sustain this contention. What that case decided was that a creditor may release or withdraw his levy on fi. fa. against personal property without affecting the lien of his judgment on the land, even though the purpose of withdrawing the levy was to let in another fi. fa. on another judgment held also by him. But this is very different from destroying the legal or equitable rights of lien holders.

An additional reason assigned by the auditor for refusing the equity of L. L. Fritch as surety was that as to the judgments of the Citizens' and Allentown Banks his brothers are sureties for him, thus creating "between the three an interchangeable and rebounding liability and suretyship for each other's debts." But this appears to be an inference from the fact that the judgments were founded on notes, on some of which L. L. Fritch's name appears as maker or endorser, and that some of these notes were for liabilities growing out of a paint business in which he was a partner. But this inference is not justified by anything that appears. The circumstances under which the notes were made were not shown, and the giving of the judgment by T. L. and M. L. Fritch alone would lead to the presumption that they alone were primarily liable. The strongest conclusion that could fairly be drawn from the facts would be that he was a joint debtor with his brothers on the notes. There was no evidence that he was the principal debtor and his brothers only sureties.

On the whole case we are of opinion that the equities being equal the distribution must be made according to the legal rights of priority among the liens.

Decree reversed, and distribution directed to be made in accordance with this opinion. Costs to be paid by the appellees.

H. B.

Jan. '99, 68. Supreme Court. February 27, 1899.

Witman v. City of Reading.

Statute of frauds—Lease—Contract—Delivery—Eminent domain—Assignment of lease.

The statute of frauds is satisfied by a note in writing, not under seal, signed by the party called on to fulfill it, if the other has accepted it.

There need not be a physical delivery of such a writing if what was done clearly appear to have been intended as a delivery, e. g., where the grantee with the knowledge and consent of the grantor makes expenditures on the faith of the writing.

The mere fact that it is intended to execute a more formal writing to the same effect does not prevent a writing which is definite as to the terms of a bargain, when acted upon by one party, from taking effect as a contract until the execution of a more formal writing.

Where the lessor endorses on his own copy of a written lease a writing extending the term thereof for a certain purpose, and signs the same, informing the lessee of his so doing, whereupon the lessee acts, and expends money in reliance thereon, the lessee is vested with an estate, for interference with which by the public authorities in the exercise of the right of eminent domain, he is entitled to recover damages.

The fact that after the exercise of the right of eminent domain has destroyed the value of a lease for the purposes to which the lessee was putting the land, the lessee assigns the same, does not destroy the right of the lessee to recover for the impairment of the value of his lease, by reason of such exercise, or confine him to nominal damages.

Appeal of William A. Witman and John A. Witman, plaintiffs, from the judgment of the Common Pleas of Berks County, in certain proceedings to assess damages suffered by them by reason of the exercise of the right of eminent domain by the City of Reading.

William A. Witman and John A. Witman, presented a petition to the Court of Common Pleas setting out that they had suffered injury through the construction of a boulevard by the city of Reading and praying the appointment of viewers to assess damages. Viewers were accordingly appointed, and assessed the damages at $3500. The city took an appeal. On the trial of the case, before ENDLICH, J., the facts appeared as follows:

The plaintiffs owned in fee simple about ten acres of quarry land situate near the top of Mt. Penn. The product of the quarry was got to the market over an inclined railway constructed on a narrow strip of mountain land ten feet wide owned by DeB. Randolph Keim. This strip of land was leased to the plaintiffs by Keim for the term of two years from October 1, 1891.

The lease was, by memorandum endorsed thereon and signed by the lessor, extended for two years, viz., from October 1, 1893, to October 1, 1895.

During the summer of 1895, William A. Witman, one of the lessees, informed the lessor that the plaintiffs desired to erect a crusher and machinery for the conversion of the waste of the quarry into merchantable sand and that they could not do so without a longer lease, whereupon the lessor said that the lease might be ex-

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tended for five years and that a writing might be drawn up and he would sign it. The lessor thereupon endorsed the following memorandum on the original agreement of lease:

"This lease upon agreement with and at request of Wm. A. Witman was extended from October 1, 1895, to October 1, 1900—or five years, to accommodate him, on the same terms as the original lease of September, 1891, in the erection of a stone and sand crusher then being erected.

"(Signed) DEB. RANDOLPH KEIM."

A short time after, Witman spoke to Keim as to the drawing of a lease, and Keim said, "It don't matter, I endorsed it on the other lease same as before." Keim also said that the plaintiffs might have the lease written out and that he would sign it. He told the plaintiffs of the memorandum but did not deliver it to them. On May 18, 1896, the plaintiffs executed a lease of the quarry to one Tobias for ten years.

The plaintiffs offered to show that in December, 1895, the park commissioners of the city of Reading laid out a boulevard, the route of which crossed the plaintiffs' inclined railway at two points, and marked the said route with construction stakes; that on January 18, 1896, the commissioners, by formal resolution, adopted the plan and route so marked, and submitted it to councils, together with the form of an ordinance which, being passed by both branches, was approved by the mayor April 2, 1896. This ordinance authorized the commissioners "to purchase, acquire, enter upon, take, use, and appropriate" property for the construction of the said boulevard.

The plaintiffs further offered to show how the construction of the boulevard affected the plaintiffs property; that after the endorsement of the memorandum signed by the lessor in the lease, the plaintiffs relying thereon expended a large amount of money and labor on the leased property; that Keim recognized his lease to the plaintiffs by demanding rent on September 10, 1896; that the construction of the boulevard cut off all access to the plaintiffs' quarries, causing his tenant Tobias to throw up his lease; and to show the difference in market value of the plaintiffs' property just before the actual construction of the boulevard and after its construction as affected thereby. All these offers were rejected. The Court charged the jury as follows:

"Gentlemen of the jury:—Under the view which the Court has taken of the numerous questions of law that have arisen in this case, and which view, of course, is binding upon the jury, the plaintiffs have shown no right to recover from the city of Reading in this action. It is therefore the duty of the Court to say to the jury that it is their business to render a verdict for the city. In doing so, the jury will be relieved of all responsibility; the responsibility rests entirely with the Court, and if there has been any error committed that error can be rectified in due course. You will therefore return a verdict in favor of the city."

Verdict accordingly for defendant. The plaintiffs took this appeal, assigning as error, inter alia, the rejection of the offer of evidence above noted and the charge of the Court.

Cyrus G. Derr, (with him *Henry D. Green* and *Herbert R. Green*), for appellants.

The memorandum endorsed on the original lease, signed by the lessor and declaring that the lease "was extended from October 1, 1895, to October 1, 1900," assented to and accepted by the lessees, was sufficient writing to take the case out of the operation of the statute of frauds and perjuries.

The signature of the lessees was not required.

McFarson's Appeal, 11 Pa. 503.
Tripp *v.* Bishop, 56 Id. 528.
Johnston *v.* Cowan, 59 Id. 280.
Smith & Fleek's Appeal, 69 Id. 474.

No physical delivery was necessary; the intention on the part of the grantor to treat the writing as his was sufficient.

Smith on Contracts, 7th ed., 6 note.
Ruckman *v.* Ruckman, 32 N. J. Eq. 260.

Even if the lease had been in parol, the city could not take advantage of that; the statute can be pleaded by the lessee only, as it is for his benefit.

Houser *v.* Lamont, 55 Pa. 317.
Lloyd et al.'s Appeal, 82 Id. 488.

The marking of the route of the boulevard with construction stakes, the making of a survey and map thereof, the adoption of the same by ordinance of city councils approved by the mayor, the ordinance authorizing the common commissioners to "enter upon, take, use, and appropriate" the lands embraced in the map and survey, constituted in legal contemplation a taking of the plaintiffs' leasehold, which became complete at the time of the approval of the ordinance, viz., April 2, 1896, though actual construction was not begun until September following.

Wadhams *v.* L. & B. R. R. Co., 42 Pa. 310.
Beale *v.* Pa. R. R. Co., 86 Id. 511.
Pittsburgh etc. Ry. Co. *v.* Com'th, 101 Id. 196.
Davis *v.* Titusville etc. Ry. Co., 114 Id. 314.
O'Brien *v.* R. R. Co., 119 Id. 190.
Pa. S. V. R. R. Co. *v.* Ziemer, 124 Id. 570.

William J. Rourke, city solicitor, (*George F. Baer* with him), for appellee.

The memorandum was not sufficient to satisfy the requirements of the statute of frauds. It was a mere memorandum of Keim's, and made on a

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lease in his possession, could not enure to appellants' benefit. The statute can be set up by the city, which by proper proceedings has acquired the fee of Keim's land.

Dumn *v.* Rothermel, 112 Pa. 272.
Moore *v.* Small, 7 Harris, 461.
Woods *v.* Farmare, 10 Watts, 195.
Blakeslee *v.* Blakeslee, 22 Pa. 237.

The marking out did not constitute a taking. The appellants rely on the analogy of appropriation by a railroad company, but the survey and the staking out of a line, returning a map thereof to the offices of the company, the preliminary entry by engineers and surveyors who run and mark out lines, map them, and report them to the company, do not constitute a location. It is only after the board of directors have adopted the line and condemned the property, that the location becomes valid against third persons and rival corporations.

Pitts., Va. & Ch. Ry. Co. *v.* R. R. Co., 159 Pa. 331.
Wmsport. & N. B. R. R. *v.* R. R. Co., 141 Id. 407.

The appellants were mere tenants at will and hence cannot recover—the mere expectation of continuance of the tenancy is not such a right of property as will entitle the tenant to compensation.

Rex *v.* L. & M. Rd., 4 Ad. & E. 650.
Brickyard Case, 8 M. G. & Sc. 500.

April 24, 1899. DEAN, J. The Witmans, plaintiffs, owned ten acres of land on Mount Penn; on this was a valuable stone quarry, which they operated, shipping the stone to market, over an inclined railway built on the land of DeB. Randolph Keim. The land necessary for the construction of the railway, a strip about ten feet wide, was leased to plaintiffs by Keim for a term of two years from October 1, 1891, and then, by a written memorandum, extended for a further term of two years, to October 1, 1895. In the summer of the year 1895, William A. Witman, told Keim they wanted to put up a crusher and machinery to turn the waste of the quarry into merchantable sand, and that unless an extension of the lease was had, the expenditure of the money for the improvements would not be warranted; Keim assented to an extension for five years, and said, that if a proper writing were drawn up, he would sign it, and immediately endorsed this memorandum on the original lease then in his possession: "This lease upon agreement with and at request of William A. Witman, was extended from October 1, 1895, to October 1, 1900, or five years, to accommodate him, on the same terms as the original lease of September, 1891, in the erection of a stone and sand crusher, then being erected.

"(Signed) DEB. RANDOLPH KEIM."

Not long afterwards, Witman spoke to Keim about drawing a formal lease, and Keim answered: "It don't matter, I endorsed it on the other lease the same as before." Witman assented, and immediately proceeded to expend about $1500 in the construction of a crusher and machinery. In December, 1895, the park commissioners of the city of Reading, laid out a new street called a boulevard, which crossed Witman's railway at two points, and on January 18 following, the route so laid out was submitted to councils, with the request, that an ordinance be passed authorizing the park commissioners to appropriate the land marked out for the boulevard. Councils, thereupon, regularly adopted the proposed ordinance. The Witmans, as they alleged, being financially unable to adapt their railway to a crossing of the proposed boulevard, leased their property, reserving the crusher, engine and boilers, to one Tobias, for the term of ten years, with the verbal assent of Keim. The boulevard was actually constructed in 1896, and thereby cut off transportation of stone on the inclined railway, and to a considerable extent, rendered valueless plaintiffs' improvements. Tobias, also, abandoned his lease, and refused to pay rent. The Witmans, on January 18, 1898, under the Act of June 28, 1895, and its supplement of July 15, 1897, petitioned the Court for the appointment of viewers to assess the damages sustained by them by reason of the construction of the boulevard. Viewers were appointed, who went upon the premises, assessed damages, and reported their award to the Court, which confirmed the report nisi; thereupon, the petitioners appealed to the Common Pleas. In that Court, this issue was framed, and it came to trial before the Court and jury. The learned Judge who tried the cause, was of opinion, that in law, plaintiffs had made out no case, and directed a verdict for defendant. We now have this appeal by plaintiffs, who assign twelve errors, most of them being to the rejection of evidence tending to show the extent of the appropriation and injury to their property. As these rulings depend in great degree, for their correctness, on two main questions decided against plaintiffs by the Court, it is best to consider these questions first.

The Court was of opinion, first, that plaintiffs, neither in their evidence admitted, nor in that rejected, assuming the allegations in the offers of the latter to be true, had shown a taking by the city of property owned by them, and therefore their claim for damages was without foundation. Undisputedly, the city, in some degree, had taken, injured or destroyed the inclined railway on which plaintiffs transported their stone; if they are to be regarded as mere intruders on

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Keim's land, no property right was vested in them, which the city disturbed, and there was no taking of private property for public use, or act of injury to it within the meaning of the Constitution; nor was there any one, within the true intent and meaning of the second section of the Act of 1897, to whom damages were payable. This brings us to the question, whether the evidence established, within the statute of frauds, a right in plaintiffs to maintain their railway on that land. Their right under the first lease, of October 1, 1891, for two years, it seems to us, was undoubted. We do not regard the reservations in favor of the lessor, to wit, the right to have a street opened across the line of the railway, if he so desired; or the right to cancel it on three months' written notice; or the privilege to deposit stone on the land of lessor at the terminus, with the right in the lessor to revoke such privilege at will, as in the least degree affecting the legal ownership of the property. Such reservations might tend to depreciate the value of the property under the lease, but the right of property in the lessee, until Keim, under one or other of the reservations, asserted his legal demand, remained unaffected. If, then, the original lease vested in plaintiffs a property right in the land appropriated, and the railway injured it by the construction of the boulevard, was that right or ownership lost by the failure to have executed formal renewals or extensions of it? The extensions were mere endorsements on the original, signed by the lessor, but not under seal, and no duplicate or other evidence of the extension was delivered in writing to the lessees. Waiving the question, as to the right of third parties to plead the statute of frauds against the claim of the lessees, we choose to discuss the question as if the city could take the place of Keim, the lessor, and assert his legal rights under the statute. It may be admitted, that at the time the second endorsement was made, the parties themselves contemplated the execution in the future of a more formal writing; this was not done; why, appears from the testimony, when Keim was called upon by the Witmans for a formal lease, and asked, "How about drawing up that lease?" He replied, "It don't matter; I endorsed it on the other lease the same as before." This was manifestly an understanding on the part of both, that the written endorsement on the original in the possession of Keim should stand as their contract with reference to the land. Was it sufficient under the statute? It was in writing, and expressly stated the terms of the lease were those of the original on which it was endorsed. It was signed by the owner of the land; was accepted by the other party to it, not only by what he said, but by the most significant of acts, a large expenditure of money in improvements. It was not, however, under seal. We held, in McFarson's Appeal, 11 Pa. 503, that: "The statute of frauds is satisfied by a note in writing not under seal, signed by the party called on to fulfill it, if the other has accepted it." Then, in Tripp *v.* Bishop, 56 Pa. 424, we held: "It is then only the lessor or grantor who is required to sign the agreement. His contract must be in writing, and signed by him, but the statute requires no written evidence of the engagement of a lessee or grantee. The statute was passed for the protection of land owners." To the same effect are Johnston *v.* Cowan, 59 Pa. 280, and Smith and Fleek's Appeal, 69 Pa. 474. Nor, was physical delivery of the writing to the lessees necessary, under the circumstances here shown; true, to complete an absolute conveyance by deed, delivery is held to be necessary, but even at common law, it is not in all cases necessary to show actual manual transfer of the instrument; if the grantee, by formal assent, or unequivocal acts, such as entering into possession, treats the deed as in his possession, it is sufficient. It must only clearly appear that what was done was intended by grantor and grantee as a delivery. Here, in the statute, there is nothing requiring actual delivery of the writing to the lessee, and even if there were, the manifest intention of both parties was, that the endorsement on the original lease in possession of the grantor operated as a delivery. Further than this, if even Keim himself had pleaded the statute, equity would have held such plea unavailing; for treating it as resting only in parol, it could not be questioned, that thereby the Witmans, on the faith of it, with the assent of Keim, retained possession and expended a large amount of money in improvements. It would have been a fraud in the lessor, in view of these facts to have set up the statute against his lessees. We are of the opinion, that the owner, by a writing signed by him, parted with the possession of the land for a term of five years from October 1, 1895; further, that the purpose of the extension being to enlarge the term so as to warrant the lessee in erecting costly improvements, the lessor could not, after encouraging the expenditure of a large sum of money in the erection of improvements, have, in equity, revoked the lease arbitrarily. The lessees, therefore, had such interest in the property as was subject to injury and damage by the public improvement constructed by the city. The Court below, treats the written endorsement for the extension, as but a memorandum for the information of the lessor. We do not concur in this interpretation of the statements of Witman and

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Keim; we concede that they were not altogether consistent with each other, and that, possibly, Keim's is to some extent inconsistent with itself. But, taking the evidence of both, in view of the surroundings, a reasonable interpretation is, that at the request of Witman, the endorsement was made to bind both, each intending that a substitute should, in the future, be drawn and executed, more elaborate in its provisions, and this intention as to the substitute, was neglected. The endorsement, however, accomplished the very purpose of both; Keim intended to bind himself by a written agreement to extend; the Witmans requested and assented to the extension, and at once acted upon it, because they considered they were in no peril of the loss of their improvements. The failure to substitute a second writing, left the parties to their obligations under the first. The next writing, dated months afterwards, was executed, according to Witman's testimony, not because he had not already a written extension, but to show to the law committee of councils that he had an undisputed right, in addition to his disputed one resting on the endorsement. But, whether we be correct or not in our interpretation of the oral evidence, and assuming that the interpretation put upon it by the Court below is a reasonable one, still, the oral evidence, what the parties said, and what they meant by what they said, so far as such evidence is material, is for the jury, and must be submitted to them.

As to the second reason for a peremptory direction to find for defendant, to wit, that plaintiffs had assigned their term to Tobias, and their claim at most could not be for more than nominal damages, we do not think it can be sustained: Shaaber *v.* City of Reading, 150 Pa. 402, is in the main relied on as sustaining this rule. But the facts in that case were altogether different from this; there, the term had absolutely ended by the contract and notice from the lessor; the damages alleged, resulted from the removal of buildings on a street laid out and established by the city ten years before the date of claimant's lease, which facts brought him directly within the terms of the Act of April 26, 1864. This Act, by its provisions protected the municipality from claims for damages resulting from destruction or removal of buildings erected after location of street. There was no expectation of renewal of the lease, for the owner had signified by the unmistakable notice his determination not to renew. But in the case before us, the city surveyed off the land for the boulevard in December, 1895, two or three months after plaintiffs had obtained an extension of the lease for five years from October 1, 1895; the route and extent of appropriation were marked by construction stakes; in January, 1896, the commissioners, by resolution, adopted the route so staked out, and councils, by ordinance, confirmed their action; at this time, plaintiffs had already expended on their contemplated improvement $1500; to complete it, required the expenditure of $500 more. In the face of the Act of 1864, it would have been the sheerest folly to have gone on and completed it. Clearly, plaintiffs were compelled to abandon their improvements from knowledge of a subsequent appropriation by the city. On September 17, 1896, the city, by contract with Jacob Mayer, actually entered upon the land and completed its boulevard according to the appropriation made by councils. It is not important that plaintiffs, after the practically compulsory stoppage of their own operations, on May 18, 1896, re-let the railway and stone to Tobias; we mean that it is not important as affecting this cause of action for damages; the fact may be important, as one mitigating damages in their claim, but it does not bar them from asserting a claim for damages. They might, by reason of the city improvement have assigned the remainder of their term without compensation; may have considered it of no value. The case must be treated as if they were the lessees of Keim, and by the lease they obtained a property which has been injured by the construction of a public improvement, as of the date of the taking of the property, which the undisputed facts show, was the date of the municipal ordinance. This is not the case of a city laying out a street and placing it on the city plan, and thereafter, by proper municipal legislation, abandoning the improvement; it is a survey, appropriation and completion of the street. If nothing further had been done than adopting a paper plot of the street, it may be, the plaintiffs would have had, under the statute, an unavailing or an inadequate remedy; but the street was more than a project; it matured into a fact, and the city cannot now place itself in the position of a municipality which, by abandonment of its proposed improvement, only on paper, is exempt from damages for taking. By actual opening of and construction of the street, the date of taking relates back to the date of the ordinance adopting the route; this ordinance warned plaintiffs to stop their improvement; the construction of the street was the consummation of the purpose manifested by the constructive appropriation.

This is our view of the law on both questions which are so ably discussed by the learned Judge of the Court below. We think him mistaken as to his conclusions on both. The offers of evidence are necessarily passed on by our decision as to the law.

The judgment is reversed, and a venire facias de novo awarded. W. K.

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Jan. '98, 78. Supreme Court. March 17, 1898.

Bailey v. Brown Township.

Roads—Dangerous condition—Negligence—Contributory negligence.

When the dangerous character of a public highway is manifest, it is the duty of a traveler, who has a knowledge of its condition, to use due care to avoid possible injury.

A., who was driving a buggy and leading two horses on a dark and rainy night, attempted to pass over a narrow place having no guard rail or obstruction on the side next the precipice and was dragged over said precipice by the horses which he was leading, thereby receiving injuries from which he subsequently died.

In an action against the township in behalf of his children for damages, it appearing that the character of the road was known to A.:

***Held*, that A. was guilty of contributory negligence and there could be no recovery.**

Appeal of Brown Township, from the judgment of the Common Pleas of Lycoming County, in an action for damages for the death of Edward Bailey, which was alleged to have been caused by the negligence of said township.

The facts of the case as they appeared on the trial, before REED, P. J., are stated in the opinion of the Supreme Court, infra.

The defendant requested the Court to charge the jury, inter alia, as follows:

"Seventh. That under all the evidence the plaintiffs are not entitled to recover." Answer—"Refused." (Fifth assignment of error.)

The Court left the questions of negligence and contributory negligence to the jury.

Verdict for plaintiff, for $2000, and judgment thereon. Defendant appealed, assigning for error, inter alia, the refusal of the above point.

William W. Hart and *A. G. Miller*, for appellant.

It was error to leave the question of contributory negligence to the jury.

Hill *v.* Tionesta Twp., 146 Pa. 11.
Forks Twp. *v.* King, 84 Id. 230.
Crescent Twp. *v.* Anderson, 114 Id. 643.
Mueller *v.* Ross Twp., 152 Id. 401.
Winner *v.* Oakland Twp., 158 Id. 405.
Schaeffer *v.* Jackson Twp., 150 Id. 145.

W. E. Ritter, (with him *L. B. Seibert* and *Æugene Mullin*), for appellees.

It has been held in numerous instances that townships, as well as other municipalities, must keep their public highways in a safe condition.

Scott Twp. *v.* Montgomery, 95 Pa. 444.
Hey *v.* Philadelphia, 81 Id. 44.
Plymouth Twp. *v.* Graver, 125 Id. 24.
Jackson Twp. *v.* Wagner, 127 Id. 195.
Trexler *v.* Greenwich Twp., 168 Id. 214.

The law imposes on municipalities the duty of keeping their highways in a reasonably safe condition for public travel. It does not say to individuals that they must remain away from home, if they are away on business and are unable to complete it before night time.

April 3, 1899. MCCOLLUM, J. At the point where the accident occurred the width of the road did not exceed eight feet. On the western side of it there was a perpendicular ascent of about twelve feet, and above that a high and steep hill. On the eastern side of it there was a perpendicular descent of about six feet created by the wall which supported the road, and from the base of this wall to the railroad the distance was 129 feet, with a slope of 80 degrees. There was no guard rail or barrier of any description on the eastern side. The condition of the road and the dangers attending travel upon it in the night-time or in the day-time were known to the Bailey brothers. They passed over it in the forenoon of the day of the accident. They rode in a buggy, Edward driving the horse attached to it, and John leading a horse behind it. As they neared the narrows, John left the buggy and walked behind it with his horse until they passed them, when he resumed his seat in the buggy and led his horse as before. They were then about nine miles from Morris, where they arrived at noon. While at Morris they purchased two strange horses, giving in part payment the horse they had led there. About five o'clock in the afternoon they left Morris, taking with them the strange horses, and proceeded homeward. In returning they rode in the buggy, John driving the horse harnessed to it, and Edward leading the strange horses behind it. They reached Blackwell's, about two miles from the narrows at 6.30 in the evening and stopped for a short time at the hotel there. At this point they hesitated about proceeding further that night, but finally determined to go on. Before they reached the narrows it was dark and raining, and their effort to pass through them resulted in the death of Edward and of the horses he was leading.

This suit was brought by the guardian of Edward's children and in their interest. It was based on the alleged negligence of the defendant which on the trial of the case in the Court below was established by clear and satisfactory evidence. But the defendant alleges that Edward Bailey's negligence was the sole cause of or, at least contributed to, his untimely death. As sustaining this claim of contributory negligence on the part of the deceased the conditions already described are referred to and the cases supposed to be analogous to the case at bar are cited. Five of the cases cited, to wit: Forks Township *v.* King, 84 Pa. 230; Crescent Township *v.* An-

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derson, 114 Pa. 643; Hill *v.* Tionesta Township, 146 Pa. 11; Mueller *v.* Ross Township, 152 Pa. 401, and Winner *v.* Oakland Township, 158 Pa. 405, clearly recognize and sustain the settled rule or principle that "a person who knows a defect on a highway and voluntarily undertakes to test it when it could be avoided cannot recover against the municipal authorities for losses incurred through such defect."

The attempt of the Bailey brothers to pass through the narrows in the night-time was, under the circumstances, the assumption of an obviously dangerous risk, the nature and magnitude of which they fully comprehended. It was a risk which they well knew could be avoided, or at least materially minimized by the postponement until morning of their journey homeward. When they came to the narrows John left the buggy, and taking with him the lantern he lighted at Blackwell's, walked a few paces ahead of the horse he had driven from Morris. Edward remained in the buggy to drive the horse attached to it and lead the strange horses behind it. This was a task which neither of the brothers had previously undertaken. The performance of either branch of it called for the exercise of the utmost care and skill of the person charged with it. He could not allow the horse attached to the buggy to go at will without increasing the risk he had assumed. He could not intelligently guide the horse and buggy with one hand and the strange horses with the other. Did he attempt to do so? The horses he led had headstalls on with halter straps attached and tied together at the ends. Did he place the halter straps around his body, or arm, that he might have both hands free to guide the horse attached to the buggy? If any person knew what his preparations were for the performance of the task he had undertaken it was his brother John Bailey, who was but three or four paces ahead of the horse and buggy when the strange horses and Edward Bailey went off the narrows and down the slope to the railroad. He was a witness on the trial of the case, and when asked on cross-examination if he did not on the night of the occurrence, tell certain persons that Edward had the halter straps around him, he denied having made any such statement to anybody and supplemented his denial as follows: "I will tell you what I did say: I said in speaking how it happened that he might have had the halter straps around his body or he might have had them around his arm; I did not know how that was; I could not tell." His denial above stated, together with his supplement to or explanation of it, constitutes his only testimony in relation to the manner in which the horses were led by Edward after the additional burden of driving the horse attached to the buggy was cast upon him. In connection with this testimony a reference to and summary of the testimony antagonistic to it is deemed pertinent and proper. D. W. Crumm and his son Fred M. Crumm were the first to reach the point in the narrows where the accident occurred. They had with them a lantern with a light in it. John Bailey and the horse and buggy were still there. On the trial of the case D. W. Crumm referring to what passed between him and Bailey at the point aforesaid testified as follows: "First he says, 'Oh, my brother.' I says, 'Where is he?' He says, 'He has gone over the narrows.' I asked 'how he knew?' 'Because,' he said, 'he had a span of horses and they were tied around him and the horses went, and he most certainly went.' I said, 'Let's go there and see; there might be such a thing we can save him'; he said, 'No, there is no use, because he was fast to the horses.'" Fred. M. Crumm, who was present at this conversation fully corroborated the testimony of his father. J. E. Maston testified that he had a conversation with John Bailey in the presence of George Crumm, "with reference to the manner in which his brother was leading the horses," and that Bailey said, "he must have had the halters around him in front of him." His testimony was corroborated by that of George Crumm, who testified that Bailey in his conversation with Maston said that "his brother put the halter straps around in front of him so that he could have both hands to drive." G. W. Smith testified to a conversation he had with Bailey the day after the accident in which he said in substance that his brother had the halters around him so he could have both hands free to drive the horse and buggy. Dr. Delaney testified that Bailey told him that his brother had the halter straps tied around him. Bert Clayton heard the conversation between Bailey and Delaney and corroborated the testimony of the latter. S. W. Inroy, agent and operator for the Fall Brook Railway Company at Slate Run, testified that the night of the accident he had a conversation with Bailey respecting it, in which he said, inter alia, that his brother placed the halters around his body so he could drive with more freedom. The evidence thus summarized related to the manner in which the strange horses were led by Edward while he was driving the horse attached to the buggy, and the only testimony which contradicted or qualified it was that of John Bailey. It was claimed by the defendant on the trial of the case, that what John Bailey said to D. W. Crumm at the point where the accident occurred was admissible as part of the res gestæ and Coll *v.* Easton Tran-

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sit Co., 180 Pa. 618, was cited as authority for the claim. The Court held that it was not a part of the res gestæ, but that what he said at that time and afterwards upon the same subject was admissible to discredit his testimony on the trial. The Court also held that if the accident occurred in the manner described in the defendant's fourth point the negligence of the deceased contributed to it and thereby prevented a recovery in this action. As all the evidence relating to the manner in which the accident occurred was in full accord with the point and there was not a scintilla of evidence in the case to controvert it, the Court instead of submitting the case to the jury should have directed a verdict for the defendant. The position in which the horse and buggy were found; the sudden disappearance of the strange horses with the man charged with the task of driving the former and leading the latter; the testimony of eight disinterested witnesses descriptive of John Bailey's account of the occurrence, and his own testimony on the trial, unite in compelling the conclusion that the negligence of Edward Bailey contributed to his untimely death. We therefore sustain the defendant's seventh point.

Judgment reversed. W. M. S., JR.

Superior Court.

Oct. '98, 174. Superior Court. December 14, 1898.

Sparks v. Vitale.

Mutual insurance—Insolvency of company—Assessments — Affidavit of defence — Act May 1, 1876, P. L. 68.

The insolvency of a mutual insurance company is no defence in an action to recover from a member an assessment payable by the terms of the policy and by-laws.

The fact that the company, at the time of the contract with the defendant, fraudulently concealed its true condition, is no defence to an action for an assessment when the rights of innocent third persons have intervened, as by the issue of policies subsequent in date to that upon which recovery is sought.

To render an allegation in an affidavit of defence, that assessments sued for are unnecessary, excessive and illegal, sufficient to prevent judgment, the facts upon which the allegation depends must be set out so as to enable the court to draw the conclusions; mere inconvenience is no excuse for not so setting out, especially in view of the fact that the defendant as a member of the company has a right of access to its books.

The presumption of law is in favor of the regularity of proceedings to assess and of the legality of an assessment upon a mutual insurance policy.

The Act of May 1, 1876, sec. 56, P. L. 68, providing that on the filing of an affidavit denying the necessity of an assessment, or setting up fraud, the certificate of assessment shall not be evidence, applies to evidence, not to pleading; when, therefore, a mutual insurance company sets up a contract of insurance, the necessity for an assessment thereon, and the amount assessed, and attaches copies of its by-laws and of the policies, it presents a case which must be answered by affidavit, under the ordinary rules governing the same.

Appeal of Dominick Vitale, defendant, from the judgment of the Common Pleas No. 3, for the County of Philadelphia, in an action of assumpsit in which Alfred A. Sparks, receiver of the Fidelity Mutual Fire Insurance Company, was plaintiff.

This was an action originally brought by the Fidelity Mutual Insurance Company to recover certain assessments alleged to be due from the defendant, a member of the company, upon a policy held by him.

The statement set out that plaintiff had issued to the defendant two policies of fire insurance, and continued as follows:

"The said defendant accepted said policies and subsequently and before the bringing of this suit, paid the first premiums on the same, and thereby became a member of the plaintiff corporation. The said policies were delivered to the defendant, copies of which are hereto attached and hereby made a part of this statement. In the said policies it was explicitly stipulated that 'by accepting this policy, the assured hereby agrees to pay said insurance company such further sums, and at such times as the board of directors shall assess and order pursuant to the charter, the by-laws and laws of this State, providing such an assessment shall not exceed three times the amount of annual premium paid;' that under Article XVI. of the by-laws of plaintiff company, it is stipulated that 'members whose policies have been cancelled or have expired shall be liable to assessment for losses and expenses incurred during the time their policy was in force, subject to the limitation of liability as already provided for." The losses and expenses of plaintiff company during the time defendant's policies were in force, necessitated an assessment amounting to three annual premiums on each, to wit: $90 on policy No. 2668 and $120 on policy No. 20,511, which were duly assessed by the board of directors of said company, to wit: April 2, 1898, and full, due and legal notice of said assessment was served upon defendant, to wit: Notice of assessment on policy No. 2668 was served April 26, 1898, and notice of assessment on policy No. 20,511 was served May 18, 1898, whereby defendant became indebted to plaintiff in said sum of $210, yet he has neglected and re-

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fused to pay the said assessments, whereby, under Article XIII. of the by-laws of plaintiff company, which reads as follows: 'Premiums and Assessments. Each member shall pay into the treasury of this company such premiums as may be expressed in their policies and such assessment or assessments as may be levied by the board of directors and charged to their account on the books of the company within thirty days from the date hereof, and in default of such payment, each member may be charged with 25 per cent. additional to cover the cost of collection,' the defendant became indebted to the plaintiff in the further sum of 25 per cent. of said assessment, or $52.50, making a total indebtedness of $262.50. Plaintiff avers that subsequent to the issuing of defendant's policies, the plaintiff issued a large number, to wit, about 500, of similar policies of fire insurance subject to like provision as to assessments, and plaintiff avers that the whole sum of $262.50, with interest as aforesaid, is now justly due and payable by said defendant." The policies and a copy of the by-laws were attached to the statement.

The defendant filed an affidavit of defence, setting out a defence as follows:

"That at the time of the insurance of both of said several policies to deponent as set forth in plaintiff's statement, defendant is informed and believes that the said plaintiff was in a hopelessly insolvent condition, and that the assurances and promises of the said plaintiff to indemnify the said defendant against loss by fire for and during the periods of time covered by said several policies, to wit: February 15, 1896, to February 15, 1897, and February 15, 1897, to February 15, 1898, were therefore of no benefit or value to the said defendant, and deponent is also informed and believes that said plaintiffs fully knew and were aware of their insolvent condition at the time of the issuance of said policy to deponent, and the receipt of the premiums paid therefor by this deponent, but that said plaintiffs unlawfully and in violation of their duty towards deponent and of deponent's rights in said premises concealed said condition of insolvency from this deponent.

"That said alleged assessments are, as deponent is informed and believes, not the result of a true and correct division or assessment of the losses among the said several policy holders, but were and are excessive and unnecessary, and deponent has also been informed and believes that the said alleged losses did not occur during the periods of time embraced in the lifetime of either of the said policies, and therefore, under the terms and conditions of the said policies, cannot lawfully be assessed against the defendant.

"Deponent further says that by reason of said assessments being excessive, exorbitant and unlawful, and deponent's not being legally chargeable therewith, deponent was not liable for the penalty of 25 per cent., amounting to the sum of $52.50, for non-payment of the said assessments, and is not liable for any part thereof, as set forth in said statement.

"Deponent further avers that he is informed and believes that a fair and honest appropriation of the premium received by the said company from the several policy holders whose policies were in force at the time of the said alleged losses by fire would render said several assessments unnecessary, at least for the greater part thereof; and deponent is informed and believes that it is not true, and therefore denies, as set forth in plaintiff's statement, that the losses and expenses of plaintiff's company during the time defendant's policies were in force necessitated an assessment amounting to three annual premiums on each, to wit: $90 on policy No. 2668 and $120 on policy No. 20,511, and deponent further denies that the said assessments were legally or properly made by the board of directors of said company, as set forth in said complaint."

After a rule for judgment for want of sufficient affidavit had been taken, the plaintiff passed into the hands of a receiver, Alfred A. Sparks, whose substitution as plaintiff was suggeted of record. The Court, after argument, made the rule absolute and entered judgment for plaintiff for $262.50. The defendant took this appeal.

J. Joseph Murphy, for appellant.

In view of the Act of May 1, 1876, § 56, P. L. 53, the Court below erred. That Act provides that in cases against members of mutual insurance companies, an affidavit that the assessment is for more money than is necessary to pay losses and necessary expenses, or that the signature of the defendant was obtained by fraud, the certificate of the assessment shall cease to be evidence, and the plaintiff shall be compelled to prove its claim. In view of the affidavit in this case, the plaintiff was bound to show the liabilities which made the assessments necessary, and that they were made according to charter and by-laws.

Susquehanna Fire Ins. Co. v. Gackenback, 115 Pa. 492.

C. F. Eggleston, (*W. W. Weigley* with him), for appellee.

The Act of May 1, 1876, § 56, does not apply. The purposes to be served by the affidavit contemplated by this statute have reference to the

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method of proof upon the trial, and not to the exigencies of the affidavit of defence law.

The case of Susq. Fire Ins. Co. *v.* Gackenbach, 115 Pa. 492 (1886), cited by appellant, is not in point, as the question there rose upon the trial of the case.

The presumption of law is in favor of the legality of an assessment, and the burden of proof rests upon the policy holder, who is a member, to show either fraud or gross mistake, and he cannot do this by making the general assertion; he must show facts and circumstances constituting fraud.

People's Mut. F. I. Co. *v.* Groff, 154 Pa. 200.
Hummel's Appeal, 78 Id. 320.
Rosenberger *v.* Ins. Co., 87 Id. 207.
Buckley *v.* Ins. Co., 92 Id. 501.
Fire Ins. Co. *v.* Dryfoos, 20 WEEKLY NOTES, 33.
Lycoming Ins. Co. *v.* Rought, 97 Pa. 415.
Stone *v.* Lorentz, 19 Pa. C. C. 51.

A member of a mutual insurance company, who has been induced to become a member by the fraudulent representations of the officers of the company, cannot set up the fraud as a defence to an action by the receiver of the company for assessments, when other persons have subsequently joined the company as innocent third parties.

Dettra *v.* Kestner, 147 Pa. 566.
Howard *v.* Turner, 155 Id. 349.
Kramer *v.* Boggs, 172 Pa. 91, and 5 Pa. Super. Ct. 394.

April 17, 1899. SMITH, J. This case is not affected by the Act of May 1, 1876, P. L. 53: Insurance Co. *v.* Groff, 154 Pa. 200; Insurance Co. *v.* Gackenbach, 115 Pa. 492. By sec. 56 of that Act, a certificate of the assessment is made, prima facie, evidence thereof; but it loses all probative force on the filing of the prescribed affidavit of defence. This provision relates to the evidence and not to the pleading. It is enough for the declaration to state a cause of action; it need not contain matters of evidence that may become necessary on trial should the affidavit be filed. Here the declaration sets forth, in sufficient detail, the contracts of insurance on which the defendant's liability rests, the necessity for making assessments for payment of losses and expenses, the amount assessed on each policy held by the defendant, due notice to the defendant and his refusal to pay. It recites the specific provisions of the policies relating to assessments, and has attached to it copies of the policies and of the by-laws of the insurance company. It further avers the subsequent issue of some five hundred similar policies. As a whole, it adequately sets forth a cause of action.

The sufficiency of the affidavit of defence is to be tested by familiar principles. It must, either by denial or averment, exhibit everything necessary to a defence against the liability set forth in the declaration.

The insolvency of the insurance company is no defence: Sterling *v.* Ins. Co., 32 Pa. 75. The assets of a mutual insurance company consist principally, in the liability of its members to assessment. To admit insolvency as a defence to assessment, is to hold that there is no liability unless the assessments that may legally be made will prove sufficient to meet all claims. Such a proposition is opposed to its legalized system of business and has no foundation in either reason or authority. The members are bound to pay all lawful assessments, whatever the relation between their aggregate and the demands against the company. Even if the alleged concealment of the company's financial condition be deemed fraudulent, under the circumstances appearing here it is no defence, the rights of innocent third parties having intervened: Dettra *v.* Kestner, 147 Pa. 566.

The allegations of unnecessary, excessive and illegal assessments are not sufficiently specific. The facts upon which they depend should be set forth so as to enable the Court to draw the conclusions. The argument at bar, that it would be extremely inconvenient to give facts and figures showing the alleged errors and fraudulent calculations upon which the defence is based, cannot be accepted unless we reverse the principle that fraud must be proved and is not to be presumed. "Nor is it an answer to say it would be difficult to specify with exactness. If such were required, it is to be remembered that the defendant is a member of the company, with right of access to the books. There is no pretence that this was denied him, therefore the contrary is to be assumed": Ins. Co. *v.* Groff, supra. In that case also, as in this, 25 per cent. was added as liquidated damages for default in payment of assessments in accordance with the terms of the by-laws and policy, and this was sustained by the Supreme Court.

The presumption of law is in favor of the regularity of the proceedings to assess, and the legality of the assessment, and this presumption cannot be overcome by a general indefinite denial. It has often been held also that general averments of matters which in themselves are legal conclusions, from facts not stated, are insufficient to carry a case to the jury. The issue now presented is based on the declaration and the affidavit of defence, and upon examination of the latter we must, for the reasons indicated, hold it to be insufficient to prevent judgment.

Judgment affirmed.

H. B.

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WEEKLY NOTES OF CASES.

VOL. XLIV.] *FRIDAY, JUNE 9, 1899.* [NO. 10.

Supreme Court.

Jan. '98, 164. Supreme Court. March 13, 1899.

Page v. Williamsport Suspender Co.

Act July 9, 1897, P. L. 237—Constitutional law—Fraudulent judgments—Loan to partner—Practice.

The title of the Act of July 9, 1897, P. L. 237, viz.: "A supplement to an Act of the General Assembly approved the 17th day of March, A. D. 1869, entitled 'An Act relative to fraudulent debtors,' authorizing the Courts to inquire into the validity of judgments confessed and alleged to be fraudulent, and providing the practice therefor," sufficiently fulfills the constitutional requirement as to definiteness.

The constitutionality of the Act as a whole is not impaired by the second section, enacting that "no person shall be excused from answering as a witness as to any matter relating to the inquiry," etc., as such section, even if in violation of Art. I., sec. 9, of the Constitution (which is not decided), is so distinct from the rest of the Act that it may be cut off without affecting the body of the Act or its object.

The Act of June 9, 1897, P. L. 237, gives a general creditor a standing to inquire into the bona fides of a judgment confessed by his debtor such as he would have had if he had had a lien before the passage of the Act, and to facilitate his inquiry into an alleged fraud; it does not change the settled rule that a judgment fraudulent as to creditors is nevertheless good between the parties.

Where the bond required by the Act of 1897 is filed nunc pro tunc, by leave of the Court, before the appeal reaches the appellate Court, and without objection, an objection that the proceedings were irregular for want of a bond, when made upon the argument of the appeal, is too late.

That a partner who states that he is borrowing money for his firm gives as the evidence of the indebtedness his own note, does not put the lender on inquiry as to whether the loan is not really for the partner in an individual capacity; it only puts upon him the burden of showing that he believed the money was for the firm and that it actually reached it.

A., one of the firm of A. & B., in order to raise money to pay his share of the capital gave his note with C. as endorser; he told C. that the firm was the borrower; this was believed by C. The proceeds of the note were paid by A. into the firm. C. was compelled to pay the note and the firm confessed judgment to C. for the amount:

Held, as against creditors the judgment was valid.

Appeal of H. M. Page, plaintiff, from the judgment of the Common Pleas of Cumberland County, in an action against the Williamsport Suspender Company, defendant, and Jean Saylor Brown and Townsend & Longmire, intervening creditors.

Jean Saylor Brown, a general creditor of the Williamsport Suspender Company, presented a petition to set aside a judgment confessed by the Williamsport Suspender Company to H. M. Page. A rule to show cause was granted. Townsend & Longmire, also general creditors, presented a similar petition. Neither petitioner filed a bond, as required by the Act of June 9, 1897, before the granting of the rule, but Saylor-Brown by leave of Court filed one nunc pro tunc. The facts appear from the following opinion of the Court, McCLURE, P. J.:

"By the articles of co-partnership Charles C. Case was to contribute $1000 as his share of the capital stock of Ed. M. Hart & Co. To do this he borrowed $500 from his father-in-law, the plaintiff, on May 5, 1897, and paid the balance June 22, by a negotiable note drawn by Mr. Page to Case's order, payable four months after date at the West Branch National Bank. This note was endorsed by Case and Ed. M. Hart & Co., discounted by the bank, and the proceeds went to the credit of the partnership. Case was credited with the cash and proceeds of the note as capital and charged with the discount. The note was renewed October 22, 1897, with like paper signed by Page to Case's order, endorsed by him and the suspender company, Ed. M. Hart having retired in the meantime, and the partnership name changed to Williamsport Suspender Company.

"It is unquestionable that the money and credit loaned by Page were obtained by Case for the purpose of meeting his obligation to his co-partners, and it is just as clearly proven that he not only failed to disclose this fact to Page but represented to him that he was borrowing the money for the firm and they would protect him. No security was given Page until the confession of this judgment by Case for the defendant company, which was done without the knowledge of his partner, Keightley.

"Between the partners the money loaned by Page was Case's debt, but Page is on a different footing. Each partner is the general agent of the firm and has the power to bind his co-partners by acts done within the scope of the business. He may borrow money for the partnership and give notes therefor in the name of the firm. 'If the lender is informed or has notice that the money is borrowed for the individual use of the partner borrowing, and not for the firm, the partnership is not liable for any security that may be given therefor in the name of the firm. But if the lender has no knowledge or notice, at the time of

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making the loan, the firm will be liable therefor, although the money may have been borrowed for the separate use of one of the partners': Mr. Justice WILLIAMS in Potter *v.* Price, 3 Pitts. 136.

"As we have seen, Page was not informed that the money borrowed was for the individual use of Case, but was told just the contrary, and there was no notice of any fact that ought to have put him on inquiry. It follows that the $500 loaned by Page was a debt of the partnership and a judgment confessed for that amount would withstand the attack of its creditors.

"That Keightley, when insolvency came, credited Page with $500 on the books of the firm, is not of importance, as that entry would not make the partnership liable for the individual debts of Case. It was no more than a declaration that as between the members of the firm themselves they would consider it a debt of the partnership. To make it a claim which could be enforced by Page they would have to ratify the transaction or assume the debt by positive agreement with him: North Pa. Coal Co.'s Appeal, 45 Pa. 181.

"Page's endorsement is another matter. His loan of money was a valid debt of the firm, only because there was no notice to him of the purpose for which the money was obtained and the consequent lack of authority in Case to bind the partnership, nor any circumstance that would have put a reasonably prudent man on inquiry. But when his son-in-law asked him to back the firm in securing a discount in bank he presented a paper on which the name of the partnership nowhere appeared. Instead, it was a note payable to his own order, and Page signed it, thus becoming the accommodation maker, not for the partnership but for Case. If, as we believe, Case said he wanted the money for the firm, this note bore on its face evidence that his statement, if not false, was at least not the whole truth. It was apparent, from the form of the instrument, that it was for some individual transaction of Case's. When presented to Page the partnership stamp was not on the note in any form. Notice of any fact that ought to put a man on inquiry is sufficient to protect a firm from the acts of a partner within the scope of the business: Potter *v.* Price, 3 Pitts. 136. Surely here was enough to lead any reasonably prudent man to inquire, Why, if I am loaning my credit to the partnership, am I asked to sign a note payable to one of the partners? And inquiry would have developed that the money to be raised on the paper was to meet Case's obligations to his copartners, and for that he had no power to bind them. Mr. Page thought he was the endorser for the suspender company, but that cannot affect the law of the case. A man cannot be heard to say he did not know that which by due care he should have known.

"This loan of credit is not a partnership debt, and the confession of judgment by one partner, without the consent of the other, is a fraud on him and the firm creditors: McNaughton's Appeal, 101 Pa. 550. And this fraud, it would seem, taints the whole judgment, for a judgment fraudulent in part is void in the whole as against other creditors: Gates *v.* Johnston, 3 Pa. 52.

"The only exception to this rule and recognition of partly good and partly bad judgments is, as Judge ARNOLD points out in Moore *v.* Dunn & Fell, 147 Pa. 359: 'In cases of judgments held by married women against their husbands in which the excessive part will not be attributed to bad faith, but will be presumed to be a mistake, or included in good faith.' See cases cited by him on page 362. We would be inclined to add this case to the exception rather than hold it within the rule, but our judgment of what the law is must control our personal views of what it should be.

"An now, to wit, April 9, 1898, rule absolute, and the judgment is set aside so far as the Williamsport Suspender Company is concerned, as also the execution and levy upon the partnership assets."

The plaintiff took this appeal, and assigned as error, inter alia, the taking cognizance of the case under the Act of July 9, 1897, P. L. 237, said Act being unconstitutional, and the decree setting aside the judgment.

C. LaRue Munson, (*Otto G. Kaupp* with him), for appellant.

The petitions to show cause why the validity of the judgment should not be inquired into and set aside, are based on the Act of Assembly of July 9, 1897, P. L. 237, and that Act is unconstitutional.

The subject is not clearly expressed in its title, as required by Art. III., sec. 3, of the Constitution.

The said Act of Assembly is in violation of Art. V. of the amendments to the Constitution of the United States, which provides:

"No person . . . shall be compelled, in any criminal case, to be a witness against himself."

Also Art. I., sec. 9, of the Constitution of Pennsylvania, which provides:

"The accused . . . . cannot be compelled to give evidence against himself."

The Act of July 9, 1897, has been declared unconstitutional by lower Courts, but up to this time this Court has not been called upon to determine its validity.

Hamburger Co. *v.* Friedman, 6 Dist. Rep. 693.
Krug *v.* Behringer & Co., Id. 772.
Horstman *v.* Kaufman, 97 Pa. 147.

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If the Act, which is a supplement to the Act of March 17, 1869, is constitutional, the proceedings to inquire into the validity of the judgment confessed to H. M. Page cannot be sustained, because petitioners have not complied with the provisions of the said Act.

Parks v. Watts, 112 Pa. 4.
Williamson v. McCormick, 126 Id. 274.
Hoppes v. Houts, 133 Id. 34.
Johnston & Co. v. Menagh, 4 Pa. Super. Ct. 154.

The appellees, as subsequent creditors of the Williamsport Suspender Company, had no standing to inquire into the validity of the judgment confessed to H. M. Page.

Grier v. Hood, 25 Pa. 430.
Erwin's Appeal, 39 Id. 535.
Moore v. Dunn & Fell, 147 Id. 359.

The firm of Ed. M. Hart & Co., subsequently Williamsport Suspender Company, having received the money and credit loaned by Page, and having used the same exclusively in their business, there is a moral and legal obligation to support the firm's subsequent promise to pay.

Siegel v. Chidsey, 28 Pa. 279.
Walker v. Marine Nat. Bank, 98 Id. 574.
Coffin's Appeal, 106 Id. 280.
Leonard, Receiver, v. Smith, 162 Id. 284.
Potter & Jones v. Price, 3 Pitts. Rep. 136.
Larzelere & Son v. Tiel & Tooley, 3 Pa. Super. Ct. 109.

There is no fraud in securing a creditor by confessing a judgment in an amount sufficient to cover both his actual and contingent liabilities; and a judgment invalid in part does not taint the whole if the transaction is bona fide and the excess arises from an honest mistake of fact or law.

Gicker's Admrs. v. Martin, 50 Pa. 138.
Meckley's Appeal, 102 Id. 536.
Howard Watch Co. v. Bedillion, 131 Id. 385.
Braden v. O'Neil et al., 183 Id. 462.
Baldwin v. Horron, 19 Pa. C. C. R. 634.
Baird v. Ford, 152 Pa. 643.
Thompson v. Sankey, 175 Id. 597.
Hawley v. Griffith, 187 Id. 313.

W. H. Spencer, (*T. M. B. Hicks* with him), for appellees.

It is not claimed that this Act contains more than one subject, but that its subject is not clearly expressed in the title. The purpose of this portion of the constitutional requirement is to give notice to the legislators and to the people, of the character of the proposed legislation.

Cooley's Constitutional Limitations, (6th ed.) 171.
Road in Phoenixville, 109 Pa. 48.
Searight's Estate, 163 Id. 216.

The Act of 1897 meets this requirement.

State Line, etc., R. R. Co.'s Appeal, 77 Pa. 429.
Craig v. First Presbyterian Church, 88 Id. 45.
In re Pottstown Borough, 117 Id. 538.
Millvale Bor. v. Evergreen Ry. Co., 131 Id. 1.

The Act of 1897 is germane to the Act of 1869. It is only where an Act clearly violates a constitutional provision, that the Courts will declare it invalid. All the presumptions are in favor of its constitutionality.

Pennsylvania R. R. v. Riblet, 66 Pa. 164.
Powell v. Com'th, 114 Id. 292.

To doubt is to decide in favor of the constitutionality of the Act.

Erie, etc., R. R. Co. v. Casey, 26 Pa. 287, 300.
Craig v. First Presbyterian Church, 88 Id. 46.
Powell v. Com'th, 114 Id. 292.
Com'th v. Morgan, 178 Id. 209.

An objection to the sufficiency of an attachment bond, or of the affidavit upon which the attachment rests, comes too late, if made for the first time, upon appeal.

Swanger v. Snyder, 50 Pa. 218.
Poor v. Colburn, 57 Id. 416.
Conklin v. Harris, 5 Ala. 213.
Morris v. Trustees, 15 Ill. 266.
Lawver v. Langhans, 85 Id. 138.
Northrup v. Garrett, 17 Hun, 497.
Ledoux v. Smith, 4 La. An. 482.
Kenefick v. Caulfield, 88 Va. 122.

The cases cited by the appellant are not cases of fraudulent judgments; but are all cases of honest mistake; and are not applicable to the case at bar, where the transaction was found by the lower Court to be so clearly fraudulent.

Moore v. Dunn, 147 Pa. 362.

May 22, 1899. MITCHELL, J. The first question raised by the assignments of error, is the constitutionality of the Act of July 9, 1897, P. L. 237. The Act is entitled a supplement to the Act of March 17, 1869, relative to fraudulent debtors, "authorizing the Courts to inquire into the validity of judgments confessed and alleged to be fraudulent, and providing the practice therefor."

It is objected that this Act is void, first, because the title is not sufficiently explicit and the subject is not germane to that of the Act to which this assumes to be a supplement; and secondly, because sec. 2, which provides that no witness shall be excused from answering as to any matter relating to the inquiry, is in violation of the fifth amendment of the Constitution of the United States, and also of sec. 9 of the bill of rights of the Constitution of Pennsylvania.

Neither of the objections is tenable. The subject of the Act is entirely germane to the Act of 1869. The title of the latter refers to fraudulent debtors and that of the former to fraudulent judgments given by debtors. The subject of both Acts is fraud by debtors against their creditors and the object of both is to enable the creditors to investigate and defeat fraud if it be discovered. The methods and remedies are different, but the object is the same. The title to the Act of 1897

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would have been good if it had ended with calling it a supplement to the Act of 1869. But it did not stop at that. On the contrary it went on and set forth the subject of the Act itself with sufficient clearness to meet all requirements even if it had not been called a supplement at all. The Act of 1869 is not referred to or mentioned in any way in the body of the Act, and omitting all the words referring to the Act of 1869, the title would read: "An Act authorizing the Courts to inquire into the validity of judgments confessed and alleged to be fraudulent, and providing the practice therefor." Such a title indicates the subject with entire clearness.

The second objection is equally untenable. The fifth amendment of the Constitution of the United States has no applicability at all to the matter. As to the Constitution of Pennsylvania, if any part of the Act transgresses, which has not been shown, it is section second, which is so distinct and separate that it might be cut off without in any way affecting the body of the Act or its object.

The Act is constitutional and its purpose plain. Previously no creditor could interfere with another creditor's execution unless he had a lien himself by levy or otherwise. This Act was intended to give a general creditor a standing such as he would have had if he had had a lien, and to facilitate his inquiry into the alleged fraud. It is for his benefit, and does not change the settled rule that a judgment fraudulent as to creditors is nevertheless good between the parties.

The next question is whether the proceedings are not invalid under the Act itself, for failure of the petitioning creditor to file the bond required. The Act is mandatory that the bond shall be filed before the rule is granted, and the proceedings, therefore, were irregular and should have been quashed, if the objection had been made in time. The first petitioner, however, by leave of the Court filed a bond nunc pro tunc, and as the objection was not made until the record was in this Court, it may fairly be considered as waived by the respondent in the rule, now appellant, for whose benefit the bond was required. The other petitioning creditor who was permitted to intervene has never filed any bond, and the rule as to him was without jurisdiction in the Court. He therefore has no standing in the case.

The Court below found as a fact that Page advanced the first five hundred dollars, and gave his note for the second five hundred, in good faith and in the honest belief that the money was for the firm. The Court therefore found that a judgment for five hundred dollars would have been good against creditors, but in regard to the note, he held that as it was in the name of one partner only, Page was put upon notice and chargeable with knowledge that as between the partners, the money raised by the discount of the note was money due to the firm by Case as part of his contribution to the firm capital. As to this sum, therefore, the Court held that it was not a debt of the firm, and being included in the judgment made it wholly void. These deductions, however, are not sustained by the facts. The representation by Case to Page was that the money was to be raised for the use of the firm by the discount of the note. There was nothing extraordinary in that. One partner may borrow in his own name for the use of his firm, and if he borrows by having his note discounted it is no different. The only effect of the form of the loan is to put on the lender the burden of proof that he believed the money was for the firm, and that it actually reached it. Both these elements were established in this case. Page thought he was lending to the firm and the money in fact went to and was used by it. It is true that as between the partners, the money was due by Case as contribution to capital, but it is not at all clear that the form of the note on which it was borrowed was sufficient notice to put Page on inquiry into that fact, in the face of Case's assertion that it was money borrowed for the firm, and still less that it would support any inference of fraud in including this sum in the judgment. There must be fraud and the creditor must be party to it to avoid the judgment at the suit of other creditors. In Meckley's Appeal, 102 Pa. 536, 543, it was said by our late brother CLARK: "It is doubtless true, as said by Mr. Justice SHARSWOOD in Clark *v.* Douglass, 62 Pa. 415, that 'a judgment confessed voluntarily by an insolvent or indebted man for more than is due is prima facie fraudulent within the statute of 13 Eliz. c. 5,' but then it is only prima facie fraudulent, and as the auditor has specifically and expressly found from the evidence that in fact there was no dishonest or fraudulent purpose to cheat or defraud, delay or hinder the creditors, that prima facie presumption is by the auditor's finding fully rebutted." So here we do not think the rules of law are to be so applied as to compel us to hold that to be a fraud which the Court has on the evidence found to have been done honestly and in good faith. The Court below applied the legal presumption too rigidly in view of the actual facts.

Judgment reversed and rule directed to be discharged.

W. C. S.

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Jan. '99, 61. Supreme Court. April 11, 1899.

Wells, Administrator v. New England Mutual Life Ins. Co.

Life insurance—Contract—Abortion.

Where a life insurance policy contains a provision that it shall be void if the insured shall die "in violation of or attempt to violate any criminal law of the United States or of any State or country in which the insured may be," and the insured voluntarily submits to a criminal abortion, it is error for the Court to leave it to the jury whether or not the death was attributable to another or intervening cause happening between the abortion and the death.

Appeal of the New England Mutual Life Insurance Company of Boston, from the judgment of the Common Pleas of Luzerne County, in an action of assumpsit wherein George Wells, administrator of Helene Roberts, to the use of John Welles Hollenback and L. D. Shoemaker, was plaintiff.

The facts of the case appearing from the evidence at the trial, before LYNCH, J., were as follows: On August 13, 1891, Helene Roberts, an unmarried woman twenty-seven years old, took out a policy of life insurance in the defendant company. On August 19, 1891, she assigned the policy to John Welles Hollenback and L. D. Shoemaker, to secure them for certain loans which they had made to her.

On November 26, 1892, Helene Roberts died. Proofs of death were regularly furnished the defendant showing the death to have resulted from "peritonitis and septicaemia, the result of abortion."

The company refused payment, and thereupon George A. Wells took out letters of administration on the estate of the assured, and brought action to the use of the assignees of the policy.

The policy provided that it should be void if the insured died in consequence of any violation or attempt to violate any criminal law of the United States, or of any State or country in which the insured might be.

Defendant's testimony was to the effect that the insured had visited an abortionist several times, and for that purpose had gone to Nanticoke, a small town nine miles from where she lived, that she had sought the doctor and begged him to perform the operation, that he made several futile attempts and the foetus was finally expelled, as a result of which the insured died; that she had had several abortions performed upon her before this one. These facts were proved by the declarations of the insured to five persons. This evidence was uncontradicted.

Defendant asked the Court to charge:

"You will find as a fact, and so state in your verdict, that Helene Roberts did, or did not, die as the result of an unlawful operation voluntarily submitted to by her."

The Court answered: "I decline to affirm this or to so instruct you. The Court instructs you that under the testimony in this case you should find as a verdict either for the plaintiff for the amount of the policy with interest from December 15, 1892, or generally in favor of the defendant." (Second assignment of error.)

Defendant also presented the following points:

"5. That if the jury believe any abortion or abortions had been performed upon the insured prior to August 8, 1891, then the concealment of such an abortion or abortions was a material concealment, and the plaintiff cannot recover."

"6. That under all the evidence in the case there can be no recovery on the policy and your verdict must be for the defendant." Both were refused. (Third and fourth assignments of error.)

The ninth assignment of error was that the Court charged the jury, inter alia, as follows:

"Did any other cause, taking in consideration where it was alleged it was performed, intervene, which produced blood poisoning, or septicaemia, and cause death? If it did, the company will have to pay the amount of this policy. If it did not, you should return a verdict in their favor." (Ninth assignment of error.)

Verdict and judgment for plaintiff for $4080. The defendant took this appeal, assigning as error, inter alia, as above indicated.

W. S. McLean and *J. B. Woodward*, for appellant.

The Court should have directed a verdict for defendant.

The facts once established or conceded, their legal effect is for the Court. When, therefore, upon all the evidence no question of fact is left in doubt or controversy the trial Judge should direct a verdict.

Cougle *v.* McKee, 151 Pa. 603.
Gardner *v.* McLallen, 4 WEEKLY NOTES, 435.

The Court was in error to charge:

"Did any other cause, taking in consideration where it was alleged it (the operation) was performed, intervene which produced blood poisoning or septicaemia and cause death? If it did, the company will have to pay the amount of this policy. If it did not, you should return a verdict in their favor."

Winters *v.* Mowrer, Adm., 163 Pa. 239.

The policy was a Massachusetts contract and subject to Massachusetts law and under the circumstances the policy is void.

Hatch *v.* Ins. Co., 120 Mass. 550.

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H. W. Palmer, (*J. T. Lenahan* with him), for appellee.

In order to make out this defence it is perfectly clear that the burden was on the defendant to show the facts upon which this policy of law was based, as follows:

That the insured died from the effects of an abortion; that she submitted to the operation voluntarily; that she knew it was dangerous to her life; that there was no justifiable medical reason for the operation.

There was no evidence that deceased knew that operation was dangerous to her life, or that there was no justifiable reason for it.

The Court could not have given binding instructions.

Howard Express Co. *v.* Wile, 64 Pa. 201.
Reel *v.* Elder, 62 Id. 316.

The question of the credibility of a witness, even though he be uncontradicted, is for the jury.

Grambs *v.* Lynch, 20 WEEKLY NOTES, 376.
Fulton *v.* Lancaster Co., 162 Pa. 306.

April 24, 1899. GREEN, J. We are clearly of opinion that the learned Court below should have affirmed the sixth point of the defendant and directed the jury to render a verdict for the defendant. There was no dispute about the facts of the case nor any question as to the law. That the deceased woman voluntarily submitted to an operation for abortion upon her person, and that she caused it to be done by her own importunity to that end and that she died from the direct effects of the operation, was established by the overwhelming testimony in the case without the least shade of contradictory evidence. The substance of all this was conceded in the charge of the Court to the jury and the Judge instructed the jury that if they believed that the operation was submitted to voluntarily without any justifiable medical reason they should find for the defendant. The Court affirmed the first and second points of the defendant which presented the subject in that aspect alone. But the learned Court intimated that there might have been some other intervening cause that produced the death of the party and submitted that question to the jury thus: "Did any other cause, taking in consideration where it was alleged it was performed, intervene, which produced blood poisoning or septicaemia and cause death? If it did the company will have to pay the amount of this policy. If it did not you should return a verdict in their favor." As there was not the smallest fragment of testimony as to the existence of any other cause of the death of the insured than the abortion, it was grave error to submit such a question to the jury. It only tended to mislead them and direct their attention to a false issue.

There was no question that the policy was a Massachusetts contract and was governed by the law of that State. It was also shown that the Supreme Court of that State had decided in a case almost precisely similar to this, that there could be no recovery on a policy of life insurance upon the ground of public policy, if death results from the insured having voluntarily submitted herself to an illegal operation known to her to be dangerous to life, with intent to cause an abortion, without any justifiable medical reason: Hatch *v.* Mutual Life Ins. Co., 120 Mass. St. Rep. 550.

The testimony in the present case proved conclusively and without the least contradiction, that the insured procured the operation for an abortion to be performed upon her person, and that she died in direct consequence of the operation. Dr. Crawford testified on this subject as follows: "She told me in the meantime that she had undergone an operation, she had an abortion. . . . . She told me that it was done in Nanticoke one week, I think, or about one week, prior to that time; that it was done by the insertion of an instrument into her womb. She told me too that several previous attempts had been made by the same person to produce the abortion; that those attempts had failed. At the time she mentioned (a week before) she had again visited the abortionist and that he then performed a different operation, that he did what he called dilating her womb, that is introduced in and forced it open." He also testified that he told her she would certainly die and she replied, "Oh, no, I am not going to die. I have had as many as six abortions, or had an abortion produced as many as six times, and I have always gotten well, and I will now." She repeated a similar statement in the presence of Mrs. Harvey, when she said, "Oh, shaw, I am not going to die; I have had this done two or three times before," and to Dr. Whalen, who testified, "Well, she said she had that done several times before, that she would get over it"; and to Mr. Davidson who testified that she said, "She would not die, that this had been done before and she had always recovered." To Dr. Stoeckel, who delivered the foetus, she named the person who performed the operation, saying it was a Dr. Dan, of Nanticoke. She was asked: "Q. What did she say about Dr. Dan, if anything? A. She said that he had performed several operations which were not successful. Q. On her? A. On her. And she asked me, to use her own words, if I thought he hadn't made a botch of it. . . . . Q. Whether or not she told you how many times she had been down to see Dr. Dan? A. She spoke of two or three times." Dr. Stoeckel also testified that she did not discover any malformation of the womb, and when asked

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whether she discovered any medical reasons for the abortion, replied, "I didn't discover anything of that sort." Dr. Crawford testified directly that she died from the effects of an operation. In addition to this the medical testimony all showed that the conditions resulting from an abortion were present and that her death was the consequence of these conditions.

Against all this testimony there was not a particle of evidence in contradiction. There was not so much as a suggestion that there was any medical occasion for the operation and the Court was in serious error in submitting such a question to the jury. It was not necessary to establish by specific proof that there was no such necessity because the whole of the testimony disclosed the purpose of the deceased to have the operation performed in order to get rid of an illegitimate foetus, but Dr. Stoeckel did testify that she could not discover any medical reasons for the abortion.

In the Hatch case the Supreme Court of Massachusetts decided that there could be no recovery in such circumstances on the ground of public policy, saying, "We are of opinion that no recovery can be had in this case, because the act on the part of the assured causing death was of such a character that public policy would preclude the defendant from insuring her against its consequences; for we can have no question that a contract to insure a woman against the risk of her dying under or in consequence of an illegal operation for abortion would be contrary to public policy, and could not be enforced in the Courts of this Commonwealth." We see no reason to question the soundness of this proposition and it has our approval. As we have a criminal statute imposing severe punishment for the perpetration of the crime of abortion it follows that our own public policy corresponds with that pronounced by the Supreme Court of Massachusetts. But in addition to this the offence is a crime at common law. In 1 Whart. Cr. Law, sec. 592, it is said, "At common law the destruction of an infant unborn is a misdemeanor supposing the child to have been born dead, though if the child die subsequently to birth from wounds received in the womb it is homicide."

In the case of Mills *v.* Com'th, 13 Pa. 633, we said, "Miscarriage both in law and philology, means the bringing forth the foetus before it is perfectly formed and capable of living; and is rightfully predicated of the woman, because it refers to the act of premature delivery. The word abortion is synonymous and equivalent to miscarriage, in its primary meaning. It has a secondary meaning in which it is used to denote the offspring. But it was not used in that sense here, and ought not to have been. It is a flagrant crime at common law, to attempt to procure the miscarriage or abortion of the woman; because it interferes with and violates the mysteries of nature in that process by which the human race is propagated. It is a crime against nature which obstructs the fountain of life and therefore it is punished." In 1 Whart. Cr. Law, sec. 599, it is said: "All parties concerned in the offence are responsible, whatever may be the part they take." We do not think it can be questioned that the woman who solicits the commission of the offence, and submits her body for its perpetration, can be regarded as other than a participant in its commission and is therefore criminally responsible. Viewed in that light in the present instance, the deceased comes directly within the operation of the prohibitory clause of the policy, for she was actually engaged in the violation of the criminal law of Massachusetts, where the contract was made, and of Pennsylvania, where she was at the time the offence was committed. The act was also highly immoral and illegal as well on her part as on the part of the person who performed the operation, and therefore it would be contrary to public policy to permit a recovery. Upon the whole case it was the plain duty of the Court below to direct a verdict for the defendant.

The case of Morris *v.* Life Assurance Co., 183 Pa. 572, has no application, as its controlling facts are entirely different.

Judgment is reversed and judgment is now entered in favor of the defendant.

W. D. N.

Oct. '98, 68. Supreme Court. November 12, 1898.

Cooke v. Marshall.

Corporation—Right to issue stock—Increase.

A corporation, to which by its charter there is given no express authority to issue capital stock, and the purpose of whose creation can be fulfilled without such issue, has no right to issue capital stock.

A corporation can increase or diminish its capital stock beyond the limit fixed by its charter only when the power to do so is expressly conferred upon it.

Appeal of J. L. Marshall, defendant, from the judgment of the Common Pleas No. 1, for Allegheny County, in a proceeding by quo warranto at the suit of O. R. Cooke.

In the Court below, a writ of quo warranto having issued to test the defendant's right to act as secretary and treasurer of the Chartiers Cemetery Company, the following facts were agreed upon by a case stated:

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By an Act of Assembly entitled "An Act to incorporate Chartiers Cemetery, of Allegheny county, Pa.," approved April 5, A. D. 1862, Hugh Lee, M. B. Brown, J. W. Cooke, J. L. Marshall, Moses Chess, W. McClintock, J. W. Hall and W. H. Phelps, of Allegheny county, and any persons who might become their associates and their successors were duly incorporated under the name and style of the Chartiers Cemetery Company

By the second section of said Act, it was provided that the government of said company should be vested in a board of trustees, who should be elected at such times and in such manner as the said company should by its rules and regulations direct, and that such officers, agents and servants should be appointed by the trustees as said company should by its laws require.

The Act, a copy of which was annexed, conferred no express power to create or issue stock.

At a meeting of the incorporators, at which J. L. Marshall acted as secretary, it was resolved to issue capital stock to the amount of $8000, divided into shares of $50 each, and a committee was appointed to obtain subscriptions to stock.

The said stock was subscribed for as follows, on May 14, 1862:

H. Lee,	2 shares	$100.00
J. W. Hall,	2 "	100.00
W. McClintock,	2 "	100.00
P. G. Lee,	74 "	3,700.00
J. L. Marshall,	80 "	4,000.00
Total	.....	$8,000.00

And said stock was paid for by the conveyance by J. L. Marshall to the company of the real estate above described, but no money was ever appropriated or paid for said land.

By a by-law the number of trustees was fixed at five. On May 4, 1868, a resolution was passed increasing the stock to $50,000 and, on October 5, 1874, a similar resolution, increasing it to $150,000. On November 28, 1883, the stock book showed the holdings to be as follows:

W. Craig Lee, trustee	1260 shares.
Moses Chess, ...	150 "
H. Bockstoce, ...	30 "
H. Lee, ...	60 "

No transfers of stock were made after that date.

Boards of trustees were elected from time to time by a stock vote, and on October 5, 1891, a meeting at which were present Chess, Marshall and W. Craig Lee, a board was elected composed of Chess, Marshall, Bockstoce, Lee and J. S. Duncan. On February 5, 1893, a meeting was held for the election of trustees and an amendment to the by-laws presented increasing the number to seven. Marshall entered a protest against the lawfulness of the meeting, after which the amendment was adopted and a board of seven was elected, which board elected O. R. Cooke secretary and treasurer. Marshall, who had been elected a trustee, then withdrew. The same trustees were annually elected until and including October 4, 1897. On May 4, 1894, Chess and Marshall elected and organized a new board, ignoring all idea of capital stock and shares, and the new board elected Marshall secretary and treasurer, and the said board was so elected in successive years up to the beginning of the proceedings in question. Marshall refused to deliver to Cooke the seal, minute books, etc., and retained them. From the organization of the cemetery company until May 4, 1894, the entire management of the company proceeded upon the stock principle; no dividend was ever paid. In 1883 Hugh Lee and James L. Marshall assigned their stock to W. Craig Lee as trustee for their creditors, the said stock not to be sold until certain real estate of Lee and Marshall covered by a mortgage to said W. Craig Lee had been converted into cash; said trustee never paid value for the stock. In 1894 W. Craig Lee, who had been elected president by the stock board of trustees, filed a bill in equity praying a decree that Marshall surrender the books, papers, seal and other property of the corporation in his hands, to which bill Marshall filed an answer denying the validity of all the shares of stock so claimed to be held by said W. Craig Lee; denying the validity and regularity of the election of W. Craig Lee as president, and O. R. Cooke as secretary of said company; and claimed to be the lawful secretary and treasurer of said company by virtue of his election to said office by the original incorporators thereof, and their lawful successors on May 4, 1894, as above recited. Testimony was taken, and the said bill was still pending at the time of the issue of the quo warranto.

The case stated concluded:

"1. If the Court be of the opinion that the capital share stock of said cemetery company was legally created as above recited, then judgment to be entered for the plaintiff.

"2. If the Court be of the opinion regardless of the validity of said stock, that the board of trustees represented by W. Craig Lee as president, and O. R. Cooke as secretary and treasurer, is the legally constituted board of trustees of said company, judgment to be entered for the plaintiff; otherwise judgment to be entered for defendant; either party reserving the right to sue out a writ of error herein."

The Court, STOWE, P. J., delivering the opin-

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ion, entered judgment for the plaintiff and against the defendant.

The defendant took this appeal and assigned as error the entry of judgment for plaintiff.

William M. Watson and *C. S. Fetterman*, (*J. J. Miller* with them), for appellant.

The Act imposed upon the corporators of the company the duty of establishing a cemetery—this was a trust, in the corporators, their associates and successors.

The charter and body of the trust reposed by the charter of the Chartiers Cemetery Company in the incorporators and the company required that all elections of members of the company should be by the incorporators, their lawful "associates and their successors," and the attempts on May 3 and May 14, 1862, to create by by-law a capital share stock possessing such voting power was ultra vires and void. Stated in other words, this was a corporation having no semblance of private gain, but belonging rather to the class of charitable, religious or educational corporations, and could not therefore, under its charter, create and issue share stock.

1. The share stock is invalid. Its creation is contrary to the purpose of the charter and therefore ultra vires. "If the subject matter of a by-law is clearly alien to the nature of a corporation, and is a departure from the purpose, such a by-law is ultra vires and void": Crumpton *v.* Pittsburgh Council, 1 Sup. Ct. Rep. Pa. 613, Per WILLARD, J., at page 622, citing Commonwealth *v.* Gill, 3 Whart. 228.

2. Absolutely and wholly unnecessary.

3. It was an abuse of the trust reposed by the Legislature of Pennsylvania in the eight persons composing the company. If the voting power was valid, it would carry away from the incorporators the trust they owed to the public, and place the control of the cemetery trust in the hands of those whose interest it would be to constantly absorb the profits and thus divert them from maintenance and improvements of the grounds, buildings, etc.

4. If the creation of the stock or the voting power attached to it be a matter of doubt, then that doubt requires a decision against the stock, for no corporation can adopt a doubtful way of paying for its land, and wherever a corporate power is doubtful it is denied.

Pearce *v.* R. R. Co., 7 Am. Law Reg. 409.
R. R. Co. *v.* Clarke & Thaw, 5 Casey, 146.
Bank of Pa. *v.* Com'th, 7 Harris, 144.
Bank of Easton *v.* Com'th, 10 Barr, 442.
'2 Kent Com., star page 298.
Com'th *v.* R. R. Co., 27 Pa. 339, per BLACK, C. J., at pp. 351-2.

5. It is unreasonable.

A. W. Duff, for appellee.

The conduct of the incorporators in passing the by-laws under which the company has been governed immediately after its incorporation shows the intent of the promoters was to create a capital stock, and the intent thus expressed should control.

Statutes are to be construed as may best effectuate the intention of the makers which sometimes may be collected from the cause or occasion of passing the Act, and when discovered, it ought to be followed with judgment and discretion in the construction though that construction may seem contrary to the letter of the statute.

Improvement Co. *v.* Com'th, 94 Pa. 450.
Com'th *v.* Fraim, 16 Id. 169.

May 8, 1899. GREEN, J. The Chartiers Cemetery Company was created by an Act of Assembly approved April 5, 1862, P. L. 419. The first section of the Act created certain named persons, and other persons who might become their associates, into a body corporate "by the name, style and title of the Chartiers Cemetery Company and by that name shall have perpetual succession and shall be capable in law to have and use a common seal and from time to time change the same, to hold, purchase and dispose of property, real or personal, sue and be sued, plead and be impleaded in any Court of law or elsewhere to ordain, pass, and put in execution all such laws, rules and regulations not contrary to the Constitution and laws of the United States or of this Commonwealth, as shall be necessary or convenient for carrying into effect the objects of the company, and generally to do all such other matters and things as are incident to a corporation." By the third section it is made the duty of the corporators to establish a cemetery on the land of James L. Marshall, not less than thirty, nor more than one hundred acres in extent. The fourth section authorizes the corporation to lay out the ground into lots, plots, avenues, lanes, sites for offices, dwellings for its necessary officers or servants, chapel for religious services, etc., and to sell and convey by deed or otherwise lots, plots, etc., to individuals, societies or congregations. The remaining sections contain minor provisions for the regulation and management of the cemetery.

After the passage of the Act the corporators met and organized the company, and passed a resolution to establish a cemetery on the ground designated in the Act containing thirty-two acres and seventy-five perches, "and for this purpose the capital stock of the said Chartiers Cemetery Company shall be $8000 divided into 160 shares of the par value of $50 each." A committee was

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appointed to take subscriptions, and on May 14, 1862, the full amount of stock was subscribed by several persons, and the said stock was issued to J. L. Marshall and his associates in payment for the cemetery grounds. At successive meetings after that the stock was increased, first to $50,000 and later to $150,000 in consideration of various improvements and expenditures made upon the ground.

The question then is, was the original creation and issue of stock lawful, and if so, were the subsequent increases lawful? The issue was made for the purpose of performing the original duty to establish a cemetery. It was necessary to acquire land in order to create the cemetery and the corporators adopted the method of obtaining the land by issuing stock in payment for it. It is not denied that the corporation might have borrowed money for this purpose and made a mortgage on the property to secure the payment of it, although no such power was expressly conferred by the charter. On the question whether capital stock might be issued for the same purpose where the charter has not specially authorized a capital stock, not a single authority is cited for or against in the paper books of either party. There is no doubt that this particular corporation did possess full corporate powers, and there is also no doubt that it was not only authorized but expressly enjoined to create a cemetery of not less than thirty acres in extent, and after that to lay it out into lots and plots and roads and walks, and to do various other things necessary to its proper development as a cemetery. No method of raising money to acquire the land and do these various things was provided in the charter. The ordinary method in which such things are done is by the creation and issue of capital stock and it may be argued with apparent reason that it is a necessary implication from the grant of corporate existence and powers that a right to issue stock is conferred. It was decided by this Court in Gordon *v.* Preston, 1 Watts, 385, that a corporation which by its charter is authorized to purchase in fee or for any less estate "all such lands, tenements and hereditaments, and estate, real and personal, as shall be necessary and convenient for them in the prosecution of their works; and the same to sell and dispose of at their pleasure," has power to mortgage its real estate to secure the payment of a debt. In that case there was no power to mortgage conferred by the charter. It is also established by very numerous authorities that corporate stock may be issued in payment for land and other property purchased by the corporation. The rule is thus stated in 1 Cook on Stock and Stockholders, sec. 18: "An issue of stock for property is one which finds support, not only in the decisions, but in the daily transactions of corporations, and the law does not compel the corporation and the subscriber to go through the useless form of a payment by the corporation to the subscriber of the value of the property, and an immediate repayment of the same money by the subscriber to the corporation on his subscription." Numerous supporting authorities are cited in the notes.

But while this may be true it does not reach the present question. In those cases the right to issue stock under the authority of the charter was unquestioned and it was only a matter of paying for the stock with the property transferred. In this case, however, the charter confers no power to issue any stock and for such a company as this no such power is needed. It is remarkable that it is so difficult to find either text book discussion of this subject, or adjudicated cases. Whether a corporation without capital provided for in its charter, may create and issue capital stock is certainly a fundamental and radical matter in corporation law. In 1 Cook on Stock, etc., sec. 279, it is said, "The capital stock of all incorporated companies is generally fixed by the charters which give them an existence." Sec. 281, "In the absence of express authority from the State a corporation has no power whatsoever to increase or reduce the amount of its stock, and any attempt on the part of the corporation either by the corporate officers or by the stockholders, to do so is wholly illegal and void. . . . .Where the attempted increase or reduction of the stock is not authorized by the charter, not even the unanimous assent and agreement of all the parties concerned will legalize it." For this last proposition the case of Droitwich Patent Salt Co. *v.* Curzon, L. R. 3 Ex. 35, is cited and an examination of that case shows that it fully supports the text. In support of the general proposition as expressed in sec. 281, supra, there are a number of citations one of which is Scovill *v.* Thayer, 105 U. S. 143, and another is Sutherland *v.* Olcott, 95 N. Y. 93. Of course these matters of increase and decrease of capital stock are now regulated by the statute law of the several States, including our own. But the principle upon which the adjudged cases proceed is that the capital stock which is fixed by the charter can neither be increased nor decreased by the officers or the stockholders.

In 1 Morawetz on Private Corporations, sec. 434, the doctrine is thus stated: "A corporation has no implied authority to alter the amount of its capital stock where the charter has definitely fixed the capital at a certain sum. The shares of a corporation can neither be increased nor diminished in number or in their nominal value unless

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this be expressly authorized by the company's charter," citing many cases. This being the law, it is not easy to see how the two increases of capital stock made in the present case can be sustained. The first increase was made on May 4, 1868, from $8000 as originally established, to $50,000, and it was done by a resolution passed at a special meeting of the stockholders. The next increase was made on October 5, 1874, from $50,000 to $150,000, also at a meeting of stockholders. It follows hence that the increase of stock being void, all the elections held thereunder since that time are void and confer no authority upon the persons elected.

This ruling would dispose of the present contention, but it is perhaps desirable that the original creation of the $8000 of capital stock should be considered. It is extremely difficult to understand under the foregoing decisions, how any issue of capital stock by this company can be regarded as valid. The company was chartered to establish a cemetery. While a cemetery company is not necessarily a religious or charitable corporation, yet in many instances it is of that character, and perhaps as a rule this is so, yet they may be established as merelv private enterprises and carried on for profit. But in either case, if the charter confers no right or power to create capital stock it is difficult to understand how any right to create and issue such stock has any existence. If capital stock may neither be increased nor diminished without an express power to that effect how can any stock be created or issued when there is no capital stock fixed by the charter and no power is given to create it?

In 1 Cook on Corporations, sec. 8, the following definition of capital stock is given: "Capital stock is the sum fixed by the corporate charter as the amount paid in, or to be paid in, by the stockholders for the prosecution of the business of the corporation and for the benefit of corporate creditors." This definition is quoted and incorporated in the opinion of the Supreme Court of New Jersey in the case of American Pig Iron Storage Co. *v.* The State Board of Assessors, 56 N. J. L. 389. Mr. Justice DEPUE, delivering the opinion, said: "Capital stock is the sum fixed by the charter as the amount paid in, or to be paid in, by the stockholders for the prosecution of the business of the corporation, and for the benefit of the creditors of the corporation." In the foregoing citations the necessity of fixing by the charter the amount of the capital stock in cases where the authority to issue capital stock is to be conferred is fully expressed. It is true, however, that corporations without capital stock may be created and may have and exercise valid corporate authority, and of these there are very numerous instances. But the proposition remains that where a right to issue any capital stock is claimed the authority to make the issue must be found in the charter. In the case of Barry *v.* The Merchants' Exchange Co., 1 Sandford's Chancery Rep., 280, much learning is exhibited in the opinion in the description of various kinds of corporations. Amongst other things it is said: "On this subject of the capital stock of a corporation, the elementary treatises are comparatively barren. It is the aggregate amount of the funds of the corporators which are combined together under a charter, for the attainment of some common object of public convenience or private utility. This amount is usually fixed in the Act of incorporation, although we have seen in the statutes of 1823 one exception to this practice. It is thus limited in reference to the convenience of the intended corporators and for the information and security of the public at large."

In the case of Scovill *v.* Thayer, supra, Mr. Justice WOODS, delivering the opinion, and discussing the question of the right to increase or decrease the stock of a corporation, said: "As a general rule, corporations can have and exercise only such powers as are expressly conferred on them by the Act of incorporation and such implied powers as are necessary to enable them to perform their prescribed duties. . . And it is well settled that a corporation has no implied power to change the amount of its capital as prescribed in its charter, and that all attempts to do so are void" (citing a number of authorities). In this case the attempt to increase the stock of the company beyond the limit fixed by its charter was ultra vires. The increased stock itself was therefore void. It conferred on the holders no rights and subjected them to no liabilities.

In the case of Sutherland *v.* Olcott, supra, the corporation having the right to increase its capital stock, which was fixed by the charter at $300,000, from that sum to $1,000,000, did increase it to $600,000, which was held valid. It then undertook to decrease the amount to $489,500, and its right to do this was the question in controversy. In the opinion the Court said: "This action of the company if valid was in legal effect a reduction of the capital stock from $600,000 to $489,500, and the inquiry is whether this reduction was authorized. The legal capital stock of a corporation is that fixed by its charter, or by authority derived from the Legislature. A corporation has no implied authority to increase or diminish its capital stock. 'If,' says PARKER, J., in Salem Mill Dam Corp. *v.* Ropes, 6 Pick. 23, 'a corporation is created with a fund limited by the Act, it cannot enlarge or diminish that fund but by a license from the Legislature., and if the

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capital stock is parcelled out into a fixed number of shares, this cannot be changed by the corporation," (citing a number of authorities).

Now if the doctrine of these cases (and there are many more of them) be true, and the act of increasing or decreasing the capital stock of a corporation without specific charter power to do so, is a void act because it is ultra vires, how can it be true that a corporation may issue any capital stock without having specific legislative authority to do so? We cannot see. If it is ultra vires to increase, it is ultra vires to issue any stock where no power to do so is conferred by the charter. The power to create corporate capital stock is a legislative function and in any given case in order that such stock may have a legal existence the function must be exercised.

We are therefore of opinion that all the issues of capital stock made by the Chartiers Cemetery Company were ultra vires and void, and that the plaintiffs were, and are, not the legally constituted board of trustees of the said company.

The judgment of the Court below is reversed and judgment is now entered for the defendant with costs under the case stated.

H. B.

Superior Court.

Apr. '99, 65. Superior Court. April 18, 1899.

Aubrey v. McIntosh et al.

Pension money—Purchase of land with—Execution against—Exemption.

The provision of the U. S. R. S. § 4747 that pension money due or to become due to a pensioner "shall inure wholly to the benefit of such pensioner," does not exempt from execution land in the purchase of which the pensioner has used such money.

Appeal of Sarah J. McIntosh, one of the defendants, from the judgment of the Common Pleas of Fayette County, in an action of ejectment by R. L. Aubrey against Sarah J. McIntosh and J. B. Swogger.

This was an action of ejectment to recover a piece of land in Marchand township, Fayette county. The case was heard in the Court below upon a case stated, the facts of which are set forth in the opinion of the Court, REPPERT, J., as follows:

"September 5, 1882, Samuel B. G. Jobes conveyed to Sarah J. McIntosh, one of the defendants, the property in dispute. Said defendant was a pensioner of the United States, being the widow of a soldier, and the property was purchased with pension money transmitted to and received by her and retained in her possession for several months prior to the purchase. Two judgments were recovered against Sarah J. McIntosh in 1892, one in 1896. Executions were issued on these judgments and levied upon the property in dispute and the property was sold August 28, 1897. The sheriff's deed to the purchaser was acknowledged and delivered September 8, 1897. The property was purchased by R. L. Aubrey, the plaintiff in the executions, who brings this action to recover possession of the same, claiming title under the sheriff's deed. The defendants allege that the property having been purchased with the pension money of Sarah J. McIntosh is exempt from seizure and sale on execution under sec. 4747 of the revised statutes of the United States, which provides that: 'No sum of money due, or to become due, to any pensioner, shall be liable to attachment, levy, or seizure, by or under any legal or equitable process whatever, whether the same remains with the pension office, or any officer or agent thereof, but shall inure wholly to the benefit of such pensioner.'

"In Rozelle *v.* Rhodes, 116 Pa. 129, it is held that money received from the government by a pensioner of the United States and by him deposited in the hands of a bailee for safe keeping, to be returned in the identical money deposited, is subject to an attachment execution. In discussing the section of the revised statutes above quoted, Mr. Justice CLARK says: 'The money which is exempted from legal seizure, under this section, it will be observed is particularly designated; it is, "any sum of money due or to become due to any pensioner." This refers, of course, to any money due or becoming due from the pension department; it is not pretended that the language of the statute can have any wider application than this. The further provision is, that such money shall not be liable to levy or seizure, under any process in law or equity, "whether it remains with the pension office, or any officer or agent thereof." It is very plain that the $800 in the hands of Tillinghast is not "money due or to become due" from the pension department; nor is it money which remains in the pension office, or in the hands of any officer or agent thereof. It is money which some time previous to the attachment had been paid to the pensioner, and which when paid to him inured wholly to his benefit: it was his money, he could dispose of it as he pleased. The exemption provided by the statute, upon any fair and reasonable construction, will only protect the fund whilst in course of transmission to the pensioner; after that, it is liable to seizure as other money.' And he regards this intention of the section as analogous to the rule of law protecting the fees and

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salaries of public officers from process so long as they maintain their distinctive character.

"In Holmes *v.* Tallada, 125 Pa. 133, a pensioner received a check for accrued pension, endorsed and gave it to his wife, who drew the money and applied it to the purchase of real estate, taking the title in her own name. The question to be decided in that case, as stated in the opinion of Mr. Chief Justice PAXSON, was 'whether it was a fraud upon creditors for Jackson Tallada to give this money to his wife for the purpose of purchasing a home for their joint benefit.' It was held that the real estate so purchased was not liable for the debt of the husband contracted prior to the issue of the pension check. The Chief Justice expressly disclaims in his opinion the discussion of the question whether property purchased by a pensioner with pension money, and held in his own name, would be liable to execution for his debts. 'No such question,' he says, 'is before us.' He is equally careful to recognize and distinguish the case of Roselle *v.* Rhodes, above referred to.

"In the case of Reiff and others *v.* Mack, 160 Pa., it was decided that an attachment execution will not lie against the proceeds of a pension check deposited by a pensioner with a bank for collection, and which the bank, after collection, placed to the pensioner's credit as a deposit. In a Per Curiam the Court says: 'According to the undisputed evidence the money attached was part of the proceeds of the pension check which defendant deposited with the garnishee bank for collection. It was subject to his check, and was in fact part of his pension money which, as cash, had not yet come into his hands.

"Nor are we unmindful of the very able and ingenious opinion of the lower Court in this case, written by Judge ENDLICH, in which all the decisions bearing on this section are elaborately and fully reviewed and discussed. He regards the decision in Holmes *v.* Tallada as authorizing three inferences:

"1. That Congress may exempt the gratuity given by it to a pensioner, in his hands, from liability for his debts under the laws of this State.

"2. That, by the language of its enactment, it has done so.

"3. That, therefore, property acquired by means of pension money is exempt from levy and sale upon execution.

"Applying these inferences to the facts of the case in hand the learned Judge of the lower Court reasons as follows:

"The deposit of the pension check made the money paid upon it the property of the bank. The bank received it. In return the bank became debtor to the defendant for that amount, that is the defendant became the holder of a claim upon the bank, a chose in action. In other words, in exchange for this money paid by the government of the United States as a pension to the defendant, the latter became the owner of another kind of property, viz.: a credit with the bank which enabled him to draw upon it. This property therefore, being acquired with the pension money and in the hands of the pensioner, was exempt from seizure for his debts.

"While the Supreme Court sustained the lower Court in dissolving the attachment, their action does not seem to be based on the reasoning of the Court below. There is no endorsement of the conclusion of the lower Court that property acquired by means of pension money is exempt from levy and sale upon execution. On the contrary, the reason assigned was that according to the undisputed evidence the money attached was part of the defendant's pension money which, as cash, had not yet come into his hands, a principle which is in entire harmony with the former rulings of the Court.

"In Holmes *v.* Tallada, above cited, Chief Justice PAXSON says that the rational inference of the words of the Act of Congress, 'shall inure to his own benefit,' is that the pensioner may use the money in any manner he may see proper for his own benefit and to secure the comfort of his family, free from the attacks of creditors. Bearing in mind the facts of that case, we think the fair inference from the language of the Chief Justice is that any disposition made by the pensioner of pension money is not in fraud of creditors and cannot be questioned. He may keep it in his pocket; he may invest it in real estate in the name of another; he may take any step that seems advisable to protect it from his creditors, and his action will not be fraudulent. He may take any of these precautions to the end that his pension 'shall inure to his own benefit,' and for that very reason, a pension being a voluntary payment by the government, such precautions are not in fraud of creditors. That, however, is very far from saying that if he purchases property with his pension money, taking and holding the title and possession in his own name and right, such property is exempt from levy and sale upon execution. When pension money received by and in the possession of the pensioner is so applied, property purchased, title acquired, possession taken, it has wholly inured to the benefit of the pensioner within the meaning of the Act of Congress as that Act is interpreted in Rozelle *v.* Rhodes, supra, and is subject to levy and sale on execution. We do not think such a construction of the Act is hostile to the ruling of the Supreme Court in Holmes *v.* Tallada.

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"That credit shall not attach to such property is a hardship upon the honest owner, opens an easy door to fraud and invites dishonesty.

"As we understand the interpretation of the Act of Congress by the Supreme Court the money exempt from legal seizure is money due or becoming due the pensioner from the pension department; the exemption provided by the Act protects the funds only while in the course of transmission to the pensioner. When the money has been paid to him it has 'inured wholly to his benefit' and is liable to seizure as opportunity presents itself. The pensioner, however, may use the money in any manner, for his own benefit and to secure the comfort of his family, free from the attacks of creditors, and his action in so doing will not be a fraud upon them.

"In the case at bar the property was purchased in 1882, with pension money transmitted to and received by the pensioner several months prior thereto and in the meantime retained in her possession. Many years afterwards judgments were recovered against the pensioner and the property seized in the execution and sold. No objection having been raised to the regularity of the proceedings, we think the purchaser takes a good title, and we therefore direct judgment to be entered for the plaintiff."

Edward Campbell, for appellant.

The reason and reasonable construction of the Act of Congress are given in—

Yates County Nat. Bank *v.* Carpenter, 119 N. Y. 550.
Crow *v.* Brown, 81 Iowa, 344.
Sommers *v.* Howey, 1 Pa. Super. Ct. 318.
Reiff *v.* Mack, 160 Pa. 265.

A. F. Cooper and *J. Q. Van Swearingen*, for appellee.

The Supreme Court of this State has ruled that when money received as a pension has come into the actual possession and control of the pensioner, then it has "inured wholly" to his benefit, and is no longer exempt.

Rozelle *v.* Rhodes, 116 Pa. 129.
Holmes *v.* Tallada, 125 Pa. 133.
Hadsall *v.* Clark, 2 Chester Co. R. 492.

The case of Sommers *v.* Howey, 1 Pa. Super. Ct. 318, cited by the appellant, does not decide the question, nor does the other case cited, viz., Reiff *v.* Mack, 160 Pa. 265.

No case has gone so far as to hold that where the money has once been in the actual possession of the pensioner it is exempt; nor that the property bought with the pension money is exempt from levy and sale.

Cranz *v.* White, 27 Kans. 319.

May 18, 1899. RICE, P. J. In order to reverse this judgment we must hold that the words of the Act of Congress "shall inure wholly to the benefit of such pensioner," mean that if he buys land or other property with the money such property is exempt from execution. No decision of our Supreme Court has gone so far as that, and not all of the cases from other States which hold that the protection of the statute may extend beyond the transmission of the money to the pensioner's hands go so far. Some of them recognize the distinction between the conversion of it into property necessary for the maintenance of the pensioner and his family and the investment of it in trade, commerce or speculation. We need express no opinion upon the validity of this supposed distinction. We have before us the simple case of land purchased with pension money the title to which was taken in the name of the purchaser. The Court below, in a well-considered opinion, in which all the decisions of our Supreme Court are reviewed, held that it was not exempt, and in this conclusion we concur. It is in entire harmony with the rulings in Holmes *v.* Tallada, 125 Pa. 133, and Reiff *v.* Mack, 160 Pa. 265, whilst the construction which the defendant's counsel contends for would be irreconcilable with the doctrine of Rozelle *v.* Rhodes, 116 Pa. 129. We need not advance to meet other questions until they arrive.

Judgment affirmed.

W. C. S.

Oct. '98, 126. Superior Court. October 25, 1898.

In re Private Road of A. J. Roche.

Road viewers — Report of laying out of private road — Termini.

In proceedings to lay out a private road, substantial conformity between the petition and report is all that is required. Where the report of viewers and a draft attached and referred to in the report fixes one terminus and the courses and distances of the entire route, so that the other terminus is easily ascertained and the whole road located with certainty, the report is sufficient.

It is to be taken for granted that every objection made to a road report and overruled by the Quarter Sessions, which is in its nature capable of being proved, is untrue in point of fact unless the contrary appears from the record.

Appeal of the Rock Hill Iron & Coal Company, from the decree of the Quarter Sessions of Huntingdon County, overruling exceptions filed by appellant and confirming absolutely the report of viewers laying out a private road for A. J. Roche.

A petition presented by A. J. Roche for viewers to lay out a private road "to lead from his dwelling house or plantation in the township of Carbon, county of Huntingdon, over the lands

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of the Rockhill Iron & Coal Company to a public road leading from the village of Robertsdale, in said township, to New Grenada, Fulton county, at a point about 105 to 110 yards east of the E. B. T. Railroad station at Robertsdale," was referred to viewers, who reported in favor of a road "beginning at a point on the line between lands of petitioner and the Rockhill Iron & Coal Company, in Carbon township, Huntingdon county, thence (giving courses and distances) to a point in the public road in said township leading from Robertsdale to New Grenada."

This report was confirmed nisi, whereupon exceptions were filed by the Rockhill Iron & Coal Company, as follows:

1. The point from which the proposed road starts was not a dwelling house or plantation.

2. The damages allowed the exceptant, the Rockhill Iron & Coal Company, are entirely inadequate and in no sense a compensation for the injuries sustained.

3. The road is not laid out between the points designated in the petition and further the report of viewers does not fix or designate the point of beginning.

These exceptions were dismissed by the Court, BAILEY, P. J., in the following opinion:

"The petition prays for the appointment of viewers to lay out a private road from 'the dwelling house or plantation' of the petitioner to a certain public road therein designated. The viewers report that such road is necessary and that they have laid it out from the line of the petitioner's land to the public road.

"By the draft attached to the report, the terminus of the private road at the point of its intersection with the public road is fixed by its relative location to a town hall and school house, by lines drawn from them with their respective bearings to the terminus of this private road. This renders the terminus reasonably certain and from it the other terminus can be readily ascertained by following the bearings and distances of the private road as they appear in the report and draft attached to it, to the line of petitioner's land, although that terminus is not otherwise specifically designated. 'That is certain which can be rendered so.'

"It appears by the depositions presented to us that there are buildings on the land of the petitioner and that they were not occupied at the time of the view. It does not appear, however, that they were not occupied as a dwelling place at the time the viewers were appointed. They are now so occupied and their vacation may have been temporary.

"If the damages allowed by the viewers are inadequate the exceptant has a remedy. We cannot set aside the report of the viewers for that reason alone.

"We therefore overrule the exceptions and confirm the report of viewers absolutely."

The Rockhill Iron & Coal Company took this appeal and filed the following assignments of error.

"1. The Court erred in overruling appellant's third exception, which exception and ruling of the Court are as follows:

"'3. The road is not laid out between the points designated in the petition and further the report of viewers does not fix or designate the point of beginning.

"'By the draft attached to the report, the terminus of the private road at the point of its intersection with the public road is fixed by its relative location to a town hall and school house, by lines drawn from them with their respective bearings to the terminus of this private road. This renders the terminus reasonably certain and from it the other terminus can be readily ascertained by following the bearings and distances of the private road as they appear in the report and draft attached to it, to the line of petitioner's land, although that terminus is not otherwise specifically designated. "That is certain which can be rendered so."'

"2. The Court erred in overruling the first exception, which exception and the ruling of the Court are as follows:

"'1. The point from which the proposed road starts was not a dwelling house or plantation.

"'It appears by the depositions presented to us that there are buildings on the land of the petitioner and that they were not occupied at the time of the view. It does not appear, however, that they were not occupied as a dwelling place at the time the viewers were appointed. They are now so occupied and their vacation may have been temporary.'

"3. The Court erred in making the following decree:

"'We therefore overrule the exceptions and confirm the report of viewers absolutely.'"

John D. Dorris, (*A. O. Furst* with him), for appellant.

A report of viewers, laying out either a public or private road, must describe the termini with sufficient precision to enable the supervisors to locate it when ordered to be opened.

Bean's Road, 35 Pa. 280.
Road in Lower Merion, 58 Id. 66.
O'Hara Township Road, 152 Id. 319.

The report of a private road is to be made in the same manner as that of a public road.

Act June 13, 1836, P. L. 551, sec. 11.

The statement of the petition that the road was

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desired from the "dwelling house or plantation" of petitioner was met by the exception of the coal company, verified by affidavit, that the point from which the proposed road starts "was not a dwelling house or plantation." The burden of proof was then cast on the petitioner.

J. M. Steese, for appellee.

The termini reported by the viewers must correspond with those designated in the petition and order. But mathematical precision is not required in designating them either in the petition or the report. It is sufficient if there be substantial conformity, and if they be described so that the road can be located with reasonable certainty.

Cassville Borough Road, 4 Pa. Super. Ct. 511.
East Deer Township Road, 155 Pa. 53.
Springfield Road, 73 Pa. 127.
In re Private Road in Kingston Township, 5 Kulp, 235.

On appeal the Supreme Court can examine nothing but the record. If that shows proceedings which are regular, the orders of the Quarter Sessions must be affirmed. The merits cannot be investigated. The opinion of the Quarter Sessions, disposing of exceptions and embodying a statement of the facts, is no part of the record, and the Supreme Court will not consider the facts therein recited.

Duff's Private Road, 66 Pa. 459.
In re Kensington & Oxford Turnpike Co., 97 Pa. 260.
Sadsbury Township Roads, 147 Id. 471.
In re Road in Upper Dublin Township, 94 Id. 126.
In the Matter of Church St., 54 Pa. 353.
Road in McCandless Township, 110 Pa. 605.
In Keller's Private Road, 154 Id. 547.

March 23, 1899. W. D. PORTER, J. The first specification of error relates to the action of the Court below in overruling appellant's third exception, which was: "The road is not laid out between the points designated in the petition; and, further, that the report of viewers does not fix or designate the point of beginning." The record shows substantial conformity between the petition and report, as was practically conceded by appellant's counsel upon the argument. That is all which is required in this particular, and the first complaint in this exception does not require further consideration: Springfield Road, 73 Pa. 127; Cassville Borough Road, 4 Pa. Super. Ct. 511. This leaves but one question to be disposed of under the first assignment of error, viz.: Does the report of viewers designate the point of beginning of the road, as laid out by the viewers? On behalf of appellant it is contended that, as the written report of viewers does not fix the termini of the road, it cannot be helped out by the draft, referred to in the report and attached thereto by the viewers. But the draft is an essential part of the report, which is required by sec. 3 of the Act of June 13, 1836, P. L. 555, to be annexed and returned to Court. A draft so attached and returned is to be considered as a part of the report in passing upon the designation of the termini: O'Hara Township Road, 152 Pa. 319; Road in South Abington Twp., 109 Pa. 118. The draft in this case fixes one of the termini by placing it at the point of intersection of the middle line of a designated public road with two other lines, one running from the village school house and the other from the town hall, the courses or bearings of the last two mentioned lines being definitely given. This comes as near giving that end of the road with mathematical precision as possible. It certainly locates it with reasonable certainty, which is all that is required: Springfield Road, 73 Pa. 127; Road in Cassville Borough, 4 Pa. Super. Ct. 511. We have one terminus fixed, and, the courses and distances of the entire route being given in both report and draft, the other terminus is easily ascertained and the whole road located with certainty. This is sufficient to sustain the report, and the first specification of error must fall: Bean's Road, 35 Pa. 280; O'Hara Township Road, supra.

The second specification of error is to the overruling of appellant's first exception, which was: "The point from which the proposed road starts was not a dwelling house or plantation." This exception raised a question of fact, in passing upon which the Court below must be presumed to have arrived at a correct conclusion. We take it for granted that every objection made to a road report and overruled by the Quarter Sessions, and which is, in its nature, capable of being proved, is untrue in point of fact, unless the contrary appears from the record. In such cases we have before us nothing but the record proper, of which neither the testimony, nor the recital of facts in the opinion filed by the Court below is a part: Schuylkill Falls Road, 2 Binney, 250; New Hanover Road, 18 Pa. 220; Duff's Private Road, 66 Pa. 459; Sadsbury Township Roads, 147 Pa. 471; Keller's Private Road, 154 Pa. 547. "The appellants might, perhaps, have brought their case upon the record by a petition with the necessary averments, but, as it stands, we cannot take cognizance of the question which they have attempted to raise" by their second specification of error: Road in Upper Dublin Township, 94 Pa. 126.

The third specification of error is dependent upon the others and falls with them.

Judgment affirmed.

W. C. S.

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WEEKLY NOTES OF CASES.

VOL. XLIV.] *FRIDAY, JUNE 16, 1899.* [NO. 11.

Supreme Court.

Jan. '98, 295. Supreme Court. January 16, 1899.

Nathans's Estate.

Trustee—Removal of—Act of April 9, 1868, P. L. 785.

While the Act of April 9, 1868, P. L. 785, does not require the Orphans' Court to remove a trustee upon a petition dictated by the mere caprice of the life tenant, cestui que trust, yet wherever there is a feeling of hostility on the part of such cestui que trust towards the trustee, which is not a mere caprice and is deep-seated and destructive of mutual confidence between the parties, the trustee should be removed, although his personal integrity and business qualifications are not questioned.

Appeal of Rebecca N. M. Nathans, from the decree of the Orphans' Court of Philadelphia County, dismissing her petition for the removal of J. Henry Williams, Esq., from his office as one of the trustees under the will of Isaac Nathans, deceased.

Rebecca N. M. Nathans presented a petition in the Orphans' Court setting out that Isaac Nathans died in 1896, leaving a will by which he appointed J. Henry Williams and the Pennsylvania Company for Insurances on Lives and Granting Annuities, his executors, and bequeathed to them the residue of his estate in trust for the petitioner for life or widowhood with remainder over; the petition prayed the removal of Mr. Williams from his office as trustee and assigned reasons therefor as follows:

First. She avers that the said J. Henry Williams has constantly and persistently attempted to prejudice her against his co-trustee, the said Pennsylvania Company for Insurances on Lives and Granting Annuities, falsely accusing the officers of said company of deception, and lying, and of being inimical to the interests of your petitioner, and has requested your petitioner to ask them to resign. This he has repeatedly done in the presence of others, to your petitioner's great worriment and alarm.

Second. She avers that said J. Henry Williams on several occasions urged her to abuse the confidence reposed in her by her deceased husband, and take against his will and "do the charities out" of any interest in the estate, and said he could get her one hundred thousand dollars or over if she did.

Third. She avers that testator told her that said J. Henry Williams drew said will, and that he agreed he would accept the sum of five hundred dollars per year in lieu of all commissions as executor and trustee, yet said will was so drawn by him that he has received two thousand six hundred and five dollars and fourteen cents as commissions as executor in addition to the five hundred dollars per year. Petitioner has no personal knowledge of said agreement, but she knows her deceased husband to have been a truthful, honorable man, and by reason of the facts stated, she looks upon said J. Henry Williams as untruthful and dishonorable, and with him, by reason thereof, she could never hold personal communication, nor consider him other than with the utmost aversion.

Fourth. She avers that said will allows to said J. Henry Williams five hundred dollars annually for examining the accounts of testator's business at Sixth and Vine streets, and advising as to its conduct; and he has already received one sum of five hundred dollars for that purpose, yet in the nineteen months since testator's death he has only two or three times visited said store, and during those visits he only for a short time looked at the books appertaining to the business.

Fifth. She avers that said J. Henry Williams, though he knew that so doing would be in direct violation, not only of said will, but of testator's oft expressed wishes, advised this petitioner to give up to testator's daughter-in-law the property 1735 North Eighteenth street, devised by the tenth paragraph of his will.

Sixth. And she finally avers that the dislike, distrust and fear she has of the said J. Henry Williams have caused her great mental suffering and the loss of much sleep, and has seriously injured her health, which injury, she is advised by her family physician, must ever continue and increase so long as he is continued in said office as trustee.

The Court granted a citation to show cause and after answer filed, testimony was taken by an examiner. After hearing, the petition was dismissed by the Court, ASHMAN, J., delivering the following opinion:

"The petitioner seeks the benefit of the Act of April 9, 1868, whereby the majority of the beneficiaries for life shall have the right to elect trustees, and the Court upon petition shall remove the acting trustees and appoint others so chosen. The testator's will created several life annuities and a trust in the residue (which constitutes the bulk of the estate) for the testator's wife during life or widowhood. The annuities were practi-

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cally cut out of the estate because sums to secure them could have been set apart, so that the widow was in reality the sole life tenant and was, therefore, within the class of cestui que trusts which the Act describes.

"The unlimited terms of the statute were not meant to preclude the exercise of a reasonable discretion by the Court. On the one hand, they do not require in order to justify the removal of a trustee, that fraud or mismanagement shall be shown, because prior legislation provided for such delinquencies; and they do not, on the other hand, tolerate a removal which is intended to gratify a mere caprice. Between these extremes of fraud and sentiment, and perhaps equally distant from both, there is a middle ground, in which an Act of this character may work beneficently. The relation of trustee and cestui que trust is necessarily intimate, and its very intimacy may breed repugnance. Honesty, which in a public official is allowed often to cover a multitude of offences, is not the sole virtue which should be possessed by a trustee. He should not, because he accounts accurately for the trust funds, affect the language of a cowboy, or what is worse the manners of a petty railroad official. If the beneficiary fears to approach him with entire confidence for information or advice or experience, one purpose of the trust has been frustrated, and a cause for his discharge has arisen which was directly contemplated by the Legislature. Indeed no self-respecting trustee would care to continue in a post nominally of confidence in which his every act is viewed with suspicion by the very party whose interest he was seeking to protect. These points were carefully considered in Stevenson's Appeal, 68 Pa. 101; Marsden's Appeal, 166 Pa. 213; Martin's Estate, 4 Dist. Rep. 219, etc., authorities which show that, to establish harmony between trustee and cestui que trust, and yet cast no slur upon the motives of either, the Courts have given a liberal construction to the Act. But they have relieved only where there was a real grievance, and a doubt exists in this case whether any such grievance has been shown. The actual break between the petitioner and the respondent appears to have occurred when the respondent demanded a larger compensation than the petitioner believed he was entitled to under the will. It is fair to say that the auditing Judge concurred in that opinion, but all the ground for criticism was swept away when the claim of the trustee was recognized as just by the Court in banc. The evidence discloses no other adequate reason for the mental suffering of which the petitioner complains.

"She alleges that the trustee advised her to relinquish her right in remainder to a small property in which other devisees had a life interest; but the record and other proof conclusively show that he resisted and by suit is now resisting the pretentions of the devisee. She alleges also that he has neglected properly to superintend the business left by the testator. But the trustee gave his attention to the books and accounts and to the collection of the debts owing in the business and he could not well do more.

"The business was that of a pawnbroker in which moneys were loaned upon all conceivable chattels, from a darning needle to a diamond brooch and from a coffee pot to a coffin, and it was conducted by a trusted employé who had served the decedent for thirty years, and who knew by a varied experience not merely the values of the goods upon the shelves, but what was the least sum which a borrower could be induced to accept upon the article which he pawned, and what was the highest price which could be extracted from a purchaser when the pledge came to be sold. The respondent was not gifted with these rare attributes, and even if he had been he could have used them to advantage only by standing behind the counter of the pawnshop; and this we think would be an unreasonable requirement.

"The remaining reasons assigned by the petitioner are founded upon a want of harmony between the respondent and his co-executor, but they are certainly obsolete now. The respondent to avoid delay or annoyance consented that the widow should be paid her allowances by the checks of the co-trustee, in place of the joint checks of both trustees, and that the moneys and securities of the trust should remain in the custody of the co-trustee; and the trust company agreed that the repairs of the real estate and the collection of the rents should be intrusted to the respondent.

"These considerations, it is true, do not obscure the fact that the feelings with which the life tenant regards the trustee, whether it is a prejudice or not, and whether or not it is based upon a reason which proves to be exaggerated, is deep-seated and destructive of mutual confidence between the parties. The language of her petition and of her testimony is unequivocal and unmistakable in this respect. She says: 'I have lost every vestige of confidence in him; I could not believe him; I fear him; I would not go near him; I am afraid of him; I would not believe him on his oath.' But notwithstanding all this, she is not entitled to the severe remedy administered by the Act, if neither her interests nor those of the estate are at all affected by the attitude she may choose to assume toward the respondent. In point of fact she has dealt since 1896 exclu-

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sively with the co-trustee, and her petition is that it may be made her sole trustee, so that even her personal convenience will not be served by the removal of the respondent. Her mental quiet cannot be seriously disturbed by the retention in the trust of a person with whom she need never come in contact, but who was nevertheless the appointee of her own husband. Her case lacks the essential elements which were present in every instance in which a trustee has been discharged under the Act in question. For these reasons we must dismiss the petition."

The petitioner took this appeal and assigned as error the dismissal of her petition.

Alexander Simpson, Jr., for appellant.

Though the action of the trustees may not imperil or jeopardize the trust, if it will probably work positive disadvantage or inconvenience to the cestui que trust, the trustee should be removed.

Hilles's Estate, 9 WEEKLY NOTES, 421.

The cestui que trust, and not the co-trustee, is the one whose desires are to be considered.

Hurley's Estate, 5 Pa. C. C. 575.
Morgan's Estate, 8 Id. 260.

It is sufficient ground of removal that the relations between the trustee and cestui que trust are hostile, and that the former acted without consulting the latter.

Marsden's Estate, 166 Pa. 213.

To justify a removal the cause need not involve malfeasance, neglect or incompetency.

Martin's Estate, 4 Dist. Rep. 219.

Even aside from the Act of 1868, where a trustee is charged with an active trust, which gives him discretionary powers over the rights of the cestui que trust, and which brings him into constant personal intercourse with the latter, the mere existence of a strong mutual ill-feeling between the parties is sufficient cause for a removal by the Court.

McPherson *v.* Cox, 96 U. S. 404.
Wilson *v.* Wilson, 145 Mass. 490.

Thomas McConnell, Jr., for appellee.

The Court will consider the trustee as well as the cestui que trust as a removal may work a great wrong to the former.

Keen's Estate, 46 Leg. Intel. 179.

And see—

Mifflin's Estate, 19 Phila. 200.
Theis's Estate, 26 WEEKLY NOTES, 302.

There is in this case no ground for removal.

May 15, 1899. STERRETT, C. J. This appeal is from the decree of the Court below dismissing appellant's petition in a proceeding under the Act of April 9, 1868, entitled, "An Act to authorize the Court of Common Pleas and Orphans' Court of the city of Philadelphia to appoint and remove trustees," which provides as follows:

"When any trust now exists or is hereafter created, the cestui que trusts, or a majority of them having the life estate, shall have the right to elect or choose trustees to execute said trusts, and upon petition of the cestui que trusts or parties in interest as aforesaid, having such life estate, the Court of Common Pleas or Orphans' Court in and for the city of Philadelphia, having jurisdiction, shall remove the acting trustee or trustees, and appoint other or others, as chosen or elected by said parties, who shall have all the powers to execute said trusts, upon security being approved and entered by said appointees as directed by said Court appointing them": Purd. 2036, pl. 68.

It is evident from a consideration of the purposes of the Act, that the unqualified language employed therein was not intended to prohibit the exercise of a sound judicial discretion in administering its provisions. It was accordingly held in Stevenson's Appeal, 68 Pa. 101, that the Act is so far directory as to make it the duty of the Court to refuse removals that are prompted by mere caprice on the part of the cestui que trust.

In Marsden's Estate, 166 Pa. 213, 216,—in the opinion of the Court below which was adopted by this Court,—it is said: "The power of the Court under the Act of April 9, 1868, ... is not dependent upon the misconduct of the trustee sought to be superseded; and it is enough to show that his retention, by reason of the existence of hostile relations between him and the cestui que trust, would materially work disadvantage, inconvenience and great discomfort to the latter."

After referring to reasons assigned by the petitioner for the existence of unpleasant relations between herself and the respondent, founded partly upon a want of harmony between him and his co-executor, etc., and to what was done with the view of remedying the same, the learned Judge of the Orphans' Court says:

"These considerations, it is true, do not obscure the fact that the feeling with which the life tenant regards the trustee,—whether it is a prejudice or not, and whether or not it is based upon a reason which proves to be exaggerated,—is deep-seated and destructive of mutual confidence between the parties."

In view of the evidence, and of the expressions contained in the appellant's petition, there cannot be any doubt as to the substantial correctness of this conclusion of fact, that her feeling of hostility towards the respondent "is deep-seated and destructive of mutual confidence between the par-

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ties." That fact being thus clearly established, it would seem that the remedy contemplated by the Act above quoted should be applied, unless the personal interests, convenience and comfort of the cestui que trust should be subordinated to those of the trustee. We do not understand the Act contemplates any such result as that. On the contrary, we think the controlling facts of this case bring it within the purview of the Act, and require an application of the remedy therein provided. Without questioning the personal integrity or business qualifications of the respondent, it cannot be said that the antipathy, of appellant towards him, which the Court below has found to be "deep-seated and destructive of mutual confidence" between them, is the result of mere caprice on her part.

Without further comment, we think the decree of the Court below cannot be sustained.

Decree reversed and petition re-instated; and it is further ordered that the record be remitted to the Court below with instructions to enter a decree in accordance with the prayer of the petition—costs of this proceeding to be paid out of the trust funds.

H. B.

Jan. '99, 6. Supreme Court. March 7, 1899.

Baldwin v. Stier.

Evidence—Competency of witness—Declarations.

A plaintiff who claims to recover land by virtue of a sheriff's deed based on a levy and sale of said land as the property of a decedent, who has conveyed the land in his lifetime, is not a competent witness against the decedent's grantee, to prove that the deed was given by the decedent in fraud of creditors.

Declarations by a grantor, made after a grant, that at the time of the grant she was indebted, are not, without more, admissible to impeach the grant; the fact that the consideration recited in the grant is nominal is not sufficient evidence of combination to render such declarations admissible.

Appeal of William I. Baldwin and Martha A., his wife, to use of said Martha, from a judgment of the Common Pleas of Northampton County, in an action of ejectment brought by them against Walter C. Stier and William Nyce.

This was an action of ejectment to recover a certain piece of land in Upper Mount Bethel township.

The deed under which the defendants claimed was dated October 19, 1889, and was from Hannah H. Schmuck to Walter C. Stier, the recited consideration being "one dollar (and other good and sufficient considerations)."

On the trial, before SCHUYLER, P. J., the plaintiffs offered in evidence the record of a certain judgment and execution thereon and a sheriff's deed reciting that the land in question had been sold on April 6, 1895, as the property of Hannah Schmuck to Martha A. Baldwin. Objected to for the reason that the record of the deed showed that the judgment was against the executor of Hannah Schmuck and there was no record evidence offered to show that any sci. fa. was issued in order to bind the land on which to predicate a sheriff's sale as required by law. Objection sustained.

The plaintiff then offered Mrs. Baldwin, who was a daughter of Hannah Schmuck, to prove "the indebtedness existing during her mother's lifetime on which she obtained this judgment and before the conveyance to Walter C. Stier by Mrs. Schmuck, and the real estate which her mother was then possessed of, for the purpose of showing that the conveyance to Walter C. Stier by Mrs. Schmuck under which the defendant claims is in fraud of her rights as a creditor."

Objected to as incompetent and irrelevant, and for the further reason that the witness was incompetent to testify to anything that took place during the lifetime of Hannah Schmuck. Objection sustained. (Second assignment of error.)

The plaintiff called one Ott, who testified that Mrs. Schmuck made certain declarations about her indebtedness to her daughter. It appearing that the declarations were made in 1892 and that the deed of Mrs. Schmuck, under which defendant claimed was in 1890, the Court excluded testimony of such declarations and struck out the evidence already given with reference thereto. (Third and fourth assignments of error.)

The Court entered a compulsory non-suit; which the Court in banc refused to take off. The plaintiffs took this appeal, and filed the assignments of error above indicated.

M. Kirkpatrick, (*W. S. Kirkpatrick* with him), for appellants.

The land having been conveyed by Hannah Schmuck to Walter C. Stier in fraud of her creditors, it was not necessary after her death to join her heirs in the suit by Mrs. Baldwin against the executor, or that they should be made parties to the judgment against the executor in order to charge the land with the debt.

Smith *v.* Grim, 26 Pa. 95.
Drum *v.* Painter, 27 Id. 149.
Soles *v.* Hickman, 29 Id. 340.

There was sufficient evidence of fraud for submission to the jury in the indebtedness of Mrs. Schmuck to Mrs. Baldwin, and also in the fact that the consideration recited in the deed was one dollar.

Sanders *v.* Wagonseller, 19 Pa. 248.
Geiger *v.* Welsh, 1 Rawle, 349.
Chambers *v.* Spencer, 5 Watts, 404.

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Mrs. Baldwin was a competent witness. She was excluded under clause (*e*) sec. 5 of the Act of 1887, as one having an interest adverse to the right of the deceased. Her interest is not adverse to the right of Mrs. Schmuck. The right of Hannah Schmuck is the title to the land in question. That has passed out of her absolutely, whichever way this issue is finally determined. Her estate in no event can have any interest in the controversy. If the conveyance to Stier was fraudulent, it was only so as to creditors. As to all others it was absolute and indefeasible. If it was fraudulent the interest of Mrs. Schmuck in the land passed to the appellant by the sheriff's deed. If it was not fraudulent, Walter C. Stier's title was good against the world. In either event no right or interest remained in Hannah Schmuck or her estate, or heirs or devisees. Neither she nor her heirs or devisees could gainsay the deed.

See—

Serfass *v.* Serfass, 14 Pa. Co. Ct. Rep. 99.

It seems clear that the test of the competency of the witness under the clause of the Act of 1887 invoked, is whether the estate of the deceased grantor is affected by the controversy.

Brown *v.* Carey, 149 Pa. 137.

Where the bona fides of a transfer is attacked by creditors and some evidence is given to show a common design to defraud declarations of grantor after the transfer are evidence.

Hartman *v.* Diller, 62 Pa. 37.
Confer *v.* McNeal, 74 Id. 112.
Crosland *v.* Mutual Saving Fund, 121 Id. 65.
Cox *v.* Ledward, 23 WEEKLY NOTES, 382.

H. J. Steele and *H. S. Cavanaugh*, for appellees, were not heard.

May 15, 1899. GREEN, J. The testimony of Ott and his wife fails to prove any existing indebtedness by Mrs. Schmuck to Mrs. Baldwin, at or about the date of the conveyance by Mrs. Schmuck to Stier. The declarations of Mrs. Schmuck to the witness on that subject were made about 1863 to 1865, and the presumption of payment repeated nearly twice over, and the bar of the statute of limitations having intervened about five times, offered a sufficient reply to any allegations of indebtedness in 1889. The offer of testimony of these two witnesses as to declarations made after 1889 were properly ruled out and the third and fourth assignments of error are dismissed. The declarations were made after the conveyance to Stier and at a time when Mrs. Schmuck had no title. The indebtedness upon which the judgment was obtained by Mrs. Baldwin against her mother's executor did not originate until March 6, 1890, which was nearly six months after the deed was made to Stier. Under all the authorities the grantor's declarations made after he has parted with his title can not defeat the title of the grantee. There was no evidence of any fraud in the case and the ruling in Souder *v.* Schechterly, 91 Pa. 83, has no application.

It is entirely clear that Mrs. Baldwin was incompetent to testify *against* the title conveyed by her mother to Stier. That title had devolved upon Stier by the act of Mrs. Schmuck. Stier is a party to the record and the thing or contract in action is the conveyance of Mrs. Schmuck to him. The right of Mrs. Schmuck to make that conveyance is the matter in controversy. Against that right, and in her own favor, the plaintiff, Mrs. Baldwin, proposes to testify notwithstanding the death of the party to the contract and the closing of her lips as a witness. The very language of the clause (*e*) of sec. 5 of the Act of 1887 applies directly to the case when it says, "or any other person whose interest shall be adverse to the said right of such deceased or lunatic party." That which is attacked is the right of Mrs. Schmuck to convey her own land to another. If the plaintiff can be a witness to defeat that right and thereby acquire for herself the property upon which the right was exercised, when the person exercising the right is dead, she can establish in herself an interest adverse to the right of the grantor to dispose of her own property at her own pleasure. The Act contemplates and provides for the case where the party to a thing or contract in action is dead and, "his right thereto or therein has passed" to another who is a party to the record, and that is precisely this case. The testimony of the plaintiff is prohibited in that contingency because it is adverse "to the said right of such deceased party." In King *v.* Humphreys, 138 Pa. 310, the facts appear to raise the identical question presented here. Norman King was the plaintiff in an ejectment against Lillie M. Humphreys and her husband. Louis King was the former owner and he had conveyed the title to Mrs. Humphreys, and died intestate. On the trial Norman King, the plaintiff, offered to testify against the validity of the conveyance to Mrs. Humphreys, by giving in evidence facts occurring in the lifetime of the grantor tending to invalidate the deed. The witness was objected to on the ground of incompetency under the Act of 1887, and was rejected by the Court below and we sustained the decision. In Crothers *v.* Crothers, 149 Pa. 201, the action was ejectment to recover a tract of land which had been conveyed by a father to one of his sons, and after his death another son brought the action alleging that the deed was invalid. The plaintiff offered to testify in his own behalf and was rejected. Our brother

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McCollum, delivering the opinion, said: "It is apparent, therefore, that the litigation involves a transaction to which Samuel J. Crothers and his son Leman were parties and which his son William is now seeking to invalidate. Prima facie the interest of Samuel J. Crothers passed by his own formal and properly authenticated act to Leman, who is a party on the record, and whose title thus acquired is the subject of the controversy. The interest of William, who is the opposite party on the record, is adverse to this title, and his contention involves a denial of the right of the deceased grantor to transmit it. Is he a competent witness to testify to facts which he alleges in avoidance of his father's deed? An answer to this question is found in King *v.* Humphreys, 138 Pa. 310. In that case, as in this, the plaintiff claimed title by descent from his deceased father, and his sister the defendant, claimed under a deed from him. It was alleged, there, as it is here, that at the time of the execution of the deed the grantor had not sufficient mental capacity to make it, and that the grantee obtained it from him by fraud and undue influence. It was held that the plaintiff was not a competent witness to matters on which he relied to set aside the deed." In Van Horne *v.* Clark, 126 Pa. 411, cited for the appellant, the witness was offered in support of the disputed title and not against it, and therefore did not come within the prohibition of the Act. The facts in Brown *v.* Carey, 149 Pa. 134, have no analogy with the facts in the present case and do not raise the same question. The assignments of error are all dismissed.

Judgment affirmed.

H. B.

Jan. '99, 238. Supreme Court. February 21, 1899.

Robinson's Estate.
Haeberley's Appeal.

Partnership—Dissolution of—Assets—Realty and personalty—Conversion.

Equitable conversion is a fiction by which, for certain specific purposes, and to the limited extent required for such purposes, realty may be treated as personalty or personalty as realty.

Land held by partners as partnership assets is to be treated as if it were personalty to the extent demanded by the purpose with which it is put into the common stock, but no further. How far that shall go is largely a matter of intention, but the presumption is that it shall extend to all the regular and legitimate uses of the business, and it may be that as to creditors this presumption must be held conclusive.

Appeal of Emelie Haeberley, from the decree of the Common Pleas of Lackawanna County, confirming the report of the auditor in the matter of the first and final account of Charles H. Welles, trustee for Emelie Haeberley, widow of August Robinson, and Henry Armbrust, guardian of Lena and Amelia Robinson.

The account of the trustee in this matter was referred to E. C. Newcomb, Esq., as auditor. Before the auditor the following facts were agreed upon by the parties:

Charles Robinson, August Robinson and William Robinson, on May 13, 1893, entered into a co-partnership, under the name, style and title of E. Robinson's Sons, for a period of five years, by articles duly executed.

E. Robinson, the mother of Charles, August and William Robinson, conveyed to her three sons, by deed dated May 13, 1893, recorded in deed book No. 99, page 236, Lackawanna county, the brewery property, in which the business of the partnership was transacted, for a stated consideration of one dollar. The said property was acquired for the purpose of being used as a brewery plant by the said partnership, and was so used until the sale to the Pennsylvania Central Brewing Company.

William Robinson, one of the said co-partners, died September 15, 1893, leaving to survive him a widow, Emelie Robinson, who afterwards married H. H. Haeberley, and a daughter, Edna Robinson, born early in 1893, of the body of the said Emelie Robinson, and two daughters, Amelia and Lena, born of a prior deceased wife of the said William Robinson.

Henry Armbrust was duly appointed by the Orphans' Court of Lackawanna County guardian of the said Lena, Amelia and Edna Robinson, October 23, 1893.

Edna Robinson died February 12, 1894, unmarried, intestate and without issue.

The Pennsylvania Central Brewing Company offered to purchase from the said Charles Robinson, August Robinson, Henry Armbrust, guardian, and Emelie Haeberley, widow of William Robinson, the real estate of E. Robinson's Sons, used in the brewery business, together with the manufactured beer, barrels, hops, malt and material in the brewing business for the price or sum of $950,000, to be paid for in the following manner, namely: One-third cash, one-third common stock of the Pennsylvania Brewing Company and one-third preferred stock, and drawing dividends of 8 per cent. This sale was consummated, and on October 7, 1897, a deed was made to the Pennsylvania Central Brewing Company for the consideration of five dollars, and other good and valuable consideration, and the following amounts paid therefor:

Cash	$376,688.00
Bonds of the Pennsylvania Central Brewing Company	90,000.00

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Common stock of the Pennsylvania Central Brewing Company	316,666.00
Preferred stock of the Pennsylvania Central Brewing Company	166,700.00

As shown by the books of the partnership, the cost of the lands, buildings and machinery, included in the sale to the brewing company was $219,500, of which amount $77,127.54 had been invested in such lands, buildings and machinery out of the earnings of the firm subsequently to the death of William Robinson.

On January 28, 1896, Charles Robinson and August Robinson conveyed to Emelie Haeberley and Henry Armbrust, guardian, a certain lot on Seventh street, in the city of Scranton, for an express consideration of one dollar, and placed the deed on record April 22, 1897, without the knowledge or consent of either Emelie Haeberley or Henry Armbrust, guardian. The conveyance was stated to be made to the parties "in the respective proportions which they would be entitled to take said land under the intestate laws of this Commonwealth were the title of the same vested in William Robinson at and immediately before his decease." The first knowledge of the grantees of the making or recording of this deed was in September, 1897. The building and dwelling house upon said lot was begun during the lifetime of William Robinson and finished after his death, and the entire cost thereof was paid out of the earnings of the partnership.

The said house and lot were wholly paid for by August Robinson and Charles Robinson out of the earnings of the partnership after the death of William Robinson, and the cost thereof, as stated on the books, was $35,167.94, and was charged against the interest of the said William Robinson and his estate on the books of the partnership.

Emelie Haeberly, widow, and Henry Armbrust, guardian, sold and conveyed the said lot and building on Seventh street to Charles Robinson and August Robinson for the consideration of $22,500, cash, by deed dated November 24, 1897.

In making sale of the interest of William Robinson, deceased, in the brewery, and in selling the said dwelling house and lot, it was understood and agreed between the parties that the interest of the widow and guardian of the minor children of William Robinson in said property could not be determined except by adjudication of some Court of competent jurisdiction, and that the sale should be made and the questions of proportions or distributions should be submitted to Court in some proper manner, and to that end the entire amount of purchase money, stocks and bonds derived from the sale of the brewery property, being one-third of $950,000, and the purchase money of the dwelling house and lot, $22,500, were placed in the hands of Charles H. Welles, as trustee, for distribution under the supervision of the Court.

The question whether the interest of the said William Robinson's estate in the real estate, held as aforesaid by the co-partnership, was personal property or real estate, and the proportion of the interests of his widow and heirs in the same was first raised by the representatives of the brewing company, in connection with the purchase of the co-partnership property, and they declined to accept title unless Armbrust as guardian should secure the consent of the Orphans' Court of Lackawanna County to sell the interests of his wards without designating the proportion of the purchase money which said wards should be legally entitled to receive; and it was agreed that such consent should be obtained without committing any of the parties to a legal admission or agreement as to the nature of the estate so granted.

The period fixed by the articles for the continuance of the co-partnership had not yet expired; no formal agreement of dissolution had been executed; nor had all of its assets been distributed. All of the firm debts had been paid, except a mortgage of $30,000, held by Elizabeth Robinson, and there were remaining assets consisting of real and personal property, and money, notes and judgments due the firm. By the sale to the brewing company, the co-partnership divested itself of all the property and appliances necessary for the prosecution of the business for which it was formed.

In addition to the foregoing, the auditor found as follows:

"22. That coupled with the sale of the brewery plant and its equipment, the parties conveyed the goodwill of the brewery business of E. Robinson's Sons to the Pennsylvania Central Brewing Company, intending thereby to terminate and abandon the business for which the partnership was formed, and that since the sale no attempt has been made or purpose manifested to ever resume the partnership business.

"23. That the cost of the real estate so conveyed was $219,500, one-third of which, together with the further sum of $22,500, derived from the sale of the dwelling house property of William Robinson, may be fairly considered in the distribution as representing real estate.

"24. That the $30,000 mortgage held by Elizabeth Robinson, mentioned in paragraph 15 above, is shown by the record to be the mortgage of August Robinson upon property entirely distinct from the brewery plant, and not included in the

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sale thereof. This mortgage is not shown by the evidence to be a liability of the partnership."

The auditor found the following conclusions of law:

"1. That so far as the fund for distribution is composed of stocks and bonds it should be distributed in kind.

"2. So far as the fund represents real estate, it should be distributed as such to the widow and issue of William Robinson, according to the course of descent.

"3. As to the share of Edna Robinson, deceased child of William Robinson, the surviving mother, Emelie Haeberley, is entitled to take the same, both real and personal, in fee.

"4. Emelie Haeberley is therefore entitled to take five-ninths of the personal estate absolutely, two-ninths of the real estate absolutely and three-ninths of the real estate for life.

"5. Lena Robinson is entitled to take absolutely two-ninths of both the real and personal property.

"6. Amelia Robinson is entitled to two-ninths of both real and personal proporety absolutely.

"7. Upon the death of Mrs. Haeberley, Lena and Amelia Robinson are entitled to have in equal shares the three-ninths of the real estate, held by Mrs. Haeberley for life.

"8. The percentage of the fund derived from the sale of the brewery plant which should be distributed as real estate is .215725 per cent."

To this was added a table.

Emelie Haeberley filed exceptions, inter alia, that the auditor erred in his seventh and eighth conclusions of law, and—

"That the learned auditor erred in his distribution, in that he treated the value of the brewery plant as real estate, when in law it was and should have been distributed as personal property."

The Court dismissed the exceptions and confirmed the report. Emelie Haeberley took this appeal, and assigned as error, inter alia, the dismissal of her eighth exception.

James H. Torrey, for appellant, cited—

Darrow v. Calkins, 154 N. Y. 503.
Meily v. Wood, 71 Pa. 488.
West Hickory Mining Ass'n v. Reed, 80 Id. 38.
DuBree v. Albert, 100 Id. 483.
Abbott's Appeal, 50 Id. 234.
Leaf's Appeal, 105 Id. 505.

Everett Warren, (with him *Edward N. Willard* and *Henry A. Knapp*), for appellee, cited—

Wells v. Ellis, 68 California, 243.
Blaker v. Sands, 29 Kansas, 551.
Whitton v. Smith, 1 Freeman (Miss.) 231.
Kennedy v. Porter, 109 N. Y. 526.
Thompson v. Bowman, 6 Wallace, 316.
Smith v. Vanderburg, 46 Ill. 34.
Yeatman v. Woods, 6 Yerg. 20.
Wilcox v. Wilcox, 13 Allen, 252.
Whitman v. Boston R. R. Co., 3 Allen, 134.
Paterson v. Blake, 72 Ind. 438.
Smith v. Wood, 1 N. J. Eq. 82.
Buchan v. Sumner, 2 Barb. Ch. 206.
Buckley v. Buckley, 11 Barb. 44.
Foster's Appeal, 74 Pa. 391.
Fairchild v. Fairchild, 64 N. Y. 471.
Houston v. Stanton, 11 Ala. 420.
Collumb v. Read, 24 N. Y. 505.
Campbell v. Campbell, 30 N. J. Eq. 417.
Uhler v. Semple, 20 Id. 288.
Shearer v. Shearer, 98 Mass. 107.
Tillinghast v. Champlin, 4 R. I. 173.

May 1, 1899. MITCHELL, J. The auditor found that the term of the partnership under its articles had not expired, there had been no formal dissolution or settlement of accounts, there were still some undistributed assets, and one unpaid debt, a mortgage on real estate belonging to the partnership though held in the name of an individual partner; yet notwithstanding these circumstances he found as a fact that the firm had sold its entire plant, equipment and goodwill, and by common consent ended its business. This finding was confirmed by the Court, and we see no reason to question its soundness. The auditor's conclusion that the case is "analogous to that of a partnership which has dissolved by mutual consent, settled its accounts, paid its debts, and has a surplus in land," is the logical deduction from the facts. Dissolution, as between the partners, is a matter of intention, and it may be shown by the sale of the whole property and business, as well as in other ways: 17 Am. & Eng. Ency. of Law, 1100.

The question then arises, had the real estate returned to its normal character, or did it still continue in its equitable status of personalty so that its proceeds were distributable as such? In dealing with questions of this kind it is important to keep constantly in mind what equitable conversion really is, a fiction by which for certain specific purposes, and to the limited extent required for such purposes, realty may be treated as personalty or personalty as realty. As said in Wentz's Appeal, 126 Pa. 541 (551): "The money never is real estate, in law any more than in fact, but for certain purposes, and within certain limits it is treated *as if* it was real estate. . . . The whole doctrine is the creation of equity for a specific purpose, and when that purpose is accomplished, the rule ceases to operate. So far, therefore, from the money actually becoming real estate and requiring a positive act of re-conversion to restore it to its natural character of money, it never is real estate, and is only treated as such within a limit," and, quoting SHARSWOOD, J., in Foster's Appeal, 74 Pa. 397, "when the purpose of conversion is attained conversion ends."

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Land held by partners as partnership assets is to be treated as if it were personalty to the extent demanded by the purpose with which it is put into the common stock, but no further. How far that shall go is largely a matter of intention, but the presumption is that it shall extend to all the regular and legitimate uses of the business, and it may be that as to creditors this presumption must be held conclusive. It is frequently said that during the partnership it is "an out-and-out conversion." but the phrase is unfortunate, and apt to mislead. Even in a leading case in which it is used, the limited sense in which it is to be taken is shown elsewhere in the opinion: "Where land is a part of partnership stock, it at no time—not even during the continuance of the partnership—becomes personalty in such an unqualified sense as to give one partner an implied power to dispose of the whole partnership interest in it. As regards the power of disposition, land held as partnership stock is not subject to the rule which makes each partner the agent of the firm": Foster's Appeal, 74 Pa. 391.

The realty involved in the present case was put into the partnership assets for use by the firm in the business, and so long as the business continued it was liable to be treated for all necessary business purposes as part of the general stock. But its status as personalty, even during the continuance of the business was temporary and restricted, and the moment the necessity for so treating it ceased, its quasi character ceased and it resumed its normal position as land. To extend the operation of the conversion so as to alter the devolution of title would be to pervert an equitable fiction from the very purpose of its invention. If the firm had been dissolved by the death of William Robinson, as it would have been, except for the special provision of the articles of partnership, his share in the settlement of the assets as to the part represented by this fund, would have passed to his heirs as real estate. The effect of the dissolution by bringing the entire business to an end was exactly the same.

As to the dwelling house of William Robinson, a fortiori it was real estate. It had never been in position to be treated as anything else.

Decree affirmed.

W. C. S.

Jan. '99, 374. Supreme Court. March 14, 1899.

Rosencrance v. Johnson, Administrator.

Decedent's estate—Claim for services and board—Extras over contract—Statute of limitation.

Decedent lived with plaintiff under a contract to provide him a home and render him certain services. After his death, claim was made for extra services and board for a period longer than six years.

Held, that all amounts claimed for more than six years were barred by the statute of limitations, and that the strictest proof is required to recover claims for such services.

To take a debt out of the statute of limitations, it must be identified by the debtor at the time of the payment, promise or act relied on as tolling the statute; an identification by the jury by mere inference from collateral matters is not sufficient.

Appeal of George J. Johnson, administrator of the estate of George Houser, deceased, defendant, from the judgment of the Common Pleas of Bradford County, in an action of assumpsit in which John W. Rosencrance and B. W. Rosencrance, in business as Rosencrance Brothers, were plaintiffs, to use of John W. Rosencrance.

This was an action of assumpsit to recover for services rendered to the defendant's decedent in his lifetime.

On the trial, before PECK, P. J., the following facts appeared:

George Houser was a man somewhat advanced in life, who owned a farm of about one hundred and forty acres, situated in the township of Tuscarora in Bradford county. He was unmarried and his sister, a maiden lady, was his housekeeper. She died in 1889, and he having no near relatives in Bradford county, went to live with B. W. Rosencrance and John W. Rosencrance, brothers living in the same house. John W. Rosencrance was a married man, but B. W. Rosencrance was not.

On January 21, 1889, when Mr. Houser went to board with the plaintiffs, he agreed to pay them $14 per month for his board, washing and mending.

The Rosencrance brothers lived less than a mile from Mr. Houser's farm. After going to board with them Mr. Houser attended to the chores at his place, but rented his farm, for a year or two, to different persons, and then let it to the Rosencrance brothers to farm on shares. It was alleged that he was taken sick with a bowel complaint and had to have extra care and attention. It was testified that he agreed to pay extra for such care and attention, and that in pursuance of such agreement the brothers did care for him and give him such attendance as he needed. It was also testified that when Mr.

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Houser was taken sick, he agreed to pay the brothers $35 for the season for doing his chores at the farm, taking care of his stock, etc. The stock consisted at first of a span of horses or colts, and some seven or eight head of cattle, a hog, and some poultry, but after a time most of the cattle were sold and the poultry and hog. It was alleged that the brothers did some work for him on his farm, ditching a swamp, clearing the swamp up, drawing stone, making fences, drawing logs to the saw mill and the manufactured lumber back to his farm. The principal part of the demands sued for and claimed on the trial was for the boarding and services in nursing and caring for him in his sickness.

The farm of Mr. Houser was a good one, he was out of debt, and seems to have had some money ahead, which he had loaned out. The bulk of the debts due him proved, after his death to be uncollectible, but he still had some considerable money at interest.

He died December 30, 1896; after his death B. W. and John Rosencrance presented a claim to George J. Johnson, administrator of Mr. Houser's estate of $2620 for services, boarding, labor, etc.

The defendant submitted, inter alia, points, which, with the answers thereto, were as follows:

"1. In actions against decedents' estates, claims which though on their face accruing for years are not presented as legal demands until after the death of the alleged debtor come before the Court discredited by the claimants' own acts, and every intendment will be made against them, and failure to ask for payment during a considerable period will create a presumption that all demands were compensated as they arose." Answer—"That would be the law in case of domestic services. We charge you that unless you are satisfied from all the evidence in this case that the services charged for by the plaintiff have not been paid then you should ignore these accounts or claims of the plaintiff. But if you are satisfied from the evidence which is before you, from the witnesses who have testified before you, that the accounts of the Rosencrance brothers have not been paid, then, as we have said to you, you should compensate them as you would compensate any other person who has a claim against the estate. But you should examine all these accounts closely, and give them close care and attention, because these claims are against a dead man's estate and he cannot answer for himself. If he were present he might make some explanations or suggestions which might throw a different light upon this case, and if he were permitted to do that, then these brothers might answer on their side. But all parties are shut out here, and you must get such light from the evidence as will enable you to determine it as best you can." (Tenth assignment of error.)

"5. A partial payment will operate to toll the statute, but to have this effect it must be shown unequivocally that the payment was on the claim in suit, and any uncertainty in the identification of the debt upon which the payment is alleged to have been made is fatal to the plaintiff's claim as to all that accrued more than six years from the commencement of this suit." Answer—"We affirm this proposition. But it is for you to take into consideration, in considering this proposition, whether the payments made were upon the claims in suit here. Is there any evidence of any claims or demands which the brothers had against Mr. Houser, except the claims in suit." (Twelfth assignment of error.)

In the general charge the Court said:

"The defendant has raised the statute of limitations, and ordinarily an account which has run six years is barred; all over six years is barred by the statute of limitations.

"This suit was brought in May, 1897, and unless you are convinced, as we shall hereafter instruct you, you should bar out all of the evidence back of May, 1891, as being over six years from the time the suit was commenced. But the plaintiff, in answer to that, claims that the brothers received payments, that this old man paid them at one time $10—at Laceyville, in 1895—and also paid them a hog, which was to be turned upon their account, and the plaintiff claims that that takes the case out of the statute of limitations; that it was an acknowledgment by Mr. Houser of the validity of the account which these brothers had against him. But we will instruct you more particularly as we answer the defendant's points in this case." (Eighth assignment of error.)

Verdict for plaintiff, $2620.19, and judgment thereon. The defendant took this appeal and assigned error, inter alia, as above indicated.

W. J. Young, (*S. W. Little* and *William Little* with him), for appellant.

William Maxwell and *C. M. Culver*, (*Stewart* with them), for appellee.

May 22, 1899. MITCHELL, J. The plaintiff's claim was one which raised a twofold requirement of strict proof, in that it was in the first place a claim for extra compensation over and above the amount expressly fixed by contract, and secondly, it was a claim against the estate of a decedent for services of a kind which in the ordinary course of life are paid for currently as they are rendered.

First. There is no more fruitful source of dispute and litigation than claims for "extras," and

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where they are super-added to claims upon an express contract for services of the same or a similar kind they should be made out clearly and explicitly before they are allowed. The plaintiff gave evidence of an express agreement by Houser, the defendant's decedent, to pay fourteen dollars a month for "board, washing, and mending." Prima facie this covers all such household attendance and attention as are usual in families of the same situation and circumstances of life, including the chances and changes of health and sickness. In fact the plaintiff's own witnesses professing to use the language of the decedent spoke of the agreement as one that had provided him with a "home." The extra services claimed for by plaintiff were of the same class, and differed only in degree, arising from the alleged sickness of the decedent during a considerable part of his latter years, whereby he required more attention. This did not change the nature of the services nor take them out of the agreement. Where such an agreement becomes burdensome by reason of changed circumstances, the remedy is to make a new one and the new one should be clearly proved. The case relied on by appellee: Harrington *v.* Hickman, 148 Pa. 401, is very close in point and illustrates this requirement. The extra services there were more different in character from those covered by the contract of hiring than those claimed here but the right of recovery was put expressly by our late brother WILLIAMS, on the evidence of a new and additional contract to pay for them. In the present case there was no attempt to prove such a contract.

Second. The claim for board, etc., against the estate of the decedent belongs to that class that we have so often had occasion to say requires strict proof: Carpenter *v.* Hays, 153 Pa. 432; Mueller's Estate, 159 Pa. 590; Hughes's Estate, 176 Pa. 387. The plaintiff may be considered as having proved a contract for fourteen dollars a month, and as having given some evidence, not very strong, but sufficient to go to the jury, that the payments on this account were in arrears at the time of decedent's death. The latter's declarations as testified to by the witnesses went to this extent, but by no reasonable construction can they be carried any further. There is nothing in any of them to permit the jury to find an indebtedness back of the period of limitation. The strongest of them, during his last sickness, that he "would like to live till he got up, for he owed them a big bill, so he could settle it up," and again to another witness "that he owed them a large bill," are fully satisfied by an application to the arrears on the express contract for board, etc., for a period not exceeding six years. There is no approach to the identification of any other debt, or the extension of this one beyond that period.

Plaintiff also gave evidence of the receipt of ten dollars from Houser, with the direction to credit it on his account and at another time a hog with similar direction. The learned Judge submitted these payments to the jury to say if they were made on the very debt in suit, and in this connection, answering defendant's fifth point, he told the jury they might consider if there was any evidence of any claim or demands that plaintiff had against the decedent, except the claims in suit. This was directly against the case of Burr *v.* Burr, 26 Pa. 284, where a payment on "that note which I hold of thine," and the absence of evidence that there was any other note than the one sued on were held not sufficient to identify the debt. See also Landis *v.* Roth, 109 Pa. 621; and Ward *v.* Jack, 172 Pa. 416. To take a debt out of the bar of the statute of limitations the identification of it must be made by the debtor at the time of the promise, or payment or act relied on. An identification by mere inference of the jury from other collateral matters is not sufficient.

It is not necessary to go over the assignments of error in detail. The evidence of the character of decedent for punctual payment of obligations, the income from his farm, the fact that he kept account books which could not be found after his death, and his declarations as to what he was going to do when he left the witness's house, were properly excluded. They had no direct bearing on the issue.

The judgment, however, must be reversed on the two main points, first, the so-called extra services in the way of care and attendance were presumptively within the express contract for fourteen dollars a month, and no recovery could be had on them without a new contract, of which there was no evidence; and, secondly, there was no evidence to prevent the bar of the statute of limitations as to all of the claim for the fourteen dollars a month which was more than six years old at the issue of the writ. It was error to submit either of these claims to the jury.

Judgment reversed and venire de novo awarded.

W. C. S.

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Superior Court.

Oct. '97, 218. Superior Court. November 21, 1898.

City of Chester v. First National Bank.

Negligence — Municipality — Property owner — Defective sidewalk — Damages — Act April 6, 1850, P. L. 346 — Act April 3, 1867, P. L. 708.

Where damages have been recovered from a municipality for injuries received by a citizen by reason of a defective sidewalk the corporation may bring suit against the owner of the land abutting the sidewalk, to recover the amount of damages paid in former suit.

The obligation of property owners to keep the sidewalk in repair implies a liability for damages resulting from failure to do so.

The remedy by lien and for collecting the expense of the repairs are separate and independent of the liability of and duty imposed upon the owner of the land.

Appeal of the First National Bank of Chester, from the judgment of the Common Pleas of Delaware County, in an action in trespass wherein the City of Chester was plaintiff.

On the trial, before CLAYTON, P. J., it appeared that the sidewalk in front of the defendant's premises in the city of Chester being out of repair, one Margaret Lee fell and was injured by reason of its defective condition. She brought action against the city of Chester and recovered a verdict, which the city paid, the amount so paid with costs amounting to $293.21. No notice had been given to the defendant to repair the sidewalk. The city claimed to recover the amount paid by it with interest.

The defendant presented the following point:

"There is no liability in this case from the defendant to the plaintiff, except only such liability as may appear from a duty resting upon the defendant to repair the pavement by force of a requirement resting upon statute or municipal ordinance; and none such having been shown in this case, the verdict should be for the defendant."

The Court reserved defendant's point, and directed the jury to find a verdict for the plaintiff subject thereto. Verdict accordingly for plaintiff, $331.50. The Court in banc subsequently discharged a motion of defendant for judgment non obstante veredicto and entered judgment on the verdict.

The plaintiff appealed and error was assigned as follows: (1) Not affirming the defendant's point; (2) directing a verdict for plaintiff; (3) dismissing the motion of defendant for judgment non obstante veredicto.

W. B. Broomall, for appellant.

No duty is imposed by the Act of Assembly upon the abutting land owner in positive terms to repair the sidewalks, the duty is merely inferential and arises only after notice from the municipal authorities.

Act April 6, 1850, P. L. 346.

If the owner of a property refuse or neglect to repair a pavement abutting his property the city has power to cause the repairs to be made and to collect such expense by lien.

Act April 3, 1867, sec. 29, P. L. 708.
Act May 23, 1889, P. L. 289.

In the absence of liability imposed by statute there is no obligation on the abutting land owner to repair streets, and he is not liable for an injury arising by reason of a defect in the street.

Am. & Eng. Ency. of Law, Vol. IX., p. 395, par. 10, note 3.

A. A. Cochran, for appellee.

A person injured by a defective pavement may sue either the municipality or the property owner, although the property owner is primarily liable and responsible for the condition of the pavement in front of his property. If the injured one sues the municipality, then the municipality has to work out its equities against the property owner, which can be done by an action against said property owner to recover the amount the municipality has paid.

Brookville Borough *v.* Arthurs, 152 Pa. 334.
Reading City *v.* Reiner, 167 Id. 41.
Phila. Co. *v.* Central Traction Co., 165 Id. 456.

In order to charge the owner of premises with notice the defect need not be so notorious as to be evident to all pedestrians in the neighborhood.

Dickson *v.* Hollister, 123 Pa. 429.

The liability of municipalities for injuries caused by defective streets is not because of its breach of duty in failing to do the work, but because it has failed to compel the owner to do it.

Lohr *v.* Philipsburg Borough, 156 Pa. 246.

February 17, 1899. SMITH, J. While walking along the sidewalk, fronting the defendant's vacant lot in the city of Chester, a woman was injured by reason of the walk being out of repair. For this injury she recovered damages in an action against the city. The present action was then brought by the city against the lot owner to recover the amount thus paid, and a verdict was directed for the plaintiff, subject to a reserved question raised by the defendant's first point. The question was as follows: "There is no liability in this case from the defendant to the plaintiff, except only such liability as may ap-

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pear from a duty resting upon the defendant to repair the pavement by force of a requirement resting upon statute or municipal ordinance; and none such having been shown in this case, the verdict should be for the defendant." The Court subsequently entered judgment for the plaintiff on the reserved question, and this is assigned for error. By the reservation the case was made to turn on the question whether a duty to repair rested on the defendant.

In Grier *v.* Sampson, 27 Pa. 183, it was said by WOODWARD, J.: "That the owner of real estate, lying along a public street or highway, is bound to keep it in such repair as to make it safe to passers-by, and is liable in damages for injury resulting from his neglect to perform this duty, is a proposition unquestioned by the thirteen errors assigned upon this record." This proposition was there stated with reference to the facts of that case. If too broad to be uniformly applicable, it is at least beyond question that, whenever the abutting owner is by law bound to keep the highway in repair, he is liable for an injury caused by his negligence, and that the municipality, if subject to action by reason of such negligence, has recourse over to him: Brookville Borough *v.* Arthurs, 152 Pa. 334. Property owners are bound by the ordinances enacted for the benefit and welfare of the inhabitants of the municipality and they must accept the burdens with the benefits. The general power of a municipality to require the owner of abutting property to pave and if necessary repair a sidewalk at his own expense has often been decided: Smith *v.* Borough, 120 Pa. 357; Borough *v.* Home for Aged, 131 Pa. 109; Brookville Borough *v.* Arthurs, supra. This power is conceded in the present case. The position of the appellant is that this duty has not been lawfully imposed and therefore no neglect of duty is shown and no liability established.

By Act of April 6, 1850, the borough of Chester was incorporated, and under the Act of February 14, 1866, this borough was organized as the city of Chester. The municipality afterward became a city of the third class, having duly accepted the Act of May 23, 1889. Section 25, of the Act of April 6, 1850, provides: "If the owner .... of any ground fronting on a footway wholly or partially paved and curbed shall suffer the said curbing and paving to be out of repair and shall neglect for the space of twenty days after he shall have been required .... to put the same in good repair, then it shall be lawful for the proper officers to recurb and repair such footway," and recover the expense from the owner. By Act of April 3, 1867, section 29, it is provided: "That in case of refusal or neglect by any owners of property in the city of Chester to repair the pavement, curbstone or sidewalk in front of their respective properties for the space of three days after notice," the repairs may be made by the city and collected from the owners. These statutes are still in force as part of the charter of the city of Chester and show by implication at least, a duty imposed upon the owners of property fronting on footways or sidewalks, to construct, maintain and repair such walks. It is an established principle of construction that "What is implied in a statute, pleading, contract, or will, is as much a part of it as what is expressed": United States *v.* Babbit, 66 U. S. 61. It is also a well established principle that a penalty for doing an act implies a prohibition of the act, though the statute contains no words of prohibition: Mitchell *v.* Smith, 1 Binney, 110. In like manner a penalty for the non-performance of an act implies the duty of performance, though this be not directly commanded, since otherwise there is no ground for the penalty. Applying these principles to the foregoing statutes it is quite clear that the duty to repair sidewalks, and the liability for its neglect are lawfully charged upon the owners of abutting property.

This contruction of the sections quoted is not qualified or affected by the additional provisions contained therein for enforcing liability. They relate to the same subject and were properly included in the same sections, but the duty to repair does not depend on measures for its enforcement. The remedy by lien and for collecting the expense of the repairs are separate and independent of the liability and duty imposed. These may or may not be pursued, as the circumstances may require, and are resorted to only when it is necessary to secure or to collect the expense from the lot owner. As this expense is not involved in the present case it is immaterial whether the statutory remedy for its collection has been duly observed or not. The duty to repair existing, failure to perform it is a breach for which an action may be maintained. That municipalities may recover over from those who are primarily liable for injuries caused by their neglect to maintain sidewalks has been decided so often by the Supreme Court that it is familiar law.

The judgment is affirmed.

W. D. N.

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Oct. '98, 73. Superior Court. December 13, 1898.

MacKellar v. Seeds.

Public highways—Acts of June 6, 1871, P. L. 1353; April 21, 1855, P. L. 264—Constitutional law—Title of Act—Art. III. sec. 3 of Constitution—Act May 23, 1893, P. L. 123.

The mere plotting of a street, less than thirty feet in width, which has been previously a private way, and the placing of the same upon the plan of the city of Philadelphia by the board of surveyors, does not make such way a public street.

That portion of the Act of May 23, 1893, P. L. 123, which provides that streets placed upon the city plan shall thereupon become public streets, is unconstitutional so far as regards private ways placed upon said plan, as the title of the Act, viz., "An Act to authorize councils . . . to place on the plans of public streets of such cities all streets laid out and opened prior to June 6, 1871, and which are less than thirty feet in width or have dead ends or do not extend in a straight line from one street to another," suggests no intent to make private ways, ipso facto, public streets.

Appeal of Jacob J. Seeds, defendant, from the judgment of the Common Pleas No. 2, for Philadelphia County, in an action of trespass.

On the trial of this cause, before SULZBERGER, J., the plaintiff gave in evidence a deed from C. A. Blessing to plaintiff for certain premises described as being bounded by a court: "Together with the free and common use and privilege of said court and of the said ten-feet wide court communicating therewith to the depth of thirty feet"; also a deed from James P. Townsend and others to Charles A. Blessing, dated March 27, 1890. This deed conveyed the premises to plaintiff's predecessor in title: "Together with the free and common use and privilege of said Bryan's court and of the said ten-feet wide court communicating therewith to the depth of twenty-nine feet": also deeds deducing Townsend's title from the year 1800, all reciting the easement as above; also a deed from the Congregation "Kaal Kadesh Mickoe Israel" to Jacob J. Seeds, dated January 15, 1891, for property on the east side of Seventh street at the distance of 126 feet 11 inches southward from the south side of Cherry street, containing in front 18 feet and 148 feet 9 inches in depth, recorded in deed book T. G., No. 1, page 225. That deed showed no grant of easement.

The defendant admitted that on or about the 25th day of February, 1896, he opened a doorway in the rear wall of his premises into the said court ten feet in width, and extending thirty feet eastward; that since that time the defendant had for his own purposes or for that of his tenants, used the said Bryan's court or Brinkley place, and the court in the rear of the plaintiff's property for the purpose of ingress and egress to and from his property.

The defendant offered in evidence the following ordinance:

AN ORDINANCE

To place on the city plan Kinnier, Saulnier, Stephen, McFall and Church streets; Holland place and Brinkley place.

Section 1. The select and common councils of the city of Philadelphia do ordain, That the department of public works be authorized to place on the city plan Kinnier street, twenty-two feet wide, from Chelten avenue to Bowman street; . . . . Brinkley place, from Cherry street south with extensions running east and west: Provided, That before any of said streets shall be placed on the city plan, satisfactory evidence shall be furnished that the street has been laid out and opened prior to June 6, 1871, in accordance with Act approved May 23, 1893. All ordinances or parts of ordinances inconsistent herewith be, and the same are, repealed.

Approved this 31st day of March, A. D. 1894.

EDWIN S. STUART,
Mayor of Philadelphia.

Defendant also offered in evidence the official plan of the city of Philadelphia, showing thereon said Brinkley place.

The Court charged as follows: "Gentlemen of the jury, in this case you will find a verdict for the plaintiff for $5."

Verdict accordingly and judgment thereon. The defendant took this appeal, and assigned the charge as error.

James Alcorn, (*Oliver E. Shannon* with him), for appellant.

The board of surveyors, after being duly authorized by councils, plotted, as a part of Brinkley place, this ten-feet wide court or alley. The action of the board of surveyors in plotting a street is quasi-judicial, and, unless appealed from within the time mentioned in the Act of 1871, the decree of confirmation is conclusive. It was, therefore, the duty of the appellee to appear before the board of surveyors, or appeal from their action to the Court of Quarter Sessions. Not having taken that appeal, the action of the board of surveyors is conclusive upon him. The authority to plot streets was vested in the board of surveyors of the city of Philadelphia by the Act of April 21, 1855, sec. 4, P. L. 264. This Act required the Court of Quarter Sessions to approve the plans confirmed by the said board.

The Act of June 6, 1871, P. L. 1353, invested the board of surveyors with full authority to finally confirm all plans or revisions of plans of the said city, after the same had been made by direction of the councils thereof.

The later Act allowed a street under thirty feet wide to be placed on the plan.

John Marshall Gest, for appellee.

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The Act of 1893, so far as it assumes to authorize a proceeding such as that under which the defendant justifies, is unconstitutional on account of defect in its title.

Constitution, Art. III., sec. 3.
Union Pass. Ry. Co.'s Appeal, 32 P. F. Sm. 91.

April 17, 1899. SMITH, J. The appellant has presented to this Court alleged documentary evidence not offered on the trial. It is offered here under the pretence that it may aid us in our determination of the case. It is presumably well known to the profession that this is an appellate Court, without original jurisdiction, and can only review cases, not try them in the first instance. This is the limit of our authority, and it is useless to press for consideration matters beyond our field of inquiry. Neither the Supreme Court nor this Court will take into account matters not submitted on the trial; and both Courts have often said that the cases must be treated on appeal as they were tried below.

Confining our examination to the record as made up, we find the question to be whether the plaintiff's right of property has been invaded by the defendant. The subject of contention is the use of a way or court inside the building line, and abutting on the premises of the parties. The plaintiff avers it to be a private way and the defendant alleges it to be a public way. It is conceded that the plaintiff, by deed dated June 23, 1893, acquired the right to use the way, and that the defendant's claim is based on the contention that, by city ordinance approved March 31, 1894, it became a public way. The evidence shows without contradiction, that prior to the ordinance Brinkley place was a private way, and therefore the single question for the Court below and for this Court is whether it became a public way by virtue of the ordinance. This ordinance was passed in pursuance of the Act of May 23, 1893, which was enacted with reference to the Act of June 6, 1871, and this latter Act in turn modified the Act of April 21, 1855. The Act of 1893 provides that all streets laid out and opened prior to June 6, 1871, which are less than thirty feet in width, or have dead ends and do not extend in a straight line from one street to another, may be placed on the city plan, whereupon such streets shall become public streets. It is argued that under this statute Brinkley place became a public highway upon its being plotted and placed on the city plans by the board of surveyors; that this power was given to the board of surveyors by the Act of April 21, 1855, and was continued by the Acts of June 6, 1871, and May 23, 1893. There is nothing in the Act of 1855 or that of 1871 which purports to make streets or ways thus placed on the city plan public highways of the city, by the mere act of placing them there. An examination of the Act of 1855 shows very clearly that this was not intended. The seventh section provides "that whenever councils shall deem the public exigency to demand it, they may order by ordinance any street laid upon any of the public plans of the city to be opened," on giving notice and security to the owner. The Act thus recognizes the ownership as remaining a private right until otherwise divested, notwithstanding the owner's land has been plotted and recorded in the public plan as provided by the statute. The Act of 1855 contains nothing further pertaining to this point and the Act of 1871 throws no light on the subject. Turning to the Act of 1893 we find that streets laid out and opened may be placed on the city plan, "whereupon such streets shall become public streets."

Our inquiry is, therefore, whether this part of the Act is constitutional so far as it relates to a private alley, court or way, or can it be harmonized with Art. III., sec. 3, of that instrument? Its title is as follows: "An Act to authorize councils of cities of the first class to place on the plans of public streets of such cities all streets laid out and opened prior to June 6, 1871, and which are less than thirty feet in width or have dead ends, or do not extend in a straight line from one street to another." The title indicates that the councils may place certain streets on the plan of public streets, which could not have been placed there under pre-existing legislation; but it suggests no intent to make private streets, courts or ways so entered, ipso facto, public streets. This purpose first appears in the body of the Act and bears no necessary or logical relation to the title. "Public streets" and "streets" are mentioned, and it is not to be presumed that private courts or ways were contemplated. The terms employed reasonably indicate highways in which the public has rights rather than private property in which it has none. The clause of the Constitution providing that "No bill except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title," requires us to construe this Act as applying to public streets and excluding from its purview all private ways, alleys and courts. This interpretation is consistent with the title and purpose of the Act and brings the whole into harmony with the fundamental law. A contrary construction would make it embrace an important subject not clearly expressed in the title. Private property cannot be taken for public use through evasive enactments.

The plotting of a street by the board of surveyors, and the placing of it on the plan of pub-

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lic streets under this statute, does not make it a public street in fact or intent; and it has been said in analogous cases that no such legal effect can be implied from that act: Com'th *v.* The Railroad Company, 135 Pa. 256; Com'th *v.* Kline, 162 Pa. 499. What we have said necessarily decides the main question in the case, and it is unnecessary to touch upon the other subordinate features referred to in the argument.

The judgment is affirmed. H. B.

Common Pleas.

No. 4, June, '99, 171. June 5, 1899.

Landreth v. McCaffrey.

Mortgage—Taxes paid by mortgagee—Trustee.

One who holds title to land in trust is not personally liable for the amount of taxes thereon which have accrued while he holds said title, and which the mortgagee of said property has been compelled to pay; this is the case although the deed by which the land is held in trust is on its face absolute.

Rule for judgment for want of sufficient affidavit of defence.

This was an action of assumpsit. The statement set forth that the plaintiff was formerly the owner of a mortgage on each of certain properties named in a schedule annexed to statement; that she brought suit upon each of the said mortgages for non-payment of interest thereon; that under judgments obtained in the said suits, the said properties were each and all of them sold to plaintiff at sheriff's sales from time to time, for a sum in each case less than sumcient to pay the mortgage debt and taxes charged against the properties, whereby plaintiff was compelled to pay said taxes; that she subsequently, to wit, on or about December 28, 1898, paid the said taxes, to wit, the taxes for the years 1897 and 1898, with the interest, penalties and charges thereon, on each and all of the said properties, amounting in the aggregate to $1814.72; that at the time the said taxes became due and payable, the defendant was the owner of said properties (which were assessed in his name) subject to the mortgages aforesaid, but wholly failed to pay the said taxes or any part thereof; the plaintiff therefore claimed to recover the money so paid out by her for taxes, amounting as aforesaid, to $1814.72, together with interest thereon from said December 28, 1898.

The affidavit of defence set up "that while the properties aforesaid may have been assessed in his (defendant's) name, yet he denies and says that it is absolutely untrue that he was the owner of the said premises in the years of 1897 and 1898, or at any other time, but on the contrary, avers that he was a mere trustee; that one, Charles L. Davy, by indenture bearing date September 22, 1896, and recorded in deed book W. M. G., No. 81, page 421, etc., granted and conveyed unto this deponent, inter alia, the premises and properties set forth in the schedule attached to the plaintiff's statement, under and subject to the plaintiff's mortgages under which the properties were sold; that while this deed was absolute on its face yet the understanding was that it should be only to this deponent in trust for certain purposes, and that subsequently, that is to say on September 29, 1896, this deponent executed and delivered unto each of the equitable owners therein set forth a certain declaration in trust, the terms and conditions of which are fully set forth in a copy thereof which is hereunto appended, marked Exhibit 'A,' and made a part hereof, the said declaration being recorded in deed book W. M. G., No. 217, page 177, etc.

"That subsequently, that is to say on October 29, 1896, with the consent and by direction of his beneficiaries, the deponent executed and delivered unto their various creditors a certain declaration of trust the terms and conditions of which are fully set forth in a copy thereof hereunto appended, marked Exhibit 'B,' and made part hereof.

"That the plaintiff from the time of the conveyance to this deponent knew of these two declarations and that the deponent was a mere trustee and not the owner."

Lucius S. Landreth, for rule.

The case is governed by—

Hogg *v.* Longstreth, 97 Pa. 255.
King *v.* Building Ass'n, 106 Id. 165.
Bank *v.* Shoemaker, 13 WEEKLY NOTES, 255.

The title to the properties was taken by the defendant by deed absolute on its face, and has remained in him ever since. The two declarations of trust did not alter the relations of the defendant to the City or to the plaintiff. They did not convey an equitable title to any specific house, to any individual, or individuals. In fact, they simply impose upon the defendant the duty of disposing of the property as advantageously as possible, and distributing the proceeds. If such a rule as the defendant contends for be applied, a mortgagee might be compelled to pay taxes, as here, without having recourse to anyone to reimburse him.

Frederick J. Knaus, contra, was not heard.

June 5, 1899. PER CURIAM. (ARNOLD, P. J. and WILLSON, J.) We do not think that the defendant is liable. He was a mere trustee and not the owner of the property.

Rule discharged. H. B.

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WEEKLY NOTES OF CASES.

VOL. XLIV.] *FRIDAY, JUNE 23, 1899.* [No. 12.

Supreme Court.

Jan. '98, 348. Supreme Court. January 23, 1899.

Evans v. Watts.

Partnership—Existence after death of partner—Confession of judgment.

Where articles of partnership provide that on the death of a partner, it shall be within the election of his representatives whether the partnership shall continue for the term for which it was made, and that, in the event of no election being made, the partnership shall continue until an agreed date, the death of a partner does not necessarily dissolve the firm.

A partner may, without the consent of the other partners, confess a judgment in the firm name for a firm debt, and under such judgment firm property may be taken in execution. This rule applies against the personal representatives of a deceased member in whom is vested the right to elect whether the partnership shall be continued, and who have expressly or impliedly elected to continue the partnership.

Appeal of Samuel W. Evans, trading as S. W. Evans & Son, plaintiff, from a decree of the Common Pleas No. 2, for the County of Philadelphia, dismissing the bill filed in a proceeding in equity in which David H. Watts was defendant.

The plaintiff filed a bill setting up that by articles of agreement made May 7, 1894, William Harvey et al., became co-partners in the business of the manufacturing, turning and carving of ivory, bone and hardwoods, for the period of five years and six months from January 1, 1894; that by the said articles it was provided that in the event of the death of either partner during the term thereof, his executors or administrators might elect that the business should be continued during the term of the same for the benefit of the persons interested in his estate, with an allowance to the surviving partners of $500 per annum in equal proportions from the estate of the deceased partners as compensation for their trouble in the management of the business, and in that event annual settlements were to be made as in the past and the profits carried to the credit of the deceased partner's share; that it was also provided that in case the executors or administrators of such deceased partner should not within three months from the time of his decease elect to continue the business, that the same should be continued until the first day of July thence next ensuing, when the same should then be closed by the surviving partners.

That the said William Harvey died November 23, 1894, and that letters of administration upon his estate were on December 7, 1894, granted to his widow, Althea N. Harvey; that the said Althea N. Harvey as administratrix as aforesaid made no formal election in relation thereto under the terms of the articles of co-partnership aforesaid, nor were arrangements made for the closing of the business on July 1, 1895, or for the settlement of its affairs and the liquidation of its liabilities, but that the said business from the time of the death of William Harvey was, with the full knowledge and consent of the said Althea, conducted by the surviving parties with the capital, assets and estate of the said partnership, under the name of William Harvey & Co., until March 14, 1896, at which time the business became insolvent; that on March 14, 1896, a judgment note was entered, C. P. 3, M. T. 1896, No. 419, signed "William Harvey & Co.," to the order of Frils, for $1506, dated March 13, 1896, and due one day thereafter; that on the same day other judgment notes were entered similarly signed, the entry in each case being by endorsement, "Enter judgment on within note against Estate of William Harvey, John Watts, Edward Osborn, Joseph H. Watts, William H. Paul, trading as William Harvey & Co.;" that all of said judgment notes were executed by W. H. Paul, without the knowledge of Althea N. Harvey, administratrix of William Harvey; that executions were issued on said judgment and the property and assets of the firm at its factory were levied on and sold by David H. Watts; that, after the death of the said William Harvey, deceased, and the grant of administration upon his estate as above set forth, and until the fourteenth day of March, 1896, and while the said business was being conducted by the above-named parties, under the name of William Harvey & Co., the plaintiff sold and delivered unto the said business, so as aforesaid conducted by the surviving partners and for the purposes of the same, merchandise amounting to the sum of $1639.15, a portion of which was included in two certain promissory notes made under the name of "William Harvey & Co." to the order of the plaintiff, one of them for the sum of $419.79, dated November 15, 1895, payable in four months, and the other of them, for the sum of $529.04, dated December 19, 1895, payable in four months, which said notes, and the amount due him for the said merchandise so sold and delivered, still remain due and unpaid; that, on June 2, 1897, the said Althea N. Harvey, as administratrix of

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the estate of the said William Harvey, deceased, entered an appearance upon the record of the said three judgments, so, as aforesaid, entered by the said Harry L. Frils, David H. Watts and Sarah Hauss, and on the same day entered a rule on the said plaintiff, in each of the said judgments, to strike off the name of the "Estate of William Harvey" as defendant therein, which rule was made absolute on June 7, 1897; that, on June 15, 1896, plaintiff brought his action in C. P. No. 2, No. 453, against the said Althea N. Harvey, administratrix of the estate of the said William Harvey, deceased, and the said Joseph H. Watts, John Watts, William H. Paul and Edward Osborn, as co-partners, trading as William Harvey & Co., for the recovery of the amount of the two promissory notes, and the amount due him for the goods and merchandise so sold and delivered by him in the business; that, in said suit, an issue was joined between plaintiff and the said Althea N. Harvey, administratrix, and on November 19, 1897, a jury found a verdict against said Althea N. Harvey, administratrix, in the sum of $1799.-47, limited as to the execution thereon to the estate of William Harvey, deceased, in the partnership assets and estate of the firm of William Harvey & Co.; that on November 29, 1897, judgment was entered on the said verdict and on the same day judgment was entered against the other defendants for want of a plea and the damages assessed at $1803.03, the amount of which still remained unpaid and the judgment unsatisfied; that plaintiff was advised and believed that the said judgments entered by virtue of the said notes, executed by the said William H. Paul in the name of "William Harvey & Co.," under which the assets of the said business and partnership of the said "William Harvey & Co." were sold unto the defendant were null and void, by reason of the said notes having been executed after the dissolution of the said partnership of William Harvey & Co. (caused by the death of the said William Harvey, deceased, on November 23, 1894), by said William H. Paul as a surviving partner and without the knowledge and consent of the said Althea N. Harvey, administratrix as aforesaid; that said judgments were also void, because in the entry of the judgments on the said notes the "Estate of William Harvey" was alone named as defendant, and that neither said Althea N. Harvey or any other person was named as the administratrix or administrator of the said estate, whereby the entry of said judgments was unlawful for want of proper parties on the record and for the reasons aforesaid, the executions and sales thereunder passed no title to the said David H. Watts in the partnership assets and estate aforesaid, and especially as to the interest and share of the estate of the said William Harvey, deceased, therein.

The bill prayed discovery; that the sheriff's sale of the partnership assets and estate aforesaid unto the defendant be declared null and void; that the defendant be decreed to account for the property, assets and estate of the said partnership as conveyed to him as the sheriff's vendee thereof and all matters relating thereto, and to pay the plaintiff the amount of the said judgment with interest and costs thereon.

The defendant demurred. The Court sustained the demurrer and dismissed the bill. The plaintiff took this appeal and assigned as error the dismissal of the bill.

Samuel Wakeling, for appellant.

Paul as surviving partner had no right to confess the judgment. The partnership was dissolved by Harvey's death, and after dissolution of a partnership one cannot confess judgment against all who were partners without the express authority of those not signing the confession, even although for a debt bona fide due the late partnership.

Castle *v.* Reynolds, 10 Watts, 51.
Bennett *v.* Marshall, 2 Miles, 436.

In the present case the partnership was actually dissolved, the articles of co-partnership did not create a new partnership, and the business was continued in accordance with the intent of the parties for the purposes of preventing a sacrifice of assets and giving the surviving partners the opportunity of closing the business for the benefit of all persons interested therein.

R. O. Moon, for appellee.

"One partner may confess a judgment in the name of the firm of which he is a member, which will authorize a sale of the interest of all the partners in partnership property."

Kneib *v.* Graves, 72 Pa. 104.
McDonald *v.* Simcox, 98 Id. 619.
Grier *v.* Hood, 25 Id. 431.
Ross *v.* Howell, 84 Id. 129.
McCleery *v.* Thompson, 130 Id. 443.

May 31, 1899. GREEN, J. The articles of agreement in this case were executed on May 7, 1894, and provided for the creation of a partnership between the parties, to continue for the period of five years and six months from the first day of January, 1894. The partnership, therefore, would continue under the agreement until the first day of July, 1899. The articles contained a provision that in case of the death of a partner during the term, his executors or administrators might elect that the business should continue during the term for the benefit of the persons entitled under the deceased. Further provisions required that annual settlements should continue as before and

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that the share of the deceased partner in the profits should be carried to his credit and should be paid to his representatives. It was also provided that if the representatives made no election within three months after the death of the partner the business should be continued until the following first day of July, and then closed. It was alleged in the bill and was the fact, that the partner, William Harvey, died on the twenty-third day of November, 1894; that no election was made by his administratrix to continue the business under the articles, nor were any arrangements made for closing the business on the first day of July, 1895, or for the settlement of its affairs and the liquidation of its liabilities. And it was also alleged in the bill, and was the fact, that the business of the firm was continued after the death of William Harvey, with the full knowledge and consent of Althea N. Harvey, the administratrix of his estate, and was "conducted by the surviving partners with the capital, assets and estate of the said partnership, under the name of William Harvey and Company at its then existing place of business at Venango and Ruth streets, in the city of Philadelphia, and its salesroom in the city of New York, until the fourteenth day of March, A. D. 1896, at which time the business became insolvent."

It is at once apparent that the business of the firm was carried on by the surviving partners in the firm name and at the same place, after as before the death of Harvey, on November 23, 1894, and until the fourteenth day of March, 1896, by and with the full knowledge and consent of his personal representative, and that no arrangements were made for the dissolution of the firm, or closing its business at any time after his death. In such circumstances it must be considered that the administratrix had in point of fact exercised her right of election to continue the business, as no formal mode of expressing such election was prescribed by the articles of partnership. The period of time during which the firm business was thus carried on was upwards of sixteen months, and it cannot be doubted that she would have been entitled to share in the profits of the business during that time had any been made. Nor was any agreement for dissolution made on March 14, 1896, and although judgments were on that day confessed in favor of several partnership creditors against the firm, which were followed by executions and sales of the partnership property, and possession thereof taken by the purchaser, and the purchase money divided between the execution creditors, no objection either to the confession of the judgments or the seizure and sale of the partnership property was made by any member of the firm nor by the administratrix of the deceased partner. All of the confessions of judgment were signed by William H. Paul, one of the surviving partners, in the name of the partnership, "William Harvey & Co." The debts for which the judgments were confessed must be presumed to be partnership debts, because there is no allegation in the bill filed to the contrary, nor in the history of the case, nor in the argument for the appellant, and the judgments were ostensibly confessed by the partnership. The circumstance that the entry of the judgment included the name "Estate of William Harvey," in the enumeration of the persons who composed the partnership, is of no consequence, as the judgment was actually entered against the firm in the firm name, and that is sufficient to bind the firm assets. It is a mistake to assume that the death of William Harvey dissolved the partnership, and it is of no service to cite authorities to show that the power of a partner to confess a judgment against the firm expires with the dissolution of the firm. The articles having provided for the continuance of the partnership after the death of a partner, dissolution did not necessarily follow as the result of such death. It is not necessary to cite authorities in support of the proposition that partnerships may be continued by agreement of the parties after the death of a member.

In these circumstances all the authorities concur, and it is really not disputed, that a judgment may be confessed for a partnership debt by one member of a firm without the consent of the other members, and that under an execution issued upon such a judgment the property of the firm may be sold and the purchaser will take a good title. A slight reference to a very few of the decisions will suffice.

Thus in Grier & Co. *v.* Hood, 25 Pa. 430, we held that one partner has power to confess a judgment against the firm for a partnership debt. If one partner confesses a judgment against the firm for a partnership debt, another creditor of the firm can interpose no objection to the judgment on that account. A sale of partnership property, on execution issued upon a judgment confessed by one partner alone against the firm for a partnership debt, will vest a good title to the property in the purchaser; and such execution being the first lien will be entitled to the proceeds of the sale. KNOX, J., delivering the opinion, said: "It is the equities between the partners, rather than those of the creditors, which are recognized in the distribution of firm assets, and creditors are not even permitted to make an objection to a judgment, because it may have been given by one partner in the name of the firm for a firm debt. . . . So far as the judgment affects only the property of the firm, it is good if

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obtained in the firm name, against any representative of the firm, and there is no reason why it should not be, for the individual partner has full power and authority to apply the property directly to the payment of the debt. He may even assign the whole of the partnership effects for a bona fide partnership purpose (6 W. & S. 301) and what he can do by his own act, he may cause to be done by operation of law."

Under this ruling it is not a matter of the least consequence whether the administratrix of William Harvey consented to the confession of the judgment or not, or whether she had knowledge of it or not. Neither her consent nor her knowledge was necessary to give validity to the judgment.

In McNaughton's Appeal, 101 Pa. 550, the present Chief Justice delivering the opinion, said: "One of the general incidents of the partnership relation is the right of each partner to apply the firm assets to the payment of its liabilities: and following out that principle, it has been held that one of several partners may justly subject the joint property to levy and sale in discharge of partnership indebtedness, by giving a judgment note therefor in the name of the firm, as was done by Kingsland in this case."

Other authorities to the same effect are Kneib *v.* Graves, 72 Pa. 104; McDonald *v.* Simcox, 98 Pa. 619; McCleery *v.* Thompson, 130 Pa. 443.

We are clearly of opinion that the learned Court below was entirely right in sustaining the demurrer and dismissing the plaintiff's bill.

Decree affirmed and appeal dismissed at the cost of the appellant.

H. B.

Jan. '98, 251. Supreme Court. January 24, 1899.

Schleicher v. United Security Life Insurance and Trust Co.

Contract—Satisfaction.

A contract whereby one party is to manufacture an appliance for another, and, in case of any difficulty as to the work giving satisfaction, the other is to make it entirely satisfactory or take it away and replace it with one that will be so, contains by implication a provision that a reasonable opportunity shall be afforded the manufacturers to make the machine, if unsatisfactory, satisfactory.

Appeal of the United Security Life Insurance and Trust Company, defendant, from the judgment of the Common Pleas No. 1, for Philadelphia County, in an action of assumpsit brought by James Schleicher and Adolf Schleicher, trading as Schleicher, Schumm & Co.

This was an action to recover the price of an elevator. On the trial, before BIDDLE, P. J., it appeared that the terms of the contract were contained in the following letter of the defendant:

"Philadelphia, Oct. 25, 1888.

"Messrs. Schleicher, Schumm & Co.

"Dear Sirs:—We hereby accept your proposition for putting in our building, 603 Chestnut street, an elevator to run from the basement to the fourth floor for the sum named in your proposition, that is, $3405 for this entire work, when completed and working to the entire satisfaction of this company. The whole work and material to be of the best, and should there be any difficulty as to the work giving satisfaction, then you are to make it entirely satisfactory or to take it away and replace it with one that will be so. The whole work to be completed not later than December 20, and if not done at this date, then a penalty of say five dollars a day will be allowed for any time over this.

"Respectfully yours,

(Signed) "WILLIAM VERNER,

"President."

This letter the plaintiffs answered by another which contained the following: "We have your favor of the 25th with acceptance of our offer for engine and elevator, which is in order, excepting, however, that in case of delay from causes not within our control, the forfeit is not to take effect."

The defendant gave evidence that the machine was unsatisfactory and that they had rejected it on that account. There was a conflict of testimony as to whether a sufficient opportunity was given to plaintiffs to make the machine satisfactory.

The defendant submitted, inter alia, the following points, all of which were refused by the Court:

"1. That under the terms of the contract, the money for the elevator was to be paid for the entire work, only when completed and working to the entire satisfaction of the defendant company. That being so, the question of the running and working of the elevator was left to the judgment of the said defendant company, and unless there was caprice in the exercise of their judgment, the plaintiffs were bound by it, and in that event your verdict must be for the defendant.

"2. That the evidence in this case, and especially the correspondence, shows that the objections which were made to the elevator at various times were made in good faith, and many of them were recognized as being just by the plaintiffs, who attempted to remedy them. That being so, as a matter of law, the judgment of the defendant corporation was exercised fairly and not capriciously; therefore your verdict must be in its favor.

"3. That it having appeared from the evidence in this case that the elevator was completed sufficiently to enable the defendant, by riding passen-

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gers in it and otherwise, to determine whether it was or would be satisfactory, therefore the rejection of the elevator by the defendant company was not premature, and under the terms of the contract not being satisfied with it, the company had a right to reject it; therefore your verdict must be for the defendant.

"4. That it having appeared from the evidence in this case that the elevator was so far completed as to enable the United Security Life Insurance and Trust Company to understand how it would operate; therefore the company was not bound to wait an unreasonable time for the entire completion of some minor matters, but the plaintiffs having agreed to complete the whole work not later than December 20, 1888, and the cause of the delay in its completion being within the control of the plaintiffs, defendant company had the right to reject it as being unsatisfactory; therefore your verdict must be for the defendant.

"5. It having appeared from the evidence that as late as the month of June, 1889, the elevator had not been completed, defendant company by this lapse of time was justified in rejecting it, and therefore your verdict must be for the defendant.

"6. If the jury believe from the evidence that the defendant company, in order to assist them in exercising their judgment as to the construction and working of the elevator called in an impartial expert for the purpose of making an examination thereof and a report, then that fact shows that there was no caprice in the exercise of the judgment of the defendant company in rejecting the elevator; therefore your verdict must be for the defendant." (Assignments of error first to sixth.)

"8. That under all the evidence your verdict must be for the defendant." (Ninth assignment of error.)

In the general charge the Court said:

"So that the main question for you to decide in this case is this: Do you believe that they had a fair and reasonable opportunity to finish this machine and tender it to the defendant; or, do you believe they had a reasonable opportunity if it was unsatisfactory to make it satisfactory? If they had not, your verdict should be for the plaintiffs." (Seventh assignment of error.)

Verdict and judgment for plaintiffs, $5232.92. The defendant took this appeal and filed assignments of error as above indicated.

J. Campbell Lancaster and *William Henry Lex*, for appellant.

The contract required that the elevator should be satisfactory to the defendant, and while it could not reject it for a mere caprice, yet a bona fide rejection by it as unsatisfactory was a defence to the action.

Singerly *v.* Thayer, 108 Pa. 291.
Seeley *v.* Welles, 120 Id. 69.
Sidney School Fur. Co. *v.* Warsaw Sch. Dist., 130 Id. 76.
Stutz *v.* Coal & Coke Co., 131 Id. 267.
Howard *v.* Smedley, 140 Id. 81.
Kennedy *v.* Poor, 151 Id. 472.
Boiler Works *v.* Schnader, 155 Pa. 394.

John G. Johnson, for appellees.

The contract, though requiring the elevator to be completed to the satisfaction of the owner, gave to the contractor, by express words, a reasonable opportunity, if the same should not be found satisfactory, to make it so.

In the absence of express words, allowing the contractor a reasonable opportunity to make the elevator satisfactory after completion, such opportunity was his, under the law as laid down by this Court.

Boiler Works *v.* Schnader, 155 Id. 394.

The jury were rightly charged, that though there was an absolute right in the appellant to demand that the elevator should be finished to its satisfaction, it was its duty to give a reasonable opportunity so to finish it.

May 15, 1899. STERRETT, C. J. In view of the provisions of the contract between the parties, and the evidence as to what was done thereunder, etc., the learned president of the Court below rightly refused to affirm defendant company's first six points for charge, "except as answered in his general charge." Each of these points is practically a request for binding instructions in defendant's favor, and neither of them could have been affirmed, as presented, without ignoring the questions of fact referred to in the seventh specification, and upon which the case was properly submitted to the jury by whose verdict those questions were determined in plaintiffs' favor.

For substantially the same reason, the defendant's last point: "That under all the evidence your verdict must be for the defendant," was rightly refused without any qualification.

The first six and the ninth specifications are therefore dismissed without further comment.

After referring, in his general charge, to the plaintiffs' contention and commenting thereon, the learned trial Judge proceeded to instruct the jury thus:

"On the other hand, it is contended by the defendant that even if they were entitled to a moderate delay, they were not entitled to the delay they claim, and throughout this whole work they (the defendant company) gave every opportunity that they thought reasonable to have all the faults corrected, and when they were applied to, asking other opportunity to do so, they did not hesitate

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to grant the request. So that the main question for you to decide in this case is this: Do you believe that they had a fair and reasonable opportunity to finish this machine and tender it to the defendant, or do you believe they had a reasonable opportunity if it was unsatisfactory to make it satisfactory? If they had not, the verdict should be for the plaintiffs. If, however, you think the defendant did all it agreed to do and gave every opportunity a reasonable man had a right to ask to have this thing perfected, then your verdict should be for the defendant."

About the latter half of this quotation—excepting the last sentence thereof—commencing with the words, "So that the main question," etc., constitutes the seventh specification.

Without unnecessarily consuming time by referring in detail to the evidence relating to the subject matter of that part of the charge complained of, it is enough to say that it was quite sufficient to justify the instructions above quoted, part of which only are recited in the specification. There was, therefore, no error in thus submitting to the jury the questions of fact presented by the evidence; and the verdict in plaintiffs' favor necessarily implies a finding by the jury, in their favor, of the facts submitted to them.

The instructions recited in the eighth specification are merely explanatory of those which preceded, and are free from error.

We find nothing in any of the specifications that requires further notice. The case appears to have been carefully and accurately tried, and the judgment should not be disturbed.

Judgment affirmed.

H. B.

Jan. '99, 1. Supreme Court. March 21, 1899.

Cope's Estate.

Sale of personal property — What constitutes — Constructive delivery.

A collector, A., was in the habit of stopping at the store of B., whenever the latter had a new selection of prints, and after looking over them would select certain of them and say, "Put them away for me," "I will take this," or "I will take that," and the prints were thereupon put away in a drawer to which the salesman and A. alone had access. The prices were marked on the prints, either by A. or the salesman in his presence. It appeared that A. was in the habit of making mats and making short notes about his pictures, and when he had done this, he would take them to his home, catalogue them and put them in portfolios. No bills were sent to A. until he took away the prints, and then only for those thus removed; the others were charged up against A., and were not thereafter included in B.'s stock. After A.'s death, B. presented a claim against his estate for the value of a large number of prints still in the drawers:

***Held*, that the circumstances above recited constituted an absolute sale.**

Appeal by Henry T. Coates & Co., from a decree of the Orphans' Court of Philadelphia County, dismissing the exception to the adjudication in the estate of Edwin R. Cope.

The facts are stated in the opinion of the Supreme Court, infra.

The auditing Judge, ASHMAN, J., dismissed the claim for all except the balance of $880 due on prints actually delivered prior to the death of Edwin R. Cope.

Exceptions to this finding were filed, and, after argument, dismissed by the Court in banc. Thereupon this appeal was taken, assigning for error this action of the Court.

John G. Johnson, for appellants.

As to what constitutes a sale of personal property. See—

Benjamin on Sales, sec. 1.
2 Kent's Com., 515.
Gardner *v.* Lane, 12 Allen, 39.
Heilbutt *v.* Hickson, L. R. 7 C. P. 449.
Blackburn on Sales, 147.
Dixon *v.* Yates, 5 Barn. & Ad. 313.
Com'th *v.* Hess, 148 Pa. 104.
Dennis *v.* Alexander, 3 Id. 51.
Scott *v.* Wells, 6 W. & S. 367.
Bigley *v.* Risher, 63 Pa. 155.
Bowen *v.* Burk, 13 Id. 148.
Huthmacher *v.* Harris, 38 Id. 498.
Proctor *v.* Jones, 2 Car. & P. 532.
Rohde *v.* Thwaites, 6 B. & C. 388.
Simmons *v.* Swift, 5 Id. 857.

The evidence found by the auditing Judge establishes a sale. Out of a large number of engravings submitted to him, Cope selected those which pleased him, and "requested the firm to lay aside for him until he should be prepared to receive and arrange them at his dwelling house." The price was named to him; was approved by him; and, in his presence, was marked by him or by the salesman upon the backs of the engravings. These were put in drawers separately appropriated to his use. From time to time, as he desired, without consulting anybody, and without any further bargaining, he took away these prints and made a memorandum or list of the same and (from the original markings on the back) the prices to be charged against him. He directed the salesman, concerning each engraving, to put it away for him, or he said, to him, "I will take it." In obedience to this direction, the engravings were put away in the drawers specially reserved for him and to which he and the salesman alone had access.

What remained to be done to make the sale complete? The articles were selected and designated; the price was fixed, and the prints were

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deposited in a special place, in pursuance of Cope's directions. Thereafter, he treated them as his own, and took them away to be mounted as he pleased.

All the other facts were consistent with and corroborative of a sale.

Samuel Gustine Thompson, for appellee.

The proofs in this case show:

No contract of purchase on the part of decedent.

No sale on the part of appellant.

No charge in appellant's book as evidencing any sale.

No books offered in evidence.

No delivery of these prints claimed to have been sold.

No bills rendered for the same, although bills were rendered almost monthly for other prints, which had been delivered to decedent, and by him paid.

May 23, 1899. STERRETT, C. J. This appeal is from the decree of the Court below disallowing appellant's claim of $8037.55, for books and engravings sold by them to said decedent, except to the extent of $880, which represents the value of goods delivered at his home.

Mr. Cope, the decedent, was a gentleman of independent fortune and of literary and artistic tastes. For many years he had been an extensive purchaser of books and engravings from appellants. During the last three years of his life, his payments to them aggregated over eleven thousand dollars.

The nature of appellants' present claim, for balance disallowed by the Orphans' Court, will perhaps be best understood by referring to the testimony of witnesses examined in support thereof. Col. J. E. Barr, their salesman, testified, inter alia, as follows: "Mr. Cope came to the store every time, I think, that he came to town; made it a place where he always stayed, and when any new invoices of prints came in, I would always tell him and he would come in and go over them,—look at them,—and if there was anything he liked he would say: 'Put them away for me,' 'I will take this' or 'I will take that,' and I put them away in the drawers. Q. Were they put in general drawers or special drawers? A. Special drawers set apart for him, with nothing else in. Q. And drawers to which he had access? A. He and I; nobody else touched them. . . . . Q. Would the prices be named? A. He would ask the price, and I would give it to him; mark it on the prints. . . . . Q. These prints, after he bought them and the price agreed upon marked and put away in his drawers, and did he get them from time to time? A. If you will allow me to tell you, Mr. Cope was in the habit of making mats for his own prints, and making little biographical sketches on the back of each, and then put them away into portfolios and catalogue them, and in that way he would take them home as fast as he could do that, and put them away in proper portfolios; and in that way the prints in the store would accumulate faster than he could take them home. He did not want them at home lying about, because they were fine prints, and he just took enough home from time to time, to catalogue and mat them and put them away in the portfolios; and in the meantime invoices came from all parts of the world and he would see them and select what he wanted, and they were put away in these drawers. Q. And then, as he finally took them away, you sent a bill for them? A. Yes, sir. Q. You did not send a bill until he took them away? A. Oh, no. Q. He was a peculiar man, was he not? A. Yes, sir; he would make his own list, when he would take them home; he would bring the list, which he would hand to me and tell me to charge them up. Q. Were those put aside in those drawers for approval or actually sold? A. No; absolutely sold. I would not dare to take them out. Q. They were his? A. Yes, sir."

Appellants' bookkeeper testified that charges were made and bills rendered in the manner sworn to by Col. Barr, their salesman. He further testified: "Q. When you took account of stock each year, including these drawers, did you put that in your general stock, or how did you charge the amount in these drawers? A. It was charged up to Mr. Cope, so that we would not take it into stock each year. Q. On your book it would appear as charged each year? A. Yes, sir. Q. (By Mr. Thompson.) It was a memorandum merely for the purpose of showing where the goods were in your account of stock; of course it was that. A. Showing where they were. Q. That is all? A. They were not belonging to us at all; they were not included in our stock. Q. But you never rendered any bill for them, of course? A. No."

On behalf of the appellee, evidence was offered to show that the decedent always paid his bills promptly, and at the time of his death left no other outstanding accounts, except for medicine and medical attendance. It was also attempted to be shown by a salesman of the publishing house of J. B. Lippincott & Co. that decedent was in the habit of having books laid aside for inspection. This testimony was as follows: "Q. Was it not, at times, a habit of his to have set aside the books, that he would come back and confirm or disaffirm? A. No, sir. Q. He was always prompt in his payment? A. If he wanted

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a book, he would say, 'I will take it.' If I said to him, 'Perhaps you would like to look at it a different time,' he would say, 'No, he did not want it.' He was a man that would make up his mind in a very little time if he wanted an article."

This testimony on behalf of the appellee, so far as it has any bearing on the case, is corroborative of appellants' witnesses and tends to support their contention.

The learned auditing Judge, who was sustained by the Court in banc, held that there was no contract of sale, "because the minds of the parties did not come together in a common intention." In this we think he was mistaken. The evidence to support the auditing Judge's conclusion is far from being satisfactory. In examination in chief of appellants' saleman, Mr. Barr, he was emphatic in his assertion of an unconditional sale, and this was reiterated by him on cross-examination. In endeavoring to strengthen appellee's line of defence, he was asked on cross-examination: "Q. Was it not your habit of showing him prints, and was it not his habit to look at them and then come back and, having concluded to take them, to order them? A. I never put these away until he told me to do so. Q. Did he not tell you to lay these aside? A. No, sir; I never laid any prints aside for Mr. Cope." The language employed by the decedent is entirely consistent with a consummated contract of sale. The conduct of appellants was uniform in treating the transaction as a sale. In every case, the selected engravings were marked with their respective prices, separated from the common stock and made accessible to the decedent and Mr Barr alone, then charged to him and never thereafter carried into the general stock. The learned auditing Judge attached too much importance to the fact that the bills were not rendered until the goods were taken away. There is nothing in that circumstance that is inconsistent with an absolute sale, especially when we consider the uniform course of dealing, which the decided weight of the evidence shows the parties themselves adopted. The appellants were under no obligation to notify Mr. Cope of the charge. It would not have been in accord with their mutually recognized mode of dealings, and might have resulted in the loss of a valuable customer. If it had been sought to establish the contract of sale by the dealings of the parties alone, without regard to the evidence of their mutual understanding in relation thereto, there might be some force in the position contended for by the appellee; but, the direct evidence of a sale and mutually understood mode of delivery, in drawers specially designated as receptacles for decedent's purchases, is positive and uncontradicted, except by the circumstances relied on by the appellee. Unfortunately for him, none of those circumstances are inconsistent with a sale.

It follows from what has been said that the assignments of error must be sustained.

Decree reversed at appellee's costs and ordered that the record be remitted to the Court below with instructions to allow the residue of appellants' claim. W. M. S., Jr.

Jan. '98, 371. Supreme Court. February 7, 1899.

Farnum's Estate.

Appeal of the Pennsylvania Company for Insurances on Lives etc., Trustee.

Will — Interpretation of — "Shares" — Accumulations.

The testator, by a codicil to his will, directed that out of the shares of his daughters, as fixed by the will, there should be paid to them respectively, on their arrival at the age of twenty-one years, a sum of $20,000. He then directed his executors to divide all the residue of his estate into as many parts or shares as there might be children or issue of a deceased child or children living at the time of his death, and the share or shares respectively of any child or children so living at the time of his death to grant, assign and pay over to a trustee to invest the same and hold such share or shares in trust for such child or children severally and respectively:

***Held*, that the words "share" and "shares" as thus used in the will clearly imported share or shares in the residue of the estate, and the $20,000 should be paid out of the principal.**

The provision for accumulations in the will is void under the Act of April 18, 1853, and the whole amount of unlawful accumulations belongs to the cestui que trust, and must be paid to her absolutely.

Appeal of the Pennsylvania Company for Insurances on Lives and Granting Annuities, trustee for Elizabeth Farnum, under the will of J. Edward Farnum, deceased, from the decree of the Orphans' Court of Delaware County, dismissing exceptions to an auditor's report.

The Pennsylvania Company for Insurances on Lives and Granting Annuities, trustee under the will of J. Edward Farnum, filed its account which was referred to Orlando Harvey, Esq., auditor, by whom these facts were found, as follows:

"J. Edward Farnum died, domiciled in the county of Delaware, Pennsylvania, on May 15, 1884, having first made and published his last will and testament and codicil thereto, dated respectively March 27, 1874, and December 23, 1881, duly proven and registered in the office of the register of wills for the county of Delaware aforesaid, and by whom letters testamentary were duly granted thereon to Eliza L. Farnum, widow

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of the testator, and executrix named in said last will and codicil thereto.

"In and by his said last will he did, inter alia, provide as follows: 'I direct my executrix, as soon as possible after my death to divide all the residue of my estate, real and personal, into as many parts or shares as there may be children of mine, or issues of a deceased child or children, living at the time of my death, such issue collectively taking the parent's share, and the share or shares of such issue of a deceased child or children to grant, assign, pay and deliver to them, severally and respectively their heirs, executors, administrators and assigns; and the share or shares respectively of any child or children of mine so living at the time of my death, to grant, assign, pay and deliver to the Pennsylvania Company for Insurances on Lives and Granting Annuities, in trust to invest the same, if it or they shall be personalty in legal securities, and from time to time, call in or sell any securities and reinvest the proceeds, or if it or they shall be real estate to keep the same productive and hold such share or shares in trust for such child or children severally and respectively, for his, her or their sole and separate use, free from his, her or their debts, liabilities or engagements and if a daughter, from the debts, liabilities and engagements of any husband she may have or take so that the same shall not be subject to levy or execution therefor and as to the income of each of said shares to pay one-third of the same to my said wife, for the maintenance and education of such child, without any duty, however, on her part to account for the same, if she receive it in full for such maintenance and education, and as to the remaining two-thirds of such income to accumulate the same into capital until such child shall be twenty-one years of age and from and after that time to pay all income accruing on such capital to such child for his or her own use, and as to the principal or capital of each of said shares, if such child be a son to grant, assign, pay and deliver one-third thereof at each of the several ages of twenty-one, twenty-five and thirty respectively, and as to the principal or capital of each of such shares, if such child be a daughter to hold the same in trust for such daughter during her natural life for her sole and separate use so that the same shall not be subject to her debts, liabilities or engagements, or the debts, liabilities or engagements of any husband she may have or take, paying the income thereof into her own hands upon her own receipt, and in trust at her death to grant, assign, pay and deliver the principal of the share of such daughter to such person or persons as she may by will have appointed and in default of such appointment to such person or persons as would take the same, by, from, through or under me, if I had died intestate owning the same.'

"And by the aforesaid codicil to said will the testator provided, inter alia, as follows: 'Third, I also modify the provisions of my said will, respecting the shares of my daughters and do will and direct, that the trustee of their shares, shall, upon the arrival of each of my daughters at the age of twenty-one years, pay, assign, transfer and set over to such daughter, out of her share, the sum of twenty thousand dollars absolutely, or if any daughter shall have arrived at that age before the payment to the trustee aforesaid, of her share of my estate, I direct that my executrix shall make such payment and transfer of said sum of twenty thousand dollars to her directly.'

"Eliza L. Farnum, as executrix of her deceased husband's will, duly filed her account in the office of the register of wills of Delaware county aforesaid, and the balance of the decedent's estate was transferred into the hands of the present petitioner, the trustee named in said will.

"Elizabeth Farnum, one of the daughters of the decedent, and a cestui que trust named in said will, arrived at the age of twenty-one years on April 1, 1896, and immediately thereafter, to wit, upon June 16, 1896, the trustee aforesaid filed in the office of said register of wills its account of the income and accumulations to the share of the said Elizabeth Farnum, the said accumulations as shown by said account amounting to $46,785.41.

"As set forth in said petition, the said account was filed in order that it might be ascertained and determined to what extent the said accumulations during the minority of the said Elizabeth Farnum are illegal, if the same are in any way illegal, and further, in order that it might be ascertained and determined whether the legacy of $20,000, directed to be paid to the said Elizabeth Farnum upon her attaining her majority, by the terms of the aforesaid codicil, should be paid out of the said accumulations or out of the principal fund of the estate of the said cestui que trust."

The contention before the auditor was on behalf of Miss Farnum, that the accumulations directed to be capitalized by the will were valid only during her minority, and that upon her becoming of age they belonged absolutely to her, and that, therefore, the $20,000 legacy must be paid out of the principal. The trustee, contended that the legacy should be paid out of the accumulations and not out of the principal estate. The auditor found in accordance with the contention of Miss Farnum and recommended a decree directing the said trustee to pay to the said Elizabeth Farnum the amount of said accumula-

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tions as shown by the trustee's account filed, to wit, the sum of $46,785.41, and also to pay to the said Elizabeth Farnum the further sum of $20,000, being the legacy mentioned in the said codicil, out of the principal of her estate in the hands of the said trustee.

Exceptions were filed, which were dismissed by the Court, whereupon the trustee took this appeal.

John G. Johnson, (*Edmund G. Hamersly* with him), for appellant.

A. Lewis Smith, for appellee.

April 24, 1899. GREEN, J. We think the learned auditor in the Court below has correctly disposed of the question at issue in this case. By the terms of the codicil the provisions of the will were expressly modified and changed, so that out of the shares of the daughters as fixed by the will there should be paid to the daughters respectively on their arrival at the age of twenty-one years, the sum of twenty thousand dollars absolutely. The title of the daughters to these sums of twenty thousand dollars each is derived directly from the codicil, and the source from which these sums are to be taken is the principal of the estate. The testator directs his executrix to divide all the residue of his estate into as many parts or shares as there may be children, or issue of a deceased child or children, living at the time of his death, and the share or shares respectively of any child or children so living at the time of his death, he directs his executrix to grant, assign and pay over to the trustee, to invest the same and hold such share or shares in trust for such child or children severally and respectively. The words "share" and "shares" as thus used in the will must clearly import share or shares in the residue of the estate, and when the testator in the codicil uses the same words to indicate the source from which the $20,000 must be taken, it necessarily follows that it is out of the residue of the estate, which is the principal in the hands of the trustees that these legacies must be paid. That being so, the remaining considerations are very simple. It is conceded that the provision for accumulations is void, and it is only necessary to refer to the statute to learn what becomes of them. The words of the Act (April 18, 1853) are, "And the rents, issues, interests and profits so directed to be accumulated contrary to the provisions of this Act shall go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed." Under our decisions in Washington's Estate, 75 Pa. 102; McKee's Appeal, 96 Pa. 277; Grim's Appeal, 109 Pa. 391; Rhodes' Estate, 147; Pa. 277, and other kindred cases, the unlawful accumulations go to the minor absolutely upon attaining majority. The title to them is derived from the statute and is therefore not within the control of the testator. In this view of the subject it is clear that the whole amount of the unlawful accumulations belongs to the appellee and must therefore be paid to her absolutely, and the $20,000 legacy, to her by force of the codicil, and that also must be paid to her directly. We think the question is quite free of difficulty and that it needs no further discussion.

Decree affirmed and appeal dismissed at the cost of appellant.

W. C. S

Superior Court.

Mch. '99, 28. Superior Court. March 22, 1899.

Ritter's Estate.
Neff's Appeal.

Will—Judgment note—Ademption of legacy—Evidence.

A. made a will by which he left to C. $1000, and recited that his wife B. had given him her estate. B. three days later made a deed of all her property to A., reciting that out of the sum given, A.'s executors were to pay "the C. legacy of $1000 mentioned in my husband's will." After B.'s death, A. made a will revoking all prior wills and giving C. $500. This coming to C.'s ears, A. confessed to C. a judgment note for $1000, which recited the prior will and that the judgment note was to secure the payment of the $1000. After A.'s death C. claimed both the $1000 and the $500. There was evidence that A., after the execution of the judgment note, frequently said that C. would now get the $1000 instead of the $500:

***Held*, that C. was entitled to the $1000 only, and that it was not the intention of A. that she should receive both the amount of the judgment and the $500 legacy.**

Evidence to show quo animo a judgment was confessed by a testator is admissible, although its effect may be to show whether it was or was not intended as an ademption of a legacy.

Appeal of Catharine Neff, from the decree of the Orphans' Court of Franklin County, overruling exceptions and confirming the report of the auditor in the estate of Paul Ritter, deceased.

The facts are stated in the opinion of the Court, STEWART, P. J., on exceptions to the findings of the auditor as follows:

"Paul Ritter, the testator, and Hannah his wife, were each possessed of an estate; they were well advanced in life, and were childless. The wife's estate amounted to some $1200 or $1400, and has passed into the husband's hands. On January 30, 1891, she executed and acknowledged an assignment and transfer of her entire estate to her husband, the purpose of the transfer, as expressed in the paper, being 'to debar my heirs

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forever from asserting any right to said sum of money, or of disputing my husband's right thereto.' The assignment contains this reservation or condition, 'but out of said sum my husband's executor is to pay the Catharine Neff legacy of $1000, mentioned in my husband's will.'

"The will of Paul Ritter referred to in the assignment, bears date January 27, 1891, being three days prior in its execution to the wife's assignment, and contains the clause, 'After Hannah's death my executor is to sell my real estate and make good deeds for the same, and he is to collect all my personal estate, and turn it into money, and it is to be divided as follows: First, out of the proceeds of my real and personal estate I give to Catharine Neff one thousand dollars, said legacy to have preference over all other legacies and be first paid. My wife Hannah gave me as a gift her estate and I prefer that said legacy be paid out said estate so given me by my wife, but should this be consumed, said legacy is to be paid out of my other estate.'

"Shortly after this, the wife, Hannah, died, and on October 2, 1893, her husband, Paul, made another will which has been duly probated as his last will, and in which he revokes all former wills by him at any time made. This last will contains the following bequest to Tennia Neff, who, it is admitted, is identical with the Catharine Neff mentioned in the former will and in the assignment from the wife to her husband.

"'4. I give and bequeath to the said Tennia Neff, wife of George Neff, five hundred dollars in money.'

"On May 29, 1896, the testator, Paul Ritter, executed his single bill confessing judgment in favor of the same Catharine Neff in the sum of $1000, which was duly entered to No. 131 of September term, 1896, and became a lien upon the real estate. This single bill contains the following recital:

"'Whereas, Paul Ritter, of Quincy township, Franklin county, Pennsylvania, on January 27, 1891, made his last will and testament, in which among other bequests, he gave and bequeathed to Catharine Neff, of said township, the sum of $1000, to be paid to her out of his estate. The wife of the said Paul Ritter at the same time executed an instrument of writing, setting over and transferring all her estate to her husband, the said Paul Ritter. Now in order to secure to said Catharine Neff the certainty of the payment of the legacy of $1000, I hereby acknowledge myself to owe and stand indebted to said Catharine Neff,' etc.

"Ritter, the testator, died June 11, 1897. The judgment in favor of Catharine Neff has been paid out of his estate. In addition, Catharine Neff claims the legacy of $500 given her under the last will of October 2, 1893. The auditor distributing the estate, has rejected her claim to the legacy, on the ground that it was adeemed by the judgment of $1000, which had been paid her. The exceptions filed are directed to this conclusion of the auditor, and present the one issue.

"The question is one wholly of intention, and the burden is upon those who assert that it was intended by the judgment to pay and satisfy the legacy. The law raises no such presumption in a case of this kind, since the relation of parent and child did not exist between the testator and his legatee. Mrs. Neff was the testator's housekeeper. In Sprenkle's Appeal, 15 Atlantic Rep. 773, we have a clear decision that such relation raises no presumption of satisfaction from a subsequent gift.

"Nor does the contention that the judgment was given in fulfillment of this particular legacy derive any support from the written evidence of the transaction. By the terms of the single bill, it appears that it was given as substitutional for a legacy of $1000, in a will that has been revoked by testator's own act, and there is nothing whatever in the instrument to suggest that this was not its only purpose.

"It became necessary for the parties contesting to resort to extrinsic evidence, and, under objection, they offered evidence showing the circumstances under which the several wills and the judgment were executed, and the declarations of the testator as to his own understanding of what the latter was intended to accomplish.

"As to the admissibility of such evidence, there can be no question. It was not offered to explain an ambiguity, for there is none; nor to correct a mistake in the will, nor to alter or vary any of its terms, but simply to discover what purpose was in the mind of Paul Ritter when he executed the judgment note. That purpose, whatever it was, must govern.

"The legacy of $500, given in the last will was either intended to be additional to the $1000 legacy in the earlier will, or, it was the same legacy reduced in amount, that is to say, if not the former, it was intended to take the place of the larger legacy and was a substitute for it. It is important to determine which it was, because if intended as an additional legacy, it is manifestly outside of the operation of the judgment note; if, on the other hand, it was intended as a substitute, and the object in giving the judgment note was to fulfill the whole purpose of the original legacy, in such case the later legacy being identical with the earlier, except as changed in amount, would also find its fulfillment in the judgment.

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"On a careful consideration of the case we find nothing that leads us to suppose that an additional legacy was intended. On the contrary every circumstance points to the conclusion that testator's purpose was to reduce the earlier legacy one-half. Whether it was honest in him to attempt this, in view of the fact that he had received the larger amount from his wife on condition, or promise on his part, that he would bequeath it to this legatee, or whether he could have defeated Mrs. Neff's claim to it by such act, are questions aside from our present inquiry; we are concerned only with his purpose. Not only is there no suggestion in the last will that additional bounty is intended, but all reference to the money derived from his wife, and the purpose of the wife in connection with the gift, is avoided, and the earlier will which contained a free reference to these matters, and which directed a legacy of $1000, in fulfillment of the understanding between the testator and his wife, is revoked. We dare not, under such circumstances as these, suppose that the $1000 legacy was additional. Testator was a German, with little if any knowledge of the English language, but no question was ever raised as to his intelligence. He must have known that his last will revoked the earlier one, and that with it fell the legacy of $1000. He made no reference to it in his last will, nor does he recognize in any way the liability of his estate for it, until he is brought to face the alternative of securing it for Mrs. Neff, or losing her services as housekeeper, and then he gives the judgment note.

"If then we are to regard the legacy in the last will as substitutional and not as supplemental or additional, the purpose in giving the judgment note, it would seem should embrace both legacies, unless there is something expressed in the note to indicate the contrary. Here we are met with the fact that the single bill, while clearly expressing a purpose to secure the legacy contained in the earlier will, is silent with respect to the last will, and but for the substitutional character of the later legacy, which identifies it with the earlier one, the rule that the express mention of one thing implies the exclusion of another, would leave the later legacy unaffected. But in this connection we are to have regard to the situation or circumstances of testator when he gave the single bill. This paper was prepared by a scrivener who was as ignorant of German as the testator was of English, and could only know what testator meant or what he wanted as the testator's speech was interpreted to him by men who were unskilled in legal requirements. The rule referred to is not to be applied with utmost strictness to a paper drawn and executed under such circumstances. But without relaxing the rule, its effect is fully overcome by the subsequent declarations of the testator with reference to the single bill and his understanding of its effect. The admissibility of these subsequent declarations in evidence can be established by numerous authorities. It is unnecessary to cite more than Zeiter *v.* Zeiter, 4 Watts, 214. The rule as there laid down has been steadily followed ever since in questions of this character.

"The witnesses who testify to these subsequent declarations were neighbors and acquaintances of the testator. The conversations as testified to by them, show unmistakably that it was the testator's understanding that in giving the judgment he was fulfilling the whole purpose of the earlier legacy, and of the later one as well. To Mr. Middour he said that he has 'fixed a paper down at Stoler's in Waynesboro, that Tennia would get $1000 now in place of the $500, that he had put in the will.' That they (the Neffs) had found out that he had made a will, and that they were not getting the $1000, and that they would move away and not stay with him any longer if they did not get the $1000. When Mr. Middour suggested to him that the Neffs might get both the $1000 and the $500 legacies, his reply was, 'No, Stoler fixed it for only $1000.' The other declarations proven were equally as explicit, and show beyond dispute that the single bill does not by its terms express the whole of testator's purpose in its execution.

"In view of the facts and circumstances we have referred to, we do not think that Mrs. Neff's claim to this legacy of $500, can be enforced consistently with equity and good conscience. She has already received payment of her judgment, and we are convinced that to allow her this legacy in addition, would be a pro tanto duplication of payment. We agree with the auditor in his conclusions.

"And now, November 19, 1898, the exceptions to the auditor's report are overruled, and the report is confirmed."

Catharine Neff took this appeal.

The errors assigned were the confirmation of the auditor's report, and the admission of certain evidence.

J. A. Strite, for appellant.

The relations between this testator and this legatee were such as to render the evidence not admissible. No presumptions here arise, and parol evidence cannot therefore be admitted to repel or support them. There are certain cases in which parol extrinsic evidence is admissible; e. g., first, if the testator is the parent of the legatee; second, if the testator stands to the legatee in loco parentis; third, if the testator gives a

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legacy to a stranger for any particular purpose, and the testator subsequently makes a payment, advancement or gift for the same purpose. In all these cases such payment, advancement or gift is presumed to be and will operate as a satisfaction of the legacy. Parol evidence is in these cases admissible for the purpose of repelling or strengthening the presumption, and is not admissible in other cases or for other purposes.

1 Pomeroy's Eq. Jur., sec. 562.
Zeiter *v.* Zeiter, 4 Watts, 214.
Miner *v.* Atherton, 35 Pa. 528.
Zeigler *v.* Eckert, 6 Id. 13.
Gill's Estate, 1 Parsons, 139.
Keiper's Appeal, 124 Pa. 198.
Ursinus College's Appeal, 23 WEEKLY NOTES, 261.

Testator's intention is clearly expressed in writing in the single bill itself.

1 Pomeroy's Eq. Jur., sec. 570.
Kirk *v.* Eddowes, 3 Hare, 521.
DeGroff *v.* Terpenning, 14 Hun, 301.

W. U. Brewer, (*O. C. Bowers* with him), for appelleees.

May 1, 1899. BEAVER, J. It will serve no useful purpose to recount the facts fully stated in the opinion of the President Judge of the Court below. They were found by an auditor and concurred in by the Court; but it is said that they were based upon the testimony of a witness whose testimony was not competent and should have been excluded. The appellant argues the admissibility of the testimony as though an effort were being made to reform or vary the terms of the will and that, therefore, the testimony of two witnesses or what would be at least equivalent thereto is necessary, but this is not the case. There is no effort to reform the will or to vary its terms in any way. The sole question is one of the intention of the testator in giving the judgment note. If the testator had died, without executing the note upon which judgment was entered in favor of the appellant, there is no question as to what the result, so far as appellant's interests are concerned, would have been. She would have taken under the last will, the provisions of the first will being annulled by the later one. Did the testator, by recounting in the note the provision which had been made for the appellant in his first will, intend thereby to continue the provision made for the appellant in both of his wills, or did he merely intend to assure to the appellant the amount of the legacy named in his first will? We are of the opinion that, from an examination of the papers themselves, the latter statement expressed the intention of the testator; but whatever differences of opinion there may be as to the intention of the testator, viewed from the papers themselves, there can be little question in regard to it, when the testimony of Stoler, the justice of the peace, who prepared the judgment note, and Middour, to whom the plaintiff frequently communicated his intentions, is considered. The appellant and her husband became uneasy, fearing that the testator might in some way have done something to deprive them of the legacy specified in the first will, and proposed to leave his employ. Possibly they may have suspected or become satisfied of the existence of the last will. The suggestion as to a mode of providing for the payment of the amount of the legacy mentioned in the first will came from the justice of the peace who prepared the judgment note upon which judgment was entered, and which was paid to the appellant by the executor, before the distribution of the estate; but it is to be borne in mind that the appellant and her husband were insisting upon some provision which would secure it to her. After the execution of this judgment note, the testator frequently expressed himself to the witness Middour, stating that Tennia (meaning the appellant) would get $1000 now in place of the $500. By making his second will, the testator simply changed his mind as to the amount which should be paid after his death to the appellant, and the execution of the judgment note was equivalent to another change of mind and to an agreement with her that, under no circumstances, should she receive less from his estate than $1000, but the very terms of it show that it was not intended to secure to her the amount therein mentioned in addition to the testamentary provision for her.

There was abundant testimony, entirely competent, upon which to base the auditor's findings of fact, the distribution made by him was undoubtedly in accordance with the testator's intentions and they must govern. The execution and delivery of the judgment note was equivalent to an ademption of the legacy, and, when it was paid, the appellant's interest in the testator's estate was extinguished, except as to the interest thereon from the time of his death, which was allowed by the auditor.

The distribution made by the auditor, as confirmed by the Court, was based upon the intention of the testator, ascertained properly, upon competent testimony, and the decree of the Court, overruling the exceptions to his report, was entirely proper, for the reasons stated in the opinion accompanying the decree. Decree affirmed and appeal dismissed.

W. C. S.

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Apr. '99, 231. Superior Court. May 2, 1899.

Fry v. Flick.

Parol contract — For sale of land — Measure of damages — Question for jury — Specifications of error.

A plaintiff who has expended labor and money on faith of a parol contract for the sale of land, may recover the value thereof as damages for a breach of that contract.

Where no objection is raised on the trial to the admission of evidence or any request made for instructions, no error is committed in submitting the issue of fact raised by the evidence as given, to the jury for their determination.

Where the specifications of error do not conform to the rules of Court, an appeal may be dismissed.

Appeal of Philip Flick, defendant, from the judgment of the Common Pleas of Cambria County, in an action of assumpsit by E. D. Fry, for breach of parol contract for the sale of land.

On the trial, before GREER, P. J., the facts appeared as follows:

The defendant asked the plaintiff to join with him in the purchase of certain land from one Storm. The plaintiff stating that he had no money, was told that he could get time. The land was purchased on May 25, 1895, and the deed was made to the defendant, the plaintiff giving his note for half the purchase money. This note was afterwards paid with money obtained by the plaintiff from an outside source. The plaintiff entered on the land and did considerable work in its improvement. An unsuccessful attempt was made to make partition between the plaintiff and defendant, and later the defendant notified the plaintiff to do no more work until the dispute as to the division line was settled. The plaintiff, however, continued to do some work, and there was a conflict of testimony as to the notice and settlement; there was also a conflict as to whether the defendant tendered a deed or not. The plaintiff filed a bill for specific performance of the parol contract of sale of one-half of the property bought from Storm, which bill was dismissed on the ground that the contract was within the statute of frauds. The Court submitted the case to the jury with the instruction that if they found the contract, as alleged by the plaintiff, they should allow him for the expenses incurred on the faith of the contract. Verdict and judgment for plaintiff, $335. The defendant took this appeal and filed the following assignment of error:

"The Court erred in not deciding as a question of law, that Fry could not recover for work and money expended on the land; that knowing or having the means of acquiring the knowledge, that he had no title to the land or any portion of it, and having been notified in July and August, 1895, not to trespass, he is estopped from claiming for work and labor done and money expended on the land. Whether the estoppel resulted from the established facts, was a question for the determination of the Court, and the Court erred in not so determining. The Court further erred in instructing the jury that if Flick did not tender the deed they should find for the plaintiff, when Fry in his statement swears that it was tendered."

F. A. Shoemaker, for appellant.

Before the party is concluded by an estoppel it must appear that he has made an admission which is clearly inconsistent with the evidence he proposes to give or the title to the claim he proposes to set up; that the other party has acted upon the admission.

Waters's Appeal, 35 Pa. 523.
Com'th v. Moltz, 10 Id. 527.

A party is concluded by admissions or conduct upon which others have been induced to act.

Mecouch v. Loughery, 12 Phila. 419.
Crest v. Jack, 3 Watts, 240.
Carr v. Wallace, 7 Id. 400.
Hepburn v. McDowell, 17 S. & R. 384.

Alvin Evans, (with him *M. D. Kittell* and *P. J. Little*), for appellee.

The testimony in this case shows that the parties to this action made a parol agreement of sale, that appellee relying upon said agreement expended certain money and did certain work on said land, that appellant refused to convey the title in pursuance of said parol agreement. Appellee is therefore entitled to a verdict for an amount sufficient to compensate him for money expended and work done on said land.

McCafferty v. Griswold, 99 Pa. 270.
Thompson v. Sheplar, 72 Id. 160.
McNair v. Compton, 35 Id. 23.
Hertzog v. Hertzog's Adm'r, 34 Id. 418.
Dumars v. Miller, 34 Id. 319.

May 18, 1899. RICE, P. J. This was an action of assumpsit brought to recover damages for the breach of a parol contract for the sale of land. The plaintiff's claim was for the labor and money he had expended on the faith of the contract. No question is raised as to the right of the vendee to maintain an action for the breach of an oral agreement for the sale of land nor as to the rule for measuring the damages, which is, that in the absence of fraud the plaintiff is entitled to recover compensation for the money and expenses incurred on the faith of the contract: Thompson *v.* Sheplar, 72 Pa. 160; McCafferty *v.* Griswold, 99 Pa. 270. It is argued, however, that the Court erred in not charging the jury that the plaintiff was not entitled to recover in the present case,

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because he was notified by the defendant not to trespass on the land. We might dismiss this complaint with the single statement that no request was made for such instruction: Wray *v.* Spence, 145 Pa. 399; Kitchen *v.* McCloskey, 150 Pa. 376. We will add that it would have been error to hold as matter of law that the plaintiff was estopped and therefore would recover nothing; first, because the fact of notice was in dispute; second, because a considerable part of the work had been done before the alleged notice was given; third, because the notice was that the plaintiff should do no more work there until the dispute as to the division line was "settled," and according to the testimony of some of the witnesses, it was settled before they parted, by an agreement that the plaintiff was to take three acres less than had been originally agreed. These questions of fact were fairly submitted to the jury with instructions that if a settlement was effected the plaintiff might recover for what he did thereafter under the belief that a deed would be made as the defendant promised; otherwise not. In this there was no error.

It is argued in the second place that the plaintiff was not entitled to recover, because the defendant tendered a deed which the plaintiff refused. Under the evidence, this was a disputed question of fact, and was fairly submitted to the jury. No objection was raised on the trial to the admission of the evidence, nor was any request made for instructions that the plaintiff was concluded by the averment contained in his statement of claim. Moreover he was not concluded for the statement contains no distinct admission that the deed in question for forty-seven acres was tendered, and even if it did, the mistake of counsel if one was made, could have been remedied by amendment and doubtless would have been if the point had been raised on the trial. In the absence of objection to the evidence and of a request for specific instructions the Court committed no error in submitting the issue of fact raised by it to the jury for their determination: Kroegher *v.* The McConway Co., 149 Pa. 444.

In conclusion we remark lest our silence be regarded as an approval that the specification of errors does not conform to our rules fifteen and sixteen and might well have been dismissed for that reason.

Judgment affirmed.

W. C. S.

Oct. '97, 214 Superior Court. November 21, 1898.

Osborne v. Delaware County and Philadelphia Electric Rw. Co.

Street railway companies— Servitude—Measure of damages—Expert testimony—Assignment of error.

Where a street railway company, in a street already occupied by another company, lays tracks between those of the previously constructed railway and the curb, and close to the latter, it may be regarded as a structure which imposes a permanent servitude upon the land.

In such a case the value of the property before and after the construction of the track and operation of the road is the proper measure of damages.

An assignment of error as to part of a charge of the Court must express the whole spirit of the particular point to which the attention of the appellate Court is directed, a mere excerpt from the charge of the Court is not sufficient.

Appeal of Thomas J. Osborne, from the judgment of the Common Pleas of Delaware County, in an action of trespass, wherein the Delaware County and Philadelphia Electric Railway Company was defendant.

On the trial, before CLAYTON, P. J., the facts of the case appeared as follows:

On August 3, 1892, the borough of Media, by ordinance, gave the right to the Chester & Media Railway Company to build its road on Washington street, from Vernon street to Manchester avenue, and said road was built and in operation in March, 1893, the tracks passing the plaintiff's property. On December 7, 1894, the borough passed an ordinance granting the right to the Delaware County & Philadelphia Electric Railway Company to build its road on Washington street in front of plaintiff's property, requiring it to keep its rails at least sixteen feet from the curb. When the defendant came to construct its road, the Chester & Media Railway Company objected to its tracks being used and threatened an injunction. A compromise was effected, and an agreement of crossing entered into between said railway companies, and the consent of the borough was obtained by resolution and ordinance of council, and the defendant's railway was built and the crossing made by virtue of said agreement, resolution and ordinance. This caused the defendant to build its road in front of the plaintiff's property very near to the curb.

The road of the defendant on Washington street along side of the road of the Chester & Media Railway Company was 172 feet long, making two street railways on said street for that distance, 65 feet of which is in front of plaintiff's property.

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The Court sustained objections of defendant to plaintiff's witnesses being asked how much or to what extent, in their judgment, was the plaintiff's property injured by the railway. (First and second assignments of error.)

The Court charged:

"If the construction of this second track has really inflicted a special injury upon his property he is entitled to have it. Now you understand what we mean when we speak of special damage. It means some damage that is not generally caused by the construction of the railway." (Fourth assignment of error.)

Verdict for plaintiff, one dollar, and judgment thereon. The plaintiff took this appeal, assigning for error, inter alia, as above indicated.

O. B. Dickinson, for appellant.

Where the structure is permanent and imposes an additional and continual servitude upon the land, at least one measure of damages is the depreciation in the value of the property.

Thompson *v.* Traction Co., 181 Pa. 131.
Williams *v.* Fulmer, 151 Id. 405.
Penna. R. R. Co. *v.* Montgom. Co., 167 Id. 62.
Thomas *v.* Rwy. Co., 167 Id. 120.
May *v.* Traction Co., 167 Id. 343.
Heilman *v.* Pass. Rwy. Co., 175 Id. 188.

J. B. Hannum, for appellee.

If the construction was lawful the action cannot be maintained, because the road is built on a borough street.

Lockhardt *v.* Railway Co., 139 Pa. 419.
Railroad Co. *v.* Railway Co., 167 Id. 62.
Braddock & Turtle Creek Rwy. Co. *v.* Braddock Electric Rwy. Co., 1 Dist. Rep. 44.

March 23, 1899. W. W. PORTER, J. This is an action for damages brought by a property owner against a street railway company for constructing a track on a highway opposite the plaintiff's property without his consent.

The learned trial Judge, both in his rulings upon the evidence and in the views expressed in his charge, was evidently in doubt throughout the trial as to the proper measure of damages to be applied. At an early stage of the trial, he excluded the testimony of persons, (having knowledge of real estate values in the neighborhood), offered by the plaintiff to prove the value of the plaintiff's property before and after the construction of the defendant's road. Subsequently he expressed in his charge the opinion that he should have admitted the testimony, and the case went to the jury, in part, on the question of damages on the basis of the difference in value before and after the building of the railway. The plaintiff, however, lost the effect of the testimony which he offered to present. We are of opinion that the learned Judge erred in not admitting it. It was certainly one method of ascertaining what damage the plaintiff had suffered. The opinion of the Supreme Court, in Thompson *v.* Traction Co., 181 Pa. 131, was not reported at the time of the trial of this case. It was there said, by Mr. Justice McCOLLUM, (upon facts strikingly similar to those of the case before us): "The plaintiffs were justified in regarding the railway as a permanent structure, an additional and continuing servitude on their land within the highway. They could not compel a change of grade or location, nor remove the embankment which interfered with access to their lot and was necessary to the support and operation of the railway. Their only remedy was an action to obtain compensation for the injury inflicted: Penna. R. R. Co. *v.* Montgomery County Passenger Railway, 167 Pa. 62. No good reason appears for holding that the rulings and instructions in regard to the measure of compensation were erroneous."

Referring to the rulings thus affirmed, we find that the trial Judge in that case applied the rule of difference in value before and after taking, and further, permitted testimony to be introduced showing the cost of restoring the property injured, to the condition in which it was before the injury,—restricting the application of the testimony, however, by charging that it amounted to nothing if the property was not injured in its market value. This authority is a guide for the retrial of this case.

We, therefore, sustain the first and second assignments, and so much of the fifth assignment as shows the charge to be in conflict with the views herein expressed.

The third assignment is founded on the exclusion of the testimony of the witness, Gray. The exclusion was a sound ruling. The question, upon which the final ruling was had, asked the witness to say, whether in his judgment the plaintiff's property had been damaged, and if so, how much and to what extent. It was not to draw out any fact which might aid the jury in the performance of their duty, but a request to express an opinion without showing that the witness had any facts peculiarly within his knowledge to give his opinion value as testimony.

The fourth assignment being a small excerpt from the charge, severed from the context, does not disclose inherent error, and is not sustained.

The suggestion of counsel for defendant that the plaintiff's action cannot be maintained because the construction of the defendant's railway in front of the plaintiff's propertv was but a crossing of tracks within a borough by permission, cannot be considered. It in no way arises as the case is now presented.

The judgment of the Court below is reversed, and a venire facias de novo awarded. W. D. N.

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WEEKLY NOTES OF CASES.

VOL. XLIV.] *FRIDAY, JUNE 30, 1899.* [No. 13.

Supreme Court.

Jan. '98, 408. Supreme Court. March 15, 1899.

Kreamer et al v. Fleming et al.

Dower—Merger—Revival—Practice—Sheriff's sale of land as if clear.

When a dowress purchases the fee, although as between herself and the heir it is intended that there shall be no merger of the dower, yet as to third parties such intention cannot prevent the legal effect of the conveyance; hence a purchaser of the land at sheriff's sale on execution against the grantee (dowress) takes the land discharged of the dower.

Where a guardian of children entitled to a fee conveys the same to the dowress, who covenants that the principal of her dower shall remain charged on the land until her death, she in the meantime retaining the interest, the effect is to make the part of the gross price of the land which represents the dower, not payable until her death, and then without interest.

An order that a sheriff's sale of land be made as though the land were clear of liens, and that whatever encumbrances shall be found not to be discharged shall be taken as part of the purchase money is irregular and without authority.

Crosson's Appeal, 125 Pa. 380, explained and syllabus declared incorrect and misleading.

Appeal of Margaret G. Fleming, defendant, from the judgment of the Common Pleas of Clinton County, affirming the report of an auditor appointed to distribute the fund arising from an execution against defendant at suit of Frederick Kreamer and D. L. Miller.

The facts are stated in the opinion of the Supreme Court, infra.

C. S. McCormick, for appellant.

Charles Corss, for appellee.

May 22, 1899. MITCHELL, J. An outline of the material facts, omitting details of dates, amounts, etc., will help us to get at the questions presented by this very confused record.

1. John Fleming died leaving real estate to his son, Thomas, charged with the dower of his widow, Ann.

2. Thomas died intestate leaving a widow, Margaret, the appellant, and two children.

3. On proceedings by the widow of John, the land was allotted to the guardian of Thomas' children, at the appraised value, charged with liquidated amounts representing the dowers of both widows.

4. The guardian sold and conveyed the land in fee to the appellant, widow of Thomas.

5. Appellant gave a purchase money mortgage to the guardian as vendor, covenanting to pay the shares of the children in two years, the interest on the senior widow Ann's dower to her during life, and the principal at her death, and the principal of her own dower to remain charged on the land until her death, she meanwhile retaining the interest.

6. Ann, the senior widow, died and her dower interest appears to have been settled as it does not figure any further in the case.

7. For default of payment of one of the children's shares, judgment was obtained against appellant and the land sold by the sheriff, producing the fund in Court for distribution.

It was stated without contradiction at the argument that before the sheriff's sale, appellant had conveyed her title to her daughter, Belle, and a motion is made to dismiss the appeal on the ground that appellant has no longer any interest either in the land or the fund. But as this conveyance though apparently a fact, does not appear anywhere in the record we are obliged to refuse the motion.

The auditor held that it was the intention of the parties that when appellant became owner of the land, "she was to retain her interest on her share of the mortgage only so long as she remained in possession of the property, and that should she become at any time dispossessed, the payment of interest on the dower should be resumed." And then following the cases which decide that dower is an estate and not a mere lien and that as a life estate it cannot be sold on an ordinary fi. fa. and venditioni, he held that appellant's dower was not discharged by the sheriff's sale, and by an application of this ruling which is not very clear, he allowed a credit to the purchaser of a proportionate share of the value of the dower. The appellant assigns as error that the whole amount was not treated as a continuing charge on the land.

The principles determined in the cases cited by the auditor are well settled, but they have no application here. None of the cases contained the controlling element of a purchase by the tenant in dower of the whole fee. The land was allotted to the guardian of Thomas Fleming's children in fee, subject to appellant's dower (the dower of John's widow being now out of the case) and when she purchased the children's estate she purchased the fee they had, and her own life interest merged in it. It might be that as between the parties no merger was intended, though it is not

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apparent what interest they had to support such intention, but as to third parties no such intent could control the legal effect and operation of their acts. A conveyance by appellant without express reservation of dower would have carried a clear fee and she could not have set up against it the intention of the parties in the conveyance to her. So a levy and sale by a creditor on a judgment against her would have been of the fee. The sale was in fact under a judgment on the bond accompanying a purchase money mortgage for default of one of the stipulated payments. There was no question of a discharge of dower or the sale of a life estate. The dower had merged, the sale was by a creditor on a judgment and was of the fee vested in the judgment debtor. The true effect of the covenants in the conveyance from the guardian to appellant, was only to make the part of the gross price of the land which represented her dower, not payable until her death, and then without interest.

The sale was on an ordinary judgment at law, but it was ordered to be made as if the property was clear of liens and whatever encumbrances should be found not to be discharged should be taken as part of the purchase money. As a precedent for this, Crosson's Appeal, 125 Pa. 380 is cited. But that case affords no support for such irregular and dangerous practice. At an Orphans' Court sale by an administratrix for payment of debts, the auctioneer announced by direction of the administratrix, that the property was subject to two building association mortgages, the exact amount due on which was uncertain, and therefore he would sell the property as if clear, and the purchaser would be allowed for any undischarged encumbrances as part payment on his bid. Sale was made for a sum sufficient to cover all liens, and settlement effected on these terms. On the audit of the account, the auditor following Penn Square Building Association's Appeal, 81* Pa. 330, and other cases, held that the mortgages being fixed charges could not be affected by the announcement of the auctioneer, and therefore were not discharged. He therefore surcharged the accountant for not collecting the whole bid from the purchaser. On exceptions, however, the Court reversed this surcharge and dealt with the whole case as a Court of equity, saying, "While the law as stated by the auditor is undoubtedly correct that purchasers at an Orphans' Court sale buy subject to all the fixed encumbrances, yet equity will not permit the auctioneer who is the agent of the seller at a sale of this kind to dig a pit for the unwary purchaser to fall into. . . . Under the facts of this case, this sale might well be set aside, but we think justice will be substantially accomplished by refusing this surcharge." The decision was affirmed, but it was based on the equitable result under the facts, and the controlling facts were that the property brought enough to pay all the encumbrances and be really clear as the purchaser supposed when he bid, and that there was nobody before the Court complaining of injury by the result. What the Court did was to refuse to apply the admitted general principle of law as an unbending rule to the prejudice of an innocent purchaser, or of the accountant who had got the full value of the land and distributed it to the proper parties. Had the facts been different, as, e. g., if the purchase money had been insufficient to meet the encumbrances, or if a first mortgage holder had declined to recognize the discharge of his mortgage and stood on his legal right to have it undisturbed, a very different question would have been presented. The syllabus of Crosson's Appeal as reported that "where real estate to be sold at an Orphans' Court sale is subject to fixed liens the amount of which cannot be ascertained at the time of sale, it is lawful for the land to be sold as though there were no encumbrances," etc., is misleading and should be corrected before it does any further mischief. It should read, "Where real estate subject to fixed liens, the amount of which cannot be ascertained at the time of sale, has been sold as if clear and has brought enough to pay all encumbrances and there is no one before the Court complaining of the result, the Orphans' Court as a Court of equity may decline to enforce the strict legal rule as to the discharge of liens, to the prejudice of an innocent purchaser, or of an executor who has erroneously but honestly settled with the purchaser on the basis of his bid for a clear title."

In the present case all the errors of the auditor and the Court below to which our attention has been directed were in appellant's favor, and she therefore has no right to complain.

Decree affirmed with costs to be paid by appellant.

W. C. S.

Jan. '97, 402. Supreme Court. May 3, 1898.

Costello v. Costello.

Divorce — Evidence — Witness — Act May 23, 1887, P. L. 158—March 13, 1815, 6 Sm. L. 288.

A suit for divorce is a civil proceeding, the interests of the parties clearly conflict, and if the respondent appears and defends, either party may testify fully against the other: Act of May 23, 1887, sec. 5, cl. (*c*); and under sec. 7, a party to the record, whose interest is adverse to the party calling him,

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may be compelled by the adverse party to testify as if under cross-examination.

Where the libel charges the respondent with adultery with one named, evidence showing the abandonment of an action by libellant against such person is admissible.

It is not error to sustain objections of libellant to questions by respondent put to a witness as to whether certain letters had been received by witness, embodying in the questions quotations from such letters.

It is competent to explain the failure to produce a witness by the return to an attachment issued against the witness.

Appeal of John H. Costello, libellant, from the judgment of the Common Pleas of Potter County, in a proceeding in divorce by said John H. Costello against Sarah C. Costello.

The libel in this case charged the respondent with adultery. The answer charged libellant with that offence and averred that since the time when it was alleged certain of the adulterous acts were committed by respondent the libellant had admitted respondent into conjugal embraces.

At the trial of the cause, before OLMSTED, P. J., respondent called libellant as on cross-examination. Objected to by libellant. Objection annulled. (First assignment of error.)

The Court admitted against defendant's objection, the return and attachment against a witness in behalf of libellant to explain the failure to produce the witness. (Third assignment of error.)

The Court permitted a witness to be asked whether he had received certain letters, the letters being identified by quoting them in the question. (Eighth assignment of error.)

The Court against plaintiff's objection allowed proof of the discontinuation of an action against one with whom in his amendment to libel plaintiff and had charged adultery by respondent. (Fourth assignment of error.)

Verdict and judgment for respondent.

Libellant took this appeal and assigned error as above indicated.

H. C. Dornan and *John Ormerod*, for appellant.

The Act of 1887, like the Act March 27, 1865, excludes from its provisions opposite parties when they are husband and wife.

Bronson v. Bronson, 8 Phila. 261.

Proceeding in divorce is rather criminal than civil.

Faussett v. Faussett, 7 Notes Ecc. Cases, 72.
King v. King, 2 Robt. Ecc. 153.

A wife plaintiff in an ejectment where her husband is defendant cannot be called as on cross-examination by defendant.

Wells v. Bunnell, 160 Pa. 460.

The proof of the institution and discontinuance of the suit for the alienation of the respondent's affection should be by the record and not by parol.

Wharton on Evidence, 2d ed., sec. 63.
Sherman v. Smith, 20 Ill. 550.
Hughes v. Christy, 26 Tex. 230.

The discontinuance of an action must be proved by the record and cannot be proved by parol.

Wharton on Law of Evidence, 2d. ed., sec. 63.
Sheldon v. Frink, 12 Pick. 568.

What a suit involves can only be shown by the record or a copy thereof.

Otto v. Trump, 115 Pa. 425.

Eugene Mullin, (with him *Seibert*, *W. H. Baker* and *J. N. Peck* and *Stone*), for appellee.

The evidence being that plaintiff endeavored to compass the adultery of his wife, his efforts in that direction should result as having the effect of connivance.

Yocum v. Yocum, 3 D. R. 615.
Bishop on Marriage and Divorce, Vol. 2, secs. 208, 215 and 237.

Wells *v.* Bunnell, 160 Pa. 460, is not in point; the wife was not a party, merely a subpœnaed witness.

When the Court calls the jury's attention to evidence excluded, and warns them not to have it weigh with them the error of admitting it is cured.

Ins. Co. v. Gruver, 100 Pa. 260.
Com'th v. Crossmire, 156 Id. 304.

May 8, 1899. MCCOLLUM, J. This is a proceeding for a divorce from the bond of matrimony and each party to it accuses the other of adultery. The respondent demanded and obtained a trial by jury which resulted in a verdict and judgment in her favor and an appeal by the libellant to this Court. The question raised by the first specification of error is whether the learned Court below erred in permitting the respondent to call and interrogate the libellant as if on cross-examination. It is stoutly maintained by the learned counsel for the libellant that there is no warrant in our statutes for such a proceeding. Perhaps there is no precedent for it in a divorce case, but if there is none it does not follow that the proceeding is unlawful or unauthorized. A suit for a divorce is a civil proceeding and if the respondent appears and defends, either party may testify fully against the other: Act of May 23, 1887, sec. 5, clause (*c*). In any civil proceeding a party to the record or a person for whose immediate benefit such proceeding is prosecuted or defended, or any other person whose interest is adverse to the party calling him as a witness may be compelled by the adverse party to testify as if under cross-examination; see section seven of the Act referred to in the preceding sentence. It

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seems to us that the parties being qualified to testify fully against each other are clearly within the purview of section seven of the Act aforesaid. The libellant is demanding a dissolution of the marriage bond and the respondent is resisting it. Facts or circumstances relevant to the issue and within his knowledge may, if developed, defeat his purpose. In such case the concealment of them becomes essential to the success of his scheme and he refrains from testifying. They may not show or tend to show the commission by him of a crime. For instance if they showed that he admitted the respondent "into conjugal society or embraces after he knew of the criminal facts" which are the alleged ground of his application for a divorce they would not have criminated him but would have established a fact fatal to the further prosecution of his case. Moreover the interest of the libellant is adverse to the interest of the respondent. They are obviously and certainly adverse parties in the proceeding prosecuted by the former and resisted by the latter.

In considering the other specifications of error we must not overlook the fact that in the libel and bill of particulars belonging to it the libellant charges the respondent with having had, subsequent to their marriage, illicit intercourse with nine men whose names are specified therein, and with divers other men unknown to him; and that in the answer and bill of particulars pertaining to it, the respondent charges the libellant with having had, since said marriage, illicit intercourse with twelve women whose names appear therein, and with divers other women unknown to her; that in addition to the charges made as above stated the respondent alleges that the libellant at divers times in the past ten years has introduced her into company to her unknown, "and thereby undertaken to expose her to lewd company and known to him to be such at the time," and further that the libellant has had sexual intercourse with her in the months of January, February, March and May of 1895. If the respondent was found by the jury to be guilty of adultery, and either of the charges made against the libellant in her answer and bill of particulars was found by them to be true, the latter would prevail against the former and entitle the respondent to what she received, to wit, a verdict in her favor. That this is so, sufficiently appears in the seventh section of our Act of March 13, 1815, 6 Sm. 288, which is as follows: "In any action or suit commenced in said Court (the Court of Common Pleas) for a divorce for the cause of adultery, if the defendant shall allege and prove that the plaintiff has been guilty of the like crime; or has admitted the defendant into conjugal society or embraces after he or she knew of the criminal fact; or that the said plaintiff (if the husband) allowed of the wife's prostitution, or received hire for them or exposed his wife to lewd company, whereby she became ensnared to the crime aforesaid, it shall be a good defence and a perpetual bar against the same."

The testimony in the case is quite voluminous, and naturally so, in view of the number and nature of the many questions of fact to be determined by it. There is evidence in the case applicable to each of these questions and upon it it was the duty of the jury to decide them. No complaint is made respecting the instructions to the jury.

The second specification of error relates to the admission of a letter from J. H. Costello to F. H. McDonald, dated January 7, 1895. We are not convinced that the learned Court below erred in admitting it. On the contrary it seems to us that the rejection of it would have constituted error. Many letters of the same character were previously admitted without objection from libellant's counsel. It is true that this fact does not amount to a demonstration that the letter of January 7, 1895, was relevant and competent. The relevancy and competency of the letter appeared in the relation of the parties to it and upon the face of it.

The third specification of error relates to the effect and failure of the respondent to secure the attendance of Helen Embody, as a witness, and the fourth specification relates to the institution and speedy abandonment of a suit by Costello against Kench for alienating the affections of his wife. We do not discover in either of them any ground for reversing the judgment, nor do we find any error in the fifth specification. The sixth specification relates to the refusal of the Court to grant a new trial, and the seventh to the action of the Court in excusing two jurors, who were subpœnaed by the respondent, from sitting in the case. These specifications may be dismissed without comment. The eighth specification of error relates to certain questions put to the libellant by the respondent's counsel and promptly objected to by his counsel. The objection to each question was sustained by the Court. The witness was not allowed to answer either of them, and the jury were instructed to disregard them. The matters embraced in the specification are not, therefore, cause for a reversal of the judgment. All the specifications are overruled.

Judgment affirmed.

W. D. N.

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Jan. '98, 76½. Supreme Court. April 7, 1898.

Gruninger v. Gruninger.

Divorce—Grounds for—Denial by respondent—Evidence.

A libel in divorce was in the usual form, averring adulterous practices on the part of the respondent, but without stating times or persons. In a more specific bill of particulars the libellant alleged that: "Libellant's knowledge of the fact of adultery by the respondent with said B. was derived from confessions by the respondent and from correspondence between her and said B.; especially letters written July 1, 1883, April 23, 1895, undated letters written subsequent to February 19, 1894, and subsequent to July 2, 1894. In neither said confessions nor correspondence was the time or place of the adulterous practices specified more particularly than above set out, and the libellant does not know and cannot specify the same." The respondent, in her answer, "fully and unqualifiedly denies the averments contained in said libel as to each averment therein contained." The libellant testified to a confession by the respondent of an intimacy with the co-respondent, which confession was corroborated by several witnesses, and denied by the respondent:

***Held*, that a mere denial by the respondent that the confession was made as claimed is not a satisfactory answer to the testimony of libellant so corroborated.**

Appeal of Pauline Gruninger, from the decree of the Common Pleas No. 3, of Philadelphia County, granting a divorce a vinculo matrimonii at the suit of her husband John Gruninger.

The facts are stated in the opinion of the Supreme Court, infra.

Lincoln L. Eyre and *Samuel Gustine Thompson*, (*Bassler Boyer* with them), for appellant.

The charge of adultery must be shown by proof of facts and circumstances that convince the mind by the preponderance of their weight, and not by mere suspicion or conjecture from vague circumstances pointing to no specific time, place or act. Appearances equally capable of two interpretations, one an innocent one, will not justify the presumption of guilt.

Browne on Divorce, 48, 49.
Carter *v.* Carter, 62 Ill. 439.
Allen *v.* Allen, 56 Sickles, N. Y. 658.
Pollock *v.* Pollock, 26 Id. 137.

In all the cases in which divorces were decreed in this and other States and in England one or more of the following circumstances were shown:

Either direct evidence of an act or acts of adultery being committed, in sight of the witness, or, such significant circumstances as would tend irresistibly to show that the act was about to be committed, as a visit to a brothel or other place of immoral reputation.

Or such circumstances as would strongly tend to show that the act had been committed, as a sudden surprise of the guilty parties, confusion of manner, suspicious attitudes, disarrangement of clothing, etc.

Or a long continued course of conduct leading the mind to but one conclusion, as continual association between the parties, where no proper explanation can be given for their constantly being together, there being no family relation, or relation of clergyman, or lawyer, or physician; coupled with unchaste reputation; money or other presents frequently made; withdrawal of affection for the libellant, without fault on the part of libellant; low companions; indecent or disorderly conduct; improper familiarities; visits to the house of the co-respondent; birth of child without access of husband.

Not one of the foregoing circumstances has been shown in this case.

Where the relation of physician and patient exists, the evidence must be more than usually specific to rebut the presumption of innocence.

Browne on Divorce, p. 47.

An intercepted letter from the alleged paramour to the defendant is not admissible in evidence, unless it come to the knowledge or possession of the latter.

Browne on Divorce, p. 54, citing—
Holby *v.* Holby, 64 Barbour, N. Y. 277.

It is the settled practice in most States not to grant a divorce upon the alleged confession of respondent, without other and corroborative proof. Courts look with suspicion on proof that may be easily manufactured.

Browne on Divorce, 60, citing—
Betts *v.* Betts, 1 Johns. Ch. 197.
Sommerbell *v.* Sommerbell, 10 Stewart, N. J. 608.
White *v.* White, 45 N. H. 121.
Holland *v.* Holland, 2 Mass. 154.
Woolfolk *v.* Woolfolk, 5 Ga. 661.
Burgess *v.* Burgess, 47 N. H. 378.
Clutch *v.* Clutch, Saxton, N. J. 474.

Even a bald statement by the wife to the husband that she had committed adultery, would be entitled to little weight without corroborative circumstances.

Browne on Divorce, 61.
Edwards *v.* Edwards, 3 Pitts, 333.

The Court must not only be morally convinced of the respondent's guilt, but it also must be satisfied that such conviction is founded on legal evidence, applicable to legal charges.

Stewart on Marriage and Divorce, par. 346.

A divorce will not be granted when the charge rests on the testimony of the husband alone, and upon alleged confessions made to him and his brother, and it appears that his evidence is manifestly false in its details.

Blank *v.* Blank, 5 York, 67.
Matchin *v.* Matchin, 6 Pa. 332.
Realf *v.* Realf, 77 Id. 31.
Quick *v.* Quick, 6 Kulp, 137.
Pollock *v.* Pollock, 71 N. Y. 151.

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Thomas Leaming, for appellee, cited—
Matchin *v.* Matchin, 6 Pa. 332.
Allen *v.* Allen, 101 N. Y. 658.
2 Greenleaf on Evidence, secs. 40, 41.
5 Am. & Eng. Ency. of Law, 828.
Stickle *v.* Stickle, 48 N. J. Eq. Repts. 336.
Gosser *v.* Gosser, 183 Pa. 499.

April 24, 1899. McCollum, J. The parties to this litigation are husband and wife. The former seeks to obtain a divorce from the latter on the ground of her alleged adulterous intercourse with a married man who, for the sake of convenience, may be designated herein as the co-respondent. The libellant and respondent were married on December 30, 1875, and lived together peacefully until 1882 or 1883, when the intimacy existing between the libellant's wife and the co-respondent raised a suspicion of improper intercourse and led to a quarrel between the husband and wife which resulted in her temporary absence from their home. On her return to the home there was some bickering, for awhile, between the husband and wife as a consequence of the intimacy referred to, but it eventually terminated in a mutual understanding that there should be a discontinuance of the obnoxious intimacy and a renewal and proper observance of the marital relation. At that time they had two children of tender age who were entitled to the affection and care of the parents, and this circumstance may have been, and probably was, an important factor in the restoration of peace and the promotion of mutual forbearance. After this reconciliation there was a period of about ten years in which there was no serious altercation between the libellant and the respondent, although subsequent developments tended to show that while there may have been an interruption of the former intimacy between the latter and the co-respondent, there was not an absolute discontinuance or abandonment of it. Meanwhile the libellant appears to have relied on the pacification of 1883 and to have been unconscious of any violation of the mutual understanding which was the basis of it. It was not until February, 1894, that his suspicion of his wife's infidelity was revived. The immediate cause of its revival was an occurrence, the true nature of which, according to the testimony of the libellant, the respondent endeavored, but failed to conceal from him, and which, on her discovery of his knowledge respecting it, she implored him to refrain from giving publicity to. After the occurrence referred to, circumstances previously unknown to the libellant and corroborative of his suspicion of improper intercourse between his wife and the co-respondent appeared together with subsequent circumstances of a like nature. According to the testimony of the libellant the respondent on September 25, 1894, voluntarily confessed to him her guilt. The confession may have been prompted by well known circumstances or occurrences inconsistent with her innocence or by an ebullition of penitence. It resulted, however, in the occupancy by the parties of their respective rooms thereafter, in the institution of this suit on December 12, 1895, and in her retirement from his home the next day.

We have not yet referred to the correspondence between the accused parties. None of the letters bears the signature of its author. One of them bears date July 30, 1883, and the rest are practically without a date. The co-respondent did not deny that he wrote the letter of July 30, 1883, but said he had no recollection of writing it, and that he never sent it to the respondent. The letters marked exhibits A, B, C, D. and E, were shown to the respondent on the trial, and when she was asked if she wrote them, her reply was, "I don't know," or "I can't say." The testimony of reputable and disinterested members of the bar charged with the custody of the letters pending the proceedings for a divorce, tended to show that she recognized them as her work, and that she believed the omission of date and signature was sufficient to prevent the identification of them. The libellant, his two sons, and his sister Mrs. Balz were familiar with the handwriting of the respondent and they testified positively and distinctly that the letters were written by her. Aside from the oral testimony relating to the source and authenticity of the letters there is quite enough on the face of them to establish an unlawful intimacy and when it is considered in connection with the oral testimony the conclusion that the respondent and co-respondent were parties to it is irresistible.

On the testimony of Lewis Gruninger, Wilhelmina Balz and E. W. Shuttelworth there is abundant corroboration of the testimony of the libellant in regard to the respondent's confession to him on September 25, 1895. It plainly appears from their testimony that the respondent admitted the intimacy charged in the libel and appealed to them to persuade the libellant to condone it. A mere denial by the respondent that the confession was made as claimed is not a satisfactory answer to the testimony of the libellant corroborated by the testimony of the witnesses above named.

We have not specified herein all the circumstances and occurrences pertaining to the intimacy existing between the accused parties, but we have carefully examined and considered all the evidence in the case and our conclusion from it is that it fully sustains the averment in the

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third paragraph of the libel and the first averment in the bill of particulars, and that it does not sustain the averment in the respondent's supplemental answer. It is presumed that the duty which rests upon the Courts in divorce cases was faithfully and fairly discharged in the case before us, and as there is no pretence or color of claim that it was not argued and decided on the evidence in it, we see no sufficient cause for setting aside the decree entered by the learned Court below. We therefore dismiss all of the assignments.

Decree affirmed and appeal dismissed at the cost of the appellant.

W. C. S.

Superior Court.

Apl. '99, 1. Superior Court. May 1, 1899.

Commonwealth ex rel. Scott v. McAleese.

Warrant of arrest—Act July 12, 1842—Superior Court — Jurisdiction of, in habeas corpus — Bankruptcy law of 1898.

The provisions of the Act of June 24, 1895, P. L. 212, creating the Superior Court, which declare that "the said Court shall have no original jurisdiction, except that it may issue writs of habeas corpus," give the right to issue a habeas corpus to annul an order, decree or judgment of a lower Court only in cases where revisory jurisdiction is given the Superior Court over such lower Court.

A. applied to the Superior Court for a writ of habeas corpus, complaining that he was illegally held in custody under a commitment issued after a hearing in the Common Pleas on a warrant of arrest under the Act of July 12, 1842, based upon debts exceeding in amount $50,000, claiming that the proceedings were void because the statutory proceedings under which they were issued were superseded by the bankrupt law of 1898:

***Held*, that as the proceedings attacked were in the Common Pleas Courts, and by reason of the amount in controversy were not reviewable in the Superior Court, the latter Court had no authority to discharge the relator under habeas corpus.**

Whether or not the provisions of the Act of July 12, 1842, relating to warrants of arrest, have been superseded by the bankrupt law of 1898, not decided.

Sur rule to show cause why writ of habeas corpus should not issue to discharge J. McD. Scott, from the custody of the warden of the Allegheny County jail.

The facts are stated in the opinion, infra.

J. S. Ferguson and *John Marron*, (with them *E. G. Ferguson*, *J. A. Langfitt* and *W. B. Rodgers*), for petitioner.

W. A. Blakeley and *W. A. Way*, (*Walker* and *Morris* with them), for intervening creditors.

May 10, 1899. Rice, P. J. This is an application by J. McD. Scott for a writ of habeas corpus. He complains that he is held in custody by the warden or keeper of the Allegheny county jail under two commitments. One was issued by the Honorable S. A. McClung, a Judge of Court of Common Pleas No. 3, of Allegheny county, after a hearing upon thirty warrants of arrest issued by him under the Act of July 12, 1842. Prior to this time warrants of arrest had been obtained by other creditors and the relator had given bond to them conditioned to apply for the benefit of the insolvent laws of the State. He did so apply, and, after a hearing, Court of Common Pleas No. 3 committed him for trial on a charge of fraudulent insolvency before the Court of Quarter Sessions of Allegheny county. Up to the present time no action has been taken by the latter Court in the matter.

The relator's contention is that the commitments are illegal and void because the statutory provisions under which they were issued have been superseded by the bankrupt law of 1898.

The question is one of the highest importance, but before considering it we are called upon to meet and dispose of the objection raised by the creditors, who were permitted to intervene to oppose the present application, that as the commitments were issued in civil proceedings in which the amount actually in controversy exceeded one thousand dollars, the Superior Court has not jurisdiction.

The jurisdiction of the Superior Court within the limits prescribed by the Act of June 24, 1895, is exclusive, not concurrent with that of the Supreme Court. That is to say, it is not left to the option of the person aggrieved to determine whether the order, decree or judgment of the lower Court of which he complains shall be reviewed by the Supreme Court or the Superior Court. Subject to a conditional right of appeal, the jurisdiction of the Supreme Court in certain classes of cases has been transferred to the Superior Court and all jurisdiction not so transferred remains unimpaired. If it be shown that one Court has jurisdiction of the proceeding to be reviewed, the other has not and this is determinable not by the form of the application made to the appellate Court but by the subject matter of the proceeding to be reviewed, or by the Court in which it was had. Subject to certain exceptions not necessary to be noticed here, the Superior Court has revisory jurisdiction of "all proceedings of any kind in the Court of Quarter Sessions or any Judge thereof." Manifestly these were not proceedings in the Quarter Sessions, nor before any Judge acting as a Judge thereof. The proceedings were in a Court of Common Pleas and before a Judge

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of the Common Pleas exercising powers conferred upon him as such. But not every proceeding in the Common Pleas is reviewable by the Superior Court. In general, the proceeding must involve the possession or ownership of real or personal property, or a right the value of which can be measured in money and the value of the property or the amount of money actually in controversy must not exceed one thousand dollars. To say that the present proceedings do not involve such a controversy, but simply the personal liberty of the relator is to state his case out of Court. Nor is this contention sustained by the authorities. Neither the commitment issued by Judge McCLUNG, nor that issued by the Court is of the nature of a summary conviction. They are but steps in proceedings to compel the payment of debts fraudulently contracted or payment of which is fraudulently evaded: Gosline *v.* Place, 32 Pa. 520; Berger *v.* Smull, 39 Pa. 302; Grieb *v.* Kuttner, 135 Pa. 281. All the above cited cases, as well as Hart *v.* Cooper, 129 Pa. 297; March *v.* Raubitschek, 159 Pa. 559, and Shoe Co. *v.* Saupp, 7 Pa. Sup. Ct. 480, show an appropriate if not the only appropriate remedy for the review of the action complained of would be by certiorari, or, as now called, appeal. In the cases cited the certiorari was treated as the principal writ and the writ of habeas corpus, if one issued, as ancillary to it. But whether one or the other be treated as the principal writ the object is the same, namely, to overturn and annul the orders of the Court of Common Pleas and of the Judge thereof in proceedings in which the amount in controversy far exceeds the statutory limit of our jurisdiction. If the relator had appealed we suppose no one would have any doubt as to the appellate Court that would have jurisdiction. The question arises here because of this provision of the Superior Court Act: "The said Court shall have no original jurisdiction except that it may issue writs of habeas corpus." But this does not mean that the Court may issue a writ of habeas corpus whenever a petition is presented in which the relator complains that he is unlawfully restrained of his liberty. Surely we would have no power to issue the writ if the relator was in custody under an order, judgment or decree of the Supreme Court. We refer to this simply as an illustration. Numberless others might be given where the principles enunciated in Com'th *v.* Lecky, 1 W. 66, and Passmore Williamson's Case, 26 Pa. 1; Williamson *v.* Lewis, 39 Pa. 9, would prevent this Court from discharging on habeas corpus. The provision under consideration was inserted in the Act of 1895 in aid of its general revisory jurisdiction and is plainly to be construed with reference thereto. In other words our jurisdiction upon habeas corpus to annul an order, decree, or judgment of the lower Court is limited by our own revisory jurisdiction over them. If an appeal is an appropriate, although perhaps not the exclusive remedy, and the Supreme Court would have jurisdiction of the appeal and we would not, it would seem plain that we could not acquire jurisdiction by issuing a writ of habeas corpus instead of a writ of certiorari. If there were any doubt as to this it is removed by a consideration of the fourteenth section of the Superior Court Act. It reads as follows: "This Act does not apply in any respect to any proceeding unless it is hereinbefore made reviewable by the said Superior Court, but all such proceedings shall continue to be reviewable directly by the Supreme Court in the same manner and to the same extent as is now or may hereafter be provided by law." In reading this section especial emphasis should be laid on the words "proceeding . . . . hereinbefore made reviewable." Nothing, it will be observed, is left to implication in defining the jurisdiction of the Court. Is the proceeding made reviewable by the act, is the question. If it is, the appropriate writ whether certiorari or habeas corpus may be issued. If it is not, we cannot make it reviewable in our Court by a choice of writs.

There was nothing said or decided in Com'th *v.* Gibbons, 9 Pa. Super. Ct. 527, in conflict with the foregoing conclusions. That was a proceeding for contempt in the Court of Quarter Sessions consisting of a refusal of a witness to testify in a case involving the right to a public office. As is well shown in the opinion of our brother SMITH the contempt proceeding, in character and effect, was wholly independent of the proceeding in which it had its origin, and, being in the Quarter Sessions, we unquestionably had jurisdiction over it. So, in Lizzie Nuber's Case, 6 Pa. Super. Ct. 420, we issued a writ of habeas corpus, and a writ of certiorari to bring up the record, and upon hearing discharged her from custody upon the ground that the sentence and commitment of the Quarter Sessions under which she was held were illegal and void. Here, however, the proceedings attacked were in the Common Pleas, and by reason of the amount in controversy were not made reviewable in the Superior Court. We are constrained therefore to hold that we would have no authority to discharge the relator even if his contention as to the effect of the bankrupt law were well founded.

The rule is discharged.

W. M. S., Jr.

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Oct. '98, 150. Superior Court. March 21, 1899.

Swoope v. Wakefield.

Unincorporated association — Partnership — Dissolution — Assignment by partner — Equity — Practice — Brief statement of errors

While ordinarily an assignment by one partner of his interest in the partnership works a dissolution, yet the articles of co-partnership may provide otherwise.

Where the terms of a partnership, or the by-laws of an unincorporated trading association, require its members to be also members of a certain other body, and provide for the division of the interest in the firm into shares, and that in case of a voluntary withdrawal or expulsion of a member, his interest shall be ascertained in a certain way, the assignee of the interest of a member will be entitled to receive the value of the assignor's interest as fixed by the articles of partnership; he cannot require the partnership to be wound up.

Where the appellant in equity has neglected to file in the lower Court the brief statement of errors required by the equity rules, but has filed assignments of error in the appellate Court, he may be permitted to file the required statement nunc pro tunc.

Appeal of C. T. Swoope, plaintiff, from the decree of the Common Pleas of Huntingdon County, in a proceeding in equity in which George P. Wakefield and others, trading as the Patrons Co-operative Association of Petersburg, were defendants.

This was a bill filed by C. T. Swoope, who had purchased the interest of H. W. Swoope, in the defendant partnership, from W. A. Myton, assignee for the benefit of creditors of the said H. W. Swoope, praying a dissolution of the said partnership and an account. The facts sufficiently appear in the opinion of BAILEY, P. J., as follows:

"In the year 1877 a number of persons residing in Petersburg and vicinity, who were members of of the Order of Patrons of Husbandry organized themselves into an association called the Patrons Co-operative Association of Petersburg. The object of the association was to enable the Patrons of Petersburg and vicinity 'to purchase their supplies and dispose of their products to the best possible advantage, to establish and maintain general trade in merchandise, farm products, machinery, etc., and for such purposes as may seem best for the benefit of the shareholders and customers.'

"A constitution and by-laws were adopted for the government of the association. Any member of the order of Patrons of Husbandry in good standing was eligible to membership. Its officers were a president, secretary, treasurer and six directors, who had charge of all the property of the association and were declared its trustees. Its capital stock was fixed at two thousand dollars ($2000), to be raised in shares of five (5) dollars each, which were not transferable except to members of the order. Interest at a rate not to exceed 6 per cent. annually was to be paid on the stock. The directors were to have a general oversight of the business. When a member assigned a share of stock, the assignment was to be endorsed on the back of the certificate and the same surrendered to the directors before a new certificate could be issued to the assignee.

"Any member ceasing to be a member of the order of Patrons of Husbandry was excluded from membership in the association.

"Art. V. of the by-laws provided for the withdrawal, expulsion or death of any member. In case of withdrawal or exclusion, he should 'receive payment of the capital advanced by him with all arrears of profit (if any) that may be declared at the first meeting of the board of directors after his withdrawal.'

"Upon the death of any member, his legal representatives were to be repaid all the capital owned by the deceased with all arrears of interest and dividends or profits that may be declared at the first meeting of the directors after notice of the decease of the member.

"The constitution and by-laws are to be considered as articles of co-partnership and as between themselves the members are bound by their terms: Bulkley *v.* Wood & Co., 4 Pa. Super. Ct. 391.

"Henry W. Swoope was one of the original members of the association. He took an active part in the organization and was present at the meeting of the members when the constitution and by-laws were adopted; on April 4, 1895, he was the owner of ten shares of the stock and on that day made an assignment of all his property for the benefit of his creditors to W. A. Myton, who on October 1, 1895, sold and assigned these ten shares to C. T. Swoope, the plaintiff, for the sum of $130. Neither of these assignments was endorsed on the back of the original certificates issued to H. W. Swoope, as required by sec. 2, of Art. VI. of the constitution. C. T. Swoope was not a member of the order of Patrons of Husbandry, and, therefore, not eligible to membership in the association.

"Henry W. Swoope had received interest upon his stock regularly and the yearly dividends upon his purchases until he assigned his stock.

"The association conducted a general store in Petersburg, and continued the business the same after the assignment by Swoope of his share as before. At that time there were 151 shares outstanding.

"C. T. Swoope, the plaintiff, claims that the assignment by H. W. Swoope for the benefit of

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the creditors worked a dissolution of the association and that it was the duty of the remaining members to have closed out the business, wound up the affairs of the association and divided the assets among the shareholders: and not having done so, but having continued the business with the goods and effects of the association, they must account to the plaintiff for their value at the time of the assignment by Swoope and not at the value of the stock on hand at the time of filing this bill, because the goods on hand now are not the identical goods on hand at the time of the assignment. At the time of Swoope's assignment the association was composed of over forty members.

"We have no doubt under many recent decisions of our higher Court—prominently Christy *v.* Sill, 131 Pa. 492; Powell's Appeal, 2 Pa. Super. Ct. 618, and Gwinn *v.* Lee, 6 Pa. Super. Ct. 646, that this association was a partnership and that the same rules that are applicable to ordinary partnership are equally applicable to it; therefore, the assignment by H. W. Swoope of his share in it for the benefit of creditors worked its dissolution in so far as the partnership relations had existed between him and the other members, but it does not follow that the retirement of Swoope would ipso facto prevent the remaining members from continuing the business with the effects of the previous partnership if they chose to do so. With this the assignee of the Swoope share had nothing to do. He had no right to any particular thing in specie: Parsons on Partnership, sec. 435. All that he had a right to require of the remaining partners was an ascertainment of the value of the share of Swoope at the time of the assignment and have it paid to him: Durburrow's Appeal, 84 Pa. 404. He has no right to the corpus of the partnership property or any part of it.

"If there were no method provided in the articles of association for ascertaining the value of a retiring partner's interest, then the disposal of its effects, closing out the business and winding up its affairs would be a necessary consequence of the dissolution.

"Sec. 3 of Art. V. of the by-laws provides that upon the withdrawal or exclusion of any member, he shall receive payment of the capital advanced by him, with all arrears of profit (if any) that may be declared at the first meeting of the board of directors after his withdrawal. The next section (4) provides for the ascertainment of the value of a share of a member who may die. The evident intention of these provisions was that the death, withdrawal or exclusion of any member should not work a total destruction of the association and defeat the purpose of the organization. I am, therefore, of the opinion that said section must be construed so as to effectuate this clear intent of the parties. The assignment by Swoope to Myton I regard as a withdrawal from the association within the above section of the by-laws. It is entirely immaterial whether the withdrawal of a member was voluntary or involuntary. Its effect as to the remaining members would be the same.

"It is argued that if Swoope had simply withdrawn and had not made an assignment of his shares their value would necessarily have been determined under the provisions of the by-laws referred to, but because he made an assignment to them, a different rule must obtain. No authority has been cited by counsel and I am unable to find any that lays down one rule for ascertaining the value of the interest of a partner before he assigns it and a different rule when it passed into the hands of an assignee. The only effect of the assignment is to entitle the assignee to receive what the assignor would have been entitled to if he had not made an assignment. The equties of the remaining partners cannot be affected by the assignment of the retiring one.

"'The by-laws and usages of the unincorporated' company 'are analogous to the terms of an article of co-partnership and in buying into the partnership, the purchaser of stock is bound to know the rules and regulations which govern it': Logan *v.* McNaugher, 88 Pa. 103.

"I am, therefore, of the opinion that the value of the stock should have been ascertained in the mode pointed out in the by-laws.

"The referee finds as a fact that the surrender value of this stock determined by the directors under the provisions of sec. 3 of Art. V. of the by-laws at the time of the assignment was $13 per share. There is no allegation, proof or finding of fraud on the part of the directors. This valuation is to be taken as conclusive between the parties to this bill.

"The referee also finds as a fact that at the time of the assignment H. W. Swoope was indebted to the association on a note for $38.77 with interest from March 19, 1895, and a book account of $17.86.

"The account then between the plaintiff and defendants to this bill would, therefore, stand thus:

10 shares of stock at $13 per share,			$130.00
Deduct:			
Note,	$38,77		
Int. from Mch. 19, 95, to May 4, '95,	.30	$39.07	
Book account,		17.86	56.93
			$73.07

Interest from May 4, 1895.

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"We have fixed May 4, 1895, as the date from which interest should be allowed, for the reason that under the section of the by-laws which we have held to be applicable to this case, the directors were to fix the surrender value of the stock at their first meeting after the withdrawal of a member. The directors were to meet monthly. The money was not payable until the amount was determined.

"We sustain the exceptions filed by the defendants so far as indicated in the foregoing opinion and make the following decree:

"And now, July 19, 1898, this case coming on to be heard upon the exceptions to the findings of the referee, and after hearing and upon consideration, it is ordered, adjudged and decreed, that the partnership heretofore existing between H. W. Swoope and the defendants is dissolved and that the defendants pay to the plaintiff, the assignee of the interest of H. W. Swoope therein, the sum of $73.07, being the value of his interest, as ascertained by the provisions of sec. 3 of Art. V. of the by-laws (less the amount of his note and book account) with interest from May 4, 1895, and it is further ordered and decreed that the defendants pay the costs. The referee's fee is fixed at $100, being at the rate of $10 per day for ten days' employ."

The plaintiff took this appeal. He filed no brief statement of errors, as required by the equity rules, but filed specifications of error in the Superior Court. The appellee moved to quash the appeal.

W. H. Woods, (*J. S. Woods* with him), for appellant.

The assignment worked a dissolution.

Christy *v.* Sill, 131 Pa. 492.
Powell's Appeal, 2 Pa. Super. Ct. 618.
Gwinn *v.* Lee, 6 Id. 646.
Horton's Appeal, 13 Pa. 66-71.

That dissolution, at once, revoked the powers of the directors. Were not the directors the mere agents of the partnership? They derived all their authority from the partnership. When it ended, that was an ending of their power.

The by-laws provided for a withdrawal, an expulsion, and when one of the partners died; they made no provision as to how a member's interest would be determined where his interest was sold on legal process for the payment of his debts. And under the law they could not make such a provision; they could not by any such provision cover up any of the property of the debtor from the just claims of his creditors. The Court below says the assignment of Mr. Swoope could not affect the equities of the other partners; true, neither could the equities of the other partners deprive Mr. Swoope and his assignor of any of his equities. His equity was simply to get what was justly and equitably coming to him. Their equities did not give them the right to rob him or his assignee.

H. H. Waite, for appellees.

The by-laws and usages of an incorporated company are analogous to the terms of an article of co-partnership, and in buying into the partnership the purchaser of stock is bound to know the rules and regulations which govern it.

Logan *v.* McNaugher, 88 Pa. 103.

An assignee for creditors is not a purchaser. His rights rise no higher than those of his assignor.

Kent, Santee & Co.'s Appeal, 87 Pa. 167.

May 18, 1899. BEAVER, J. An important question of practice is raised by the preliminary motion to quash this appeal. Appellant failed to comply with the equity rule of the Supreme Court by filing "in the Court below, with his notice of appeal, a brief statement of the errors he alleges to have been made by the order or decree appealed from or the findings on which it rests": 159 Pa. XXVIII. His reply is that he filed in this court the specifications of error required by our own rules, and that, having complied with our rule in this regard, he has discharged his full duty. It is to be remarked, however, that the equity rules published by the Supreme Court are prescribed under authority of the statute and have the force of law. They govern in all equity proceedings in any of the Courts of the Commonwealth and are to be complied with in this Court as fully as in the Supreme Court. As was said in Barlott *v.* Forney, 187 Pa. 301: "They are not abrogated by the subsequent Act of 1897. It is true that Act repeals all prior Acts intended to be changed or supplied by it, so that, as is provided in sec. 22, it 'shall furnish a complete and exclusive system in itself on all appeals,' but it was not thereby intended to interfere with the rules of equity practice, either in the Courts of first instance or here." It was held in the case just cited: "This default, however, is not necessarily fatal and in a case of mere oversight of counsel and where no special hardship would be imposed on the other party, we should be disposed to permit the filing of the statement nunc pro tunc."

We therefore permit the statement required in the section on appeals in the equity rules to be filed nunc pro tunc, and consider the appeal upon the other questions involved therein.

In the hearing of the case before the referee, the plaintiff objected to the defendants' offer of the constitution and by-laws of the association, under which they conducted business and the minutes from the date of the association. The

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objection was overruled and an exception allowed to the plaintiff and duly noted, but no exception to this ruling was filed after the report of the referee was made, in accordance with the requirements of the 69th rule of the Supreme Court rules of equity practice. We cannot, therefore, consider the first specification of error for the reason that the question involved in it was not raised in the Court below. The same is true as to the second, third and fifth specifications.

The question of fact involved in the fourth specification was raised in the Court below by a distinct exception to the finding of the referee and is, therefore, properly before us; but, inasmuch as the number of shares in the co-operative association at the date of the assignment of H. W. Swoope to Myton can only be of practical importance in case it be held that Swoope's assignment worked a dissolution of the firm or association as among the partners or shareholders themselves, so that the entire assets of the association must be marshaled and distributed; and, inasmuch as we hold for reasons which will be presently stated that the assignment of Myton was equivalent to a withdrawal from the association and did not thereby work its dissolution, so far as the members thereof were concerned, it is not necessary for us to consider whether the finding of the Court in this respect is correct or not, for the reason that the value of Myton's shares, the number of which is undisputed, must be determined in the way pointed out by the by-laws of the association and not by a division of all of its assets among the shareholders in proportion to the number held by each respectively.

The practical question for our consideration and the controlling one in the case is as to the legal effect of the assignment of H. W. Swoope. As preliminary to this is the question of the status of the plaintiff, who became the purchaser of the shares of H. W. Swoope at assignee's sale. It is conceded that he was not eligible to membership in the association, not being a member of the order known as Patrons of Husbandry. He is, therefore, entitled to all the rights of H. W. Swoope at the time of his assignment and no greater. He stands in the place of a partner or shareholder who has voluntarily deprived himself of membership in the association. He is in no sense a creditor of the partnership or association and his rights are not those of a creditor. Nor is he a creditor of H. W. Swoope. His rights can certainly rise no higher than those of the assignor. The referee finds, as one of his conclusions of law, "that the 'Patrons' Co-operative Association of Petersburg,' was a partnership which, under its constitution and by-laws, contemplated the withdrawal of old members and the reception of new members and that, therefore, the withdrawal of the old or reception of the new members under the method provided by the constitution and by-laws did not dissolve the partnership," and in this he was undoubtedly correct. Whilst it is true, as a general proposition, as held in Horton's Appeal, 13 Pa. 66, that an assignment by one of two partners of his interest in the partnership works a dissolution of the partnership, for obvious reasons stated in the opinion of COULTER, J., it is, nevertheless, clearly recognized that the articles of co-partnership may provide otherwise. The referee's final conclusion was based upon his finding "that C. T. Swoope did not become a member of the association and was not governed by its constitution and by-laws." In a sense this is true; that is, he was not governed as a member by the constitution and by-laws, but he was subject to them in that he could not become a member, because not eligible under their provisions, and also in seeking his rights as an assignee of a former member, which were to be determined under the constitution and by-laws as they affected his interest in the partnership. He was bound to know their provisions, for they practically constituted the articles of co-partnership and by them his rights were to be determined: Logan *v.* McNaugher, 88 Pa. 103. What were those rights? In other words, what effect did the general assignment of H. W. Swoope for the benefit of creditors have upon his interest in the partnership? It was voluntary. It was not induced or compelled in any sense by his partners in the association. He was not forced out of the partnership, nor is there any allegation of any kind that he was wronged while a member of the association. He was unfortunate, but there is no allegation that his fellow-members were in any sense responsible for his financial condition. How can his assignment, therefore, be regarded in any other light than as a voluntary withdrawal, subject to the provisions of the constitution and by-laws of the association relating thereto?

The surrender value of shares of stock, as found by the referee at the date of the assignment, was thirteen dollars per share, and this was the amount allowed by the Court below in determining the interest of the plaintiff. We cannot see that any wrong was done him by the Court's computation and the decree based thereon. Decree affirmed and appeal dismissed.

H. B.

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Mch. '99, 15. Superior Court. March 21, 1899.

Hoerner v. Cordell.

Act April 9, 1849—Exemption—Waiver of—Change of priority of liens—Effect of.

A waiver of the debtor's exemption under the Act of April 9, 1849, as to any lien enures to the benefit of all prior liens.

The holder of a first mortgage, given to secure a bond in which there was a waiver of exemption, may by agreement in writing give priority of lien to judgments subsequently entered, which do not contain a waiver, and if he do so and, thereafter, enter judgment on the bond containing such waiver, the said waiver will enure to the benefit of the holders of the judgments given priority.

Appeal by George A. Cordell, from a decree of the Common Pleas of Franklin County, making absolute a rule to show cause why his claim for exemption should not be dismissed.

The facts as shown by the record are as follows:

George A. Cordell, the appellant, was the owner of a small tract of land in Peters township, Franklin county, against which were entered the following liens:

(1.) Mortgage, W. S. Hoerner, use of G. W. Cromer, $108.75.

(2.) Judgment of J. H. Devor, use of G. W. Cromer, $83.50.

(3.) Judgment of George W. Cromer, $50.

(4.) Judgment, W. S. Hoerner, to the use of George W. Cromer, $108.75.

This last judgment was entered upon the bond which accompanied the mortgage, above mentioned, for the same amount and the same debt; the bond waiving the exemption laws of the Commonwealth, and containing a power of attorney to confess judgment. The mortgage was recorded on March 9, 1895, but judgment was not entered on the bond until November 7, 1896; and on the same day execution was issued upon said judgment and the mortgaged premises (the only real estate owned by the defendant) was levied upon by the sheriff.

The day before the judgment was entered on the bond, to wit, on November 6, 1896, judgments (2) and (3) above mentioned, were assigned by George W. Cromer to Ellis E. Foust, Esq., and, by an endorsement entered upon the record of the mortgage, said judgments were given priority of lien over the mortgage. Judgments (2) and (3) did not waive the benefit of the exemption laws.

Before the sale the defendant filed with the sheriff a demand, in writing, for the benefit of the exemption laws of the Commonwealth as against all liens except that of the mortgage and of the judgment entered upon the accompanying bond; that is, he claimed that after the execution in the sheriff's hands was paid, that he was entitled to the benefit of the exemption in preference to judgments numbers (2) and (3).

Defendant's real estate was sold by the sheriff to George W. Cromer for $300; and at the instance of the said Cromer and of Mr. Foust, the use plaintiff in judgments (2) and (3), a rule was taken upon the defendant to show cause why his claim for the exemption should not be dismissed, to which an answer was filed; and, the Court having expressed a doubt as to its jurisdiction in the premises, an agreement was filed that the Court "have jurisdiction of the matter in dispute upon the facts set forth in the petition and answer as though the fund had been paid into Court."

The Court, after argument, made the rule absolute, dismissing the defendant's claim for the exemption and awarding the fund to the judgment creditors, whereupon this appeal was taken, assigning for error this action of the Court.

O. C. Bowers, for appellant.

The demand for exemption was sufficient; no notice to sheriff to appoint appraisers was necessary under the circumstances.

Hill v. Johnston et al., 29 Pa. 362.

The principle that a waiver of exemption in favor of a junior lien inures to the benefit of prior liens containing no waiver is not in any way disputed, but it is submitted that as to the land bound by the mortgage, the judgment entered on the bond accompanying the mortgage being simply cumulative in character, took its lien as of the date of the mortgage and was therefore not subsequent to the other judgments.

As to the land sold this judgment is not a subsequent lien. The waiver of exemption contained in this judgment does not, nor does it tend to, reverse the order of liens, or give anything to a subsequent lien to the prejudice of an earlier one, and we contend with the greatest confidence that after the payment of the mortgage debt, represented also by the judgment upon which the execution was issued, the defendant was entitled to the benefit of the exemption laws of the Commonwealth as against the judgments entered subsequent to the mortgage.

W. S. Hoerner, (*Ellis E. Foust* with him), for appellee.

The claim for exemption was not properly made.

The debtor must claim it. If he keep silence and allow his property to be taken and sold from him, he has waived his right and it is gone.

Line's Appeal, 2 Grant, 198.

This claim must be made upon the writ which is the instrument of sale.

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McAfoose's Appeal, 32 Pa. 276.
Diehl *v.* Holben, 39 Id. 217.

And "the law contemplates that the demand will be made to the sheriff or other officer who holds the execution, and all its provisions are framed accordingly."

Gibbons *v.* Gaffney, 154 Pa. 48.

Nor dare the debtor be dilatory in making the claim, nor cause the creditor loss or delay by his dilatoriness. The rule is that the claim must be made before the advertisement of the property for sale.

Bowyer's Appeal, 21 Pa. 213.
Weaver's Appeal, 18 Id. 309.

And an appraisement is a prerequisite to the granting of any demand for the exemption, for "it is not the intent of any of the exemption laws to give to a claimant that which he did not have, but to permit him to retain that which he has already. He cannot claim the proceeds of a sale of land unless he has first claimed a part of the land, which could not be set off without prejudice to the whole."

Shaeffer's Appeal, 101 Pa. 49.
Hammer *v.* Freese, 19 Id. 257.
Hufman's Appeal, 81 Id. 331.

Distribution is regulated according to the priority of the liens and cannot be regulated by any wish of the debtor.

Bowyer's Appeal, 21 Pa. 214.

The holder of two judgment notes, one with and one without waiver, can enter them up in such manner as he pleases, and the effect of the waiver of exemption will be determined by the order of their entry.

Hallman *v.* Hallman, 124 Pa. 347.
Miller *v.* Getz, 135 Id. 558.
Bowman *v.* Tagg, 6 WEEKLY NOTES, 220.

May 18, 1899. W. W. PORTER, J. Had the sequence of liens originally been the two judgments, without waiver, and the bond and mortgage, with waiver, a sale on either the bond or the mortgage would have resulted in the debtor losing his exemption to the extent of his mortgage indebtedness: Hallman *v.* Hallman, 124 Pa. 347. By the postponement of the lien of that debt he loses it all if the Court below be affirmed.

Where the debtor has given or contracted several obligations, some with and some without waiver, he puts it in the power of the holders to determine, by the order in which the obligations are reduced to lien, whether he shall be deprived of his exemption, in case the debtor's property be insufficient to discharge all of the liens without leaving a balance for the exemption: Hallman *v.* Hallman, supra. The contention here, however, is that the judgment on the bond entered after the two other judgments became a lien anterior to them because it related back to the date of the mortgage given to secure it. In a sense the judgment does so relate back as to its lien upon the particular property covered by the mortgage. As to all other properties of the defendant its lien dates from its entry. But the lien of the mortgage was postponed by the act of the mortgagee to that of the two small judgments. The lien of the judgment on the bond was as to the mortgaged property only a duplication of the lien already there by virtue of the mortgage and represented the same debt. Release of the lien of the mortgage would work a release of the lien of the judgment on the bond. A satisfaction of either would work a satisfaction of the other. A postponement of the lien of either would work a postponement of the lien of the other. Had there been no agreement of postponement and had the property levied upon and sold under the judgment on the mortgage bond been personalty with the lien of the levy subsequent to levies upon the two small judgments the debtor would have been deprived of his exemption, and this by the act of the creditors in determining the order in which the writs of execution issued, upon the rule that a waiver as to any lien will inure to the benefit of all prior liens: Miller *v.* Getz, 135 Pa. 558. Here the property was real estate and the act of the creditor by postponing produced the result of depriving the debtor of his exemption. It is difficult to see why the difference in the character of the property possessed by the debtor should result to his advantage by tying the hands of the creditor in the case of real estate and not in the case of personalty.

The mere obtaining of the liens in either case does not thereby deprive the creditor of the right to control them, and to change if he will the order of their enforcement if it be to his advantage. No additional rights accrue to the debtor and none are lost to the creditor by the fixing of the order of the liens in the first instance.

It is not alleged that it was agreed that the mortgagee should not postpone his lien, but the claim is that he was estopped from postponing because his act deprives the defendant of his exemption. The injury to the debtor thus resulting is due to the form and character of the obligations given or contracted. By his own act he put it in the power of his creditors to deprive him of his exemption. The creditors had the right to deal with their claims in good faith, in such manner as would under the law best secure their payment. The debtor cannot be heard to complain that they have exercised the power he gave them. The "distribution is not to be regulated by any

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wish of his no matter in what form he may choose to express it": Bowyer's Appeal, 21 Pa. 210.

We need not discuss the matter of the form in which the claim for exemption was made.

The judgment is affirmed.

W. M. S., Jr.

Apr. '99, 49. Superior Court. April 11, 1899.

City of Pittsburgh v. Third Presbyterian Church.

Taxation—Exemption from—Church—Act May 14, 1874, P. L. 158.

A piece of land near a church, upon which is built a house, for the use of the janitor, which is no part of the church structure, and has no direct or physical connection therewith, is not exempt from taxation under the Act of May 14, 1874, P. L. 158.

Appeal of City of Pittsburgh, plaintiff, from the judgment of the Common Pleas No. 1, of Allegheny County, in a proceeding by scire facias for taxes against the Third Presbyterian Church.

On the trial of this cause, before COLLIER, J., the following case appeared:

In the year 1893 the city of Pittsburgh assessed for municipal taxation, a lot or piece of ground in the Third ward, fronting 18 feet on Cherry alley, and extending back 51 feet, on which was erected a two-story brick dwelling house; the taxes not being paid a lien was filed and a scire facias issued. The lot and dwelling house described was owned by the Third Presbyterian Church, defendant, and adjoined its church building, being some twenty feet distant therefrom. The church fronted on Sixth avenue. The residence fronted on Cherry alley, and was a separate and distinct building, having no connection whatever with the church. It was at that time, however, occupied by the sexton of the church as his residence. Upon this ground defendant claimed that the property was exempt from taxation. The jury, under the instructions of the Court, found a verdict for the defendant, upon which judgment was entered. The city took this appeal, and assigned errors as follows:

The Court erred in affirming the defendant's point, as follows:

"The Court is respectfully requested to charge that under the pleadings and evidence the verdict must be for the defendant."

And in refusing the plaintiff's points, as follows:

"The property described within the lien on which this case is founded, not being an actual place of religious worship, is not within the power of exemption conferred on the Legislature by Art. IX., sec. 1 of the Constitution, and therefore the verdict should be for the plaintiff."

"The property described within the lien on which this case is founded, not being a church, meeting house or other regular place of stated worship, is not within the meaning of the Act of May 14, 1874, P. L. 158, and not exempt from taxation, therefore the verdict should be for the plaintiff."

J. H. Beal, (with him *Clarence Burleigh* and *William W. Ford*), for appellant.

The burden is on the defendant to show affirmatively, that this property is exempt from public taxation, and this it must show clearly and beyond doubt.

Philadelphia v. Barber, 160 Pa. 126.
Com'th v. Co., 129 Id. 356.

This lot and dwelling is not exempt from taxation.

Constitution, Art. IX., sec. 1.
Act of May 14, 1874, P. L. 158.
Church of Our Saviour v. Montgomery County, 10 WEEKLY NOTES, 171.

Edwin W. Smith, (*Thomas W. Bakewell* with him), for appellee, cited—

Northampton County v. Lafayette College, 128 Pa. 132.
Pennsylvania Hospital v. Delaware County, 169 Id. 308.
Dickinson College v. Cumberland County, 2 Dist. Rep. 378.
Philadelphia v. Church of St. James, 134 Pa. 207.
Northampton County v. St. Peter's Church, 5 Co. Ct. 416.
White et al., Trustees, v. Smith, Collector, 189 Pa. 222.

May 18, 1899. BEAVER, J. The Constitution of the Commonwealth confers specific authority upon the General Assembly to "exempt from taxation public property used for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit and institutions of purely public charity": Art. IX., sec. 1. The language used expresses the clearest possible determination to limit the General Assembly in the exercise of the power to exempt. It not only limits the objects but hedges these objects about with words of description, which, if they mean anything, are words of limitation. In the exercise of the authority thus conferred, the General Assembly, by the Act of May 14, 1874, P. L. 158, provided "That all churches, meeting houses or other regular places of stated worship with the grounds thereto annexed necessary for the occupancy and enjoyment of the same," and other property in the Act specified and described, "are hereby exempted from all and every county, city, borough, bounty, road, school and poor tax; provided that all property real or personal, other than that which is in actual use

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and occupation for the purposes aforesaid and from which any income or revenue is derived shall be subject to taxation, except where exempted by law for State purposes, and nothing herein contained shall exempt same therefrom." Here again the language is carefully chosen and is that of express limitation, and Courts in construing it are bound to take notice of the evident legislative intent conveyed thereby.

The defendant, having a lot on Sixth avenue, in the city of Pittsburgh, upon which its church building was erected, caused to be built within the enclosure and at the rear of said lot, about twenty feet distant from the said church building, a two-story brick dwelling house, occupied by the janitor of the church. This building fronts upon and has an entrance from Cherry alley, and is entirely independent, so far as its structure and location are concerned, from the church building proper. The plaintiff caused the lot eighteen feet front on Cherry alley, extending back fifty-one feet, occupied by the janitor's dwelling house, to be assessed for taxation, and municipal taxes were duly assessed thereon. Upon their non-payment a municipal lien was duly filed and a scire facias issued thereon. At the trial both sides asked for binding instructions. There is no question as to the regularity of the proceedings and no dispute as to the facts. It is not claimed that the defendant is an institution of purely public charity. If exempt from taxation the exemption must be based upon the clause of the Act of 1874, supra, relating to churches, etc. It is very evident, however, that the lot in question and the structure thereon erected are in no sense part of the church, meeting house or regular place of stated worship. It is a separate, distinct and independent structure and has no direct or physical connection with the church building proper. Is it then included within "the grounds thereto annexed necessary for the occupancy and enjoyment of the same"? Ground for entrance and exit, for securing air and light, for the purposes of architectural and natural adornment, for the erection of horse sheds and, in the country, for shade, and, among those who prolong their religious services during a large part of the day, places for refreshment, such as springs of water, etc., all may be included as necessary for the occupancy and enjoyment of church or meeting house in the ordinary sense of the term. A janitor may also be a necessity, but it does not follow that a residence for his comfort and convenience is such. It is doubtless true that in the present case the proximity of the janitor's house is a great convenience, but not greater than if he lived across the alley—about the same distance from the church as now. The necessity for the residence of a pastor is undoubtedly as great as for a janitor, but in such a case it has been distinctly ruled that "a parsonage cannot be considered as an actual place of religious worship though erected upon ground appurtenant to a church but not a part thereof": Church of Our Saviour *v.* Montgomery Co., 10 WEEKLY NOTES, 170. The citation by defendant of the Lafayette College case and the late case of White *v.* Smith, 189 Pa. 222, is not relevant, as they relate to institutions of purely public charity and are ruled distinctly upon that ground. The same may be said of our Haverford College case, 6 Pa. Super. Ct. 71.

We are of the opinion that the plaintiff's point for binding instructions should have been affirmed and that of the defendant refused. The judgment is therefore reversed and a new venire awarded.

W. C. S.

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WEEKLY NOTES OF CASES.

VOL. XLIV.] *FRIDAY, JULY 7, 1899.* [NO. 14.

Supreme Court.

Jan. '98, 179. Supreme Court. May 19, 1898. February, 1899.

Houston et al v. City of Lancaster.

Municipality — Increase of debt of — Constitution, Art. IX., sec. 8.

The increase of municipal indebtedness of 2 per cent. on the rateable value of taxable property within a municipality, authorized to be made by the second clause of the 8th section of Art. IX. of the Constitution, may not be made except by authority of a popular vote, and this is true whether the increase has been made by successive additions, each less than 2 per cent., or at one time and by one municipal act alone.

Where the 2 per cent. limit has been more than reached by previous additions, though by subsequent reductions the aggregate of the additions may be slightly below the limit, an ordinance creating an additional loan will be invalid.

Pepper et al. *v.* Philadelphia, 181 Pa. 566, followed. Brooke *v.* Philadelphia, 162 Pa. 123, and Bruce *v.* Pittsburgh, 166 Pa. 152, distinguished.

Appeal of the City of Lancaster, Edwin L. Smeltz, mayor, and J. Harry Rathfon, city treasurer, from the decree of the Common Pleas of Lancaster County, in a proceeding in equity wherein Robert J. Houston and Joel L. Haines, were plaintiffs.

The bill filed in this case asked an injunction against the creation of a loan of $42,000 which had been directed by an ordinance of councils of the city of Lancaster passed September 20, 1897.

The following facts were agreed upon between the parties:

The total debt and outstanding bonded obligations of the said city of Lancaster, on January 1, 1874, was $490,458.06, of which $80,358.06 was held by the city itself in the sinking fund, making a net debt of $410,100.

The assessed valuation of the taxable property in Lancaster, January 1, 1874, was $12,820,500.

Between January 1, 1874, and January 1, 1885, the increase made in the indebtedness of the city of Lancaster aggregated $243,000, and between those periods was redeemed and put into the sinking fund $66,700, and this was increased between January 1, 1885 and the time of the filing of this bill $137,500, making an aggregate of $204,200.

The assessed valuation of the taxable property in the city of Lancaster, on January 1, 1885, was $12,450,000.

At elections held for the purpose the indebtedness of the city was increased by $125,000 and $150,000, and by four separate ordinances the debt was increased by $120,000 (for the purpose of paying in part a judgment that had been obtained against the city of Lancaster by the county), $200,000 funding existing certificates of the same amount and the loan in question having been paid and redeemed, $100,000 for funding existing certificates and $169,500 for funding outstanding certificates of like amount.

Of the total $490,458.06 in the sinking fund, the sum of $204,200 is comprised of bonds issued for indebtedness incurred since January 1, 1874, and $286,258.06 is comprised of bonds either issued before that date or for bonds since issued to refund bonds issued before that date.

All of the bonds issued since 1885, amounting to $395,000, for new indebtedness contracted since that time, and which includes the loans of $275,000 made with the assent of the electors, are outstanding and unpaid.

The total debt of the city of Lancaster on January 1, 1897, was $1,134,958.06, of which $465,458.06 was then in the sinking fund, and $25,000 of bonds have since been placed there, making the sinking fund at the present time $490,458.06.

The assessed valuation of the taxable property in the city of Lancaster on January 1, 1897, was $15,416,646, two per centum of which is $308,332.92, and seven per centum of which is $1,063,769.56.

The plaintiffs requested conclusions of law that the present outstanding indebtedness of the city of Lancaster being $440,300 and that 2 per cent. of the assessed value of the taxable property on January 1, 1897, is $308,332.92; that the loan created by the ordinance of September 20, 1897, of $42,000 is illegal and void even though $275,000 of the indebtedness of $440,300 was created with the assent of the people, the $27,000 cannot be deducted from the present outstanding new indebtedness to enable the municipal authorities to effect the contemplated loan of $42,000.

The Court, LIVINGSTON, P. J., and BRUBAKER, J., granted a perpetual injunction restraining the creation of said loan of $42,000. The defendants took this appeal.

William U. Hensel, (with him *A. F. Shenck*, city solicitor, and *J. Hay Brown*), for appellants.

A municipality which shows the debt in 1874 was under 7 per cent. may from time to time, without the consent of the electors, increase that debt until 2 per cent. has been added.

Wheeler *v.* Philadelphia, 77 Pa. 352.

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That portion of the debt which is represented by bonds issued but actually redeemed shall not be counted as part of the city debt in estimating and fixing the constitutional limitation.

Bank *v.* Grace, Mayor, et al., 102 N. Y. 313.
Brooke *v.* Philadelphia, 162 Pa. 123.
Bruce et al. *v.* Pittsburgh, 166 Id. 152.

The obvious intention of the constitution is to authorize a continuous debt not exceeding 7 per cent. of the assessed valuation of the taxable property at the time the limit is reached.

Brooke *v.* Philadelphia, supra.

Charles I. Landis, for appellees.

The increased municipal indebtedness of 2 per cent on the assessed value of the taxable property authorized to be made by the eighth section of Art. IX. of the Constitution may not be exceeded except by popular vote where the increase has been made by successive additions each less than 2 per cent., or by the whole amount at once.

Pepper *v.* City of Philadelphia, 181 Pa. 566.
City of Wilkes-Barre's Appeal, 109 Id. 554.
Pike County *v.* Rowland, 94 Id. 238.
Wheeler *v.* City of Philadelphia, 77 Id. 338.

April 24, 1899. DEAN, J. The following is a statement of the indebtedness of Lancaster city from the adoption of the present constitution until January 1, 1897:

On January 1, 1874	$490,458.06
Of which there was then in the sinking fund	80,358.06
Leaving the net indebtedness at that time	$410,100.00
Of this indebtedness there is now in the sinking fund	$205,900.00
Leaving now outstanding of this indebtedness	$204,200.00
To which add old indebtedness, omitted by mistake	$6,500.00
Leaving total old indebtedness outstanding	$210,700.00

Since January 1, 1874, the city has contracted new indebtedness as follows:

Between January 1, 1874, and January 1, 1885	$243,000.00
Of which there is in the sinking fund	$204,200.00
Leaving outstanding of these loans	$38,800.00
And since January 1, 1885	$395,000.00
Making a total new indebtedness of	$433,800.00

All of this new indebtedness is, at this time, outstanding in the hands of creditors of the city, and no part of it is in the sinking fund.

The total old indebtedness outstanding is	$210,700.00
The total new indebtedness outstanding is	$433,800.00
Present actual outstanding indebtedness	$644,500.00
The assessed valuation of the taxable property on January 1, 1897, was	$15,416,646.00
Two per centum of which is	$308,322.92
The present city debt, it will be noticed, is now	$644,500.00

It is claimed, this can be increased $73,932.92, so that it will reach, but not exceed the amount of indebtedness allowed by the Constitution of 1874, without a vote of the people. This claim comes squarely in conflict with the interpretation of section 8, Art. IX. of the Constitution, as announced in Pepper *v.* City of Philadelphia, 181 Pa. 566. The question involved there was precisely the same as here, and the present Chief Justice speaks as follows:

"It is clear, therefore, that in all cases cited we have adhered to the proposition that the increase of 2 per cent. authorized to be made by the second clause of the eighth section, may not be transcended except by a popular vote, and this, whether the increase has been made by successive additions, each less than 2 per cent., or at one time and by one municipal act alone. We have not allowed this percentage of increase to be exceeded in any instance by mere municipal action. It follows, therefore, that, as the 2 per cent. limit in the present case has been more than reached by previous additions, though by subsequent reductions the aggregate of the additions is now slightly below the 2 per cent. limit, the ordinances authorizing the two loans of $8,000,000 and $3,000,000 respectively, are both invalid, and the plaintiffs' bill must be sustained and the injunction prayed for awarded."

We intended, by that case, to settle the very question here raised: Brooke *v.* City of Philadelphia, 162 Pa. 123, and Bruce *v.* Pittsburgh, 166 Pa. 152, do not touch it. Those cases hold, that the sinking fund must be deducted from the amount borrowed, in determining whether the 7 per cent. limit has been reached; here, the question is, whether the 2 per cent. limit of increase can be exceeded without a popular vote? We hold that it cannot. The city already has borrowed, since the adoption of the constitution, more than 2 per cent., and more than that percentage of that additional indebtedness is now outstanding and unredeemed. Although the proposed new debt would not exceed the 7 per cent. limit, nor exceed 2 per cent. of the assessed valuation, nevertheless, it makes more

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than 2 per cent. of new debt, since the Constitution went into effect; therefore, notwithstanding the reductions, the municipal authorities must have recourse to the people for authority to increase the debt.

The decree of the Court below is affirmed.

MITCHELL, J., dissents.

W. D. N.

Superior Court.

March, '99, 5. Superior Court. March 21, 1899.

Jacoby v. West Chester Fire Ins. Co.

Fire insurance—Evidence—Statement—Affidavit of defence—Pleading—Rule of court.

Where the plaintiff has complied with a rule of court requiring a specific averment of facts sufficient to support the claim to be filed with the statement, and providing that where these averments are not denied by the defendant they shall be taken as true, an affidavit denying liability to plaintiff by reason of fraud and false statements but not denying specifically the facts set out in the averment, will not put the plaintiff to proof of the facts alleged in the averment. Thus, on an action on a fire insurance policy, where the loss and notice of the same and compliance with the terms of the policy and adjustment of loss are averred, an affidavit of defence which alleges false statement of value and destruction by plaintiff of their own property, will not bind the plaintiff to prove any of the facts alleged in the averment which had not been denied.

Where only two questions are raised by the pleadings in an action on a fire insurance policy, neither one of which is to the allegations in the proofs of loss, the rule will be enforced that no evidence is admissible to defeat the recovery which the issues of facts do not require.

In an action on a fire insurance policy the plaintiff may introduce in evidence the affidavit of defence to show that the defendant adjusted the loss payable by it at a certain amount.

Where the defence in an action on a fire insurance policy is that the insured set fire to the property, evidence of a conversation between others than the plaintiff and in his absence, significant of an early destruction of the property by fire is inadmissible.

Where the instrument upon which suit is brought is offered in evidence and objection be made thereto because of incompleteness, in that a certain drawing or map which, by the terms of the instrument, is made part of it, is omitted, a subsequent offering of the map in evidence cures the incompleteness of evidence.

Appeal of the West Chester Fire Insurance Company of New York, from the judgment of the Common Pleas of York County, in an action of assumpsit wherein Adam Jacoby and Samuel F. Jacoby, trading and doing business as Adam Jacoby & Brother, were plaintiffs.

The facts of the case appearing from the record were as follows: The plaintiffs insured in the defendant company for $500 and the insured property was destroyed by fire on June 15, 1897. Twenty-two companies, including the defendant underwrote a risk of $16,000 on the property. Defendant's share of the adjusted loss was $450.51. Payment of the loss was refused on the ground that plaintiffs had set fire to the property and that the statements in the proofs of loss were false and fraudulent in that the property was grossly overvalued and liability was further denied on the ground that the policy contained a condition that the insured, within sixty days after the fire, shall render a statement to the company of, among other things, "all encumbrances thereon," and that, in the plaintiffs' proof of loss no mention was made of two judgments aggregating $4500, which were a lien upon the property at the time of the fire.

The Court of Common Pleas of York county has a rule which provides that the plaintiff shall file a specific averment of facts sufficient to support the plaintiff's claim, and providing that where these averments are not denied by the defendant they shall be taken as true.

In accordance with this rule the plaintiffs filed "a specific averment of facts" which averred that all of the conditions, agreements, covenants and warranties binding upon the plaintiffs by reason of said policy have been fully complied with and performed; and the occurrence of the fire and adjustment of loss. The affidavit of defence set out that the fire was fraudulently caused by plaintiffs and that the statements of the loss sustained by the plaintiffs were untrue and that the agent of the company at the time of the adjustment did not know that they were false and fraudulent.

At the trial the plaintiffs offered the affidavit of defence in evidence to show the issue raised by plaintiffs and showing the adjustment of loss and a promise by the representative of the defendant to pay the amount claimed in the statement. The offer was admitted by the Court so far as proof of the adjustment of loss by the agent of the company was concerned. (Fifth assignment of error.)

The policy in suit was offered in evidence, but the map which is referred to in the form of policy used was not attached and the objection was that the policy was incomplete. The policy was admitted. (Sixth assignment of error.)

An offer of evidence of a conversation between a witness and another who had been an employé in the property which was insured that on a night shortly before the fire one said to the other, "take a look at the factory to-night, for this is the last time you will see it," was rejected by the Court. (Ninth assignment of error.)

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The defendant offered to prove that one Zeigler, an insurance agent, having been informed of the suspicious action of one of the plaintiffs, in relation to the fire, went to the plaintiff and demanded that he should surrender $3000 of the insurance which Zeigler had procured for him in three companies, and that that was done to induce Zeigler to keep the matter quiet so that the plaintiffs might receive the insurance placed in other companies, to be followed by other evidence that Zeigler did withhold his knowledge from the other insurance companies at the adjustment so that the other companies agreed to pay.

Objected to as improper, as what was done by Zeigler, the insurance agent, could not affect the plaintiffs or be evidence for the defendant. Objection sustained. (Seventh and eighth assignments of error.)

An offer of defendant to show that one of the plaintiffs had told witness that witness and Zeigler were talking too much about the fire and told the witness that one Robbins was talking too much about the fire, was rejected. (Tenth assignment of error.)

The plaintiffs presented the following points:

"The undisputed evidence being that the proof of loss was executed by the plaintiff, Adam Jacoby, two days after the adjustment of the loss, and the ascertainment of the amount due by the defendant company, nothing in proof of loss can affect the plaintiffs' right to recover.

"Even although the proof of loss in this case contains the statement that there were no encumbrances upon the property insured, and although as a matter of law the two judgments offered in evidence by the defendant, one against Adam Jacoby and Samuel F. Jacoby, and the other against Samuel F. Jacoby and Adam Jacoby, are encumbrances against the firm property, that is no bar to the recovery by the plaintiffs, unless the jury find from the evidence that the plaintiffs, or one of them, willfully and knowingly made the misstatements with a view to cheat the company." Both of which were affirmed by the Court. (First and second assignments of error.)

The defendant submitted, inter alia, a point, as follows:

"3. If the jury find from the evidence that there were two liens on the insured property, when plaintiffs stated in their proof of loss that there were no encumbrances upon it, and said statement was made with full knowledge of said encumbrances, then said false statement avoids the policy of insurance, according to its terms and conditions, and there can be no recovery upon it," which was refused. (Third assignment of error.)

Verdict and judgment for plaintiffs, $458.53. The defendant took this appeal and filed assignments of error as above indicated.

N. M. Wanner, for appellant.

Misstatements as to encumbrances on the property need not be made with the express object of cheating the company in order to avoid the policy. It is enough if made with full knowledge of the encumbrances, as was admittedly done here. It is a violation of a condition of the contract, even without any fraudulent intent.

Hench v. Ins. Co., 122 Pa. 128.
Chaflin v. Ins. Co., 110 U. S. 81.
Gottsman v. Ins. Co., 56 Pa. 210.

Testimony as to the transactions between Zeigler, the agent, and the plaintiffs, was entirely competent, and also as to Zeigler's explanation.

Glessner v. Patterson, 164 Pa. 230.
B. & O. R. R. Co. v. Hoge, 34 Id. 214.
Reinhard v. Keenbartz, 6 Watts, 93.
Stauffer v. Young, 39 Pa. 455.

This evidence would have been admissible even in a criminal case for conspiracy, where the incriminating declarations of one are admissible against all, after they have been shown to have acted in concert.

Lowe v. Dalrymple, 117 Pa. 564.
Jones v. Lewis, 148 Id. 236.
Palmer v. Gilmore, 148 Id. 49.
Weil v. Cohn, 4 Pa. Super. Ct. 443.

H. C. Niles, (with him *H. Keesey* and *Neff*), for appellees.

If the proof of loss had been a material matter, upon the faith of which the insurance company relied, and if it had contained a definite statement that there were no encumbrances upon the real estate, this would not have avoided the policy or have been any defence in this action.

To constitute such fraud or false swearing or assertions in proofs of loss as will render the policy void, it must be willfully made in regard to a material matter, with the intention of thereby deceiving the insurer.

Ins. Co. v. Updegraff, 43 Pa. 350.

Where a policy provides that if the property insured be encumbered that it should be voided, the fact that there were judgments existing against the insured at the time of the insurance was no defence and the policy is not void on that account.

Ins. Co. v. Hoffman, 125 Pa. 626.

The rejection of the testimony as to the conversations concerning the destruction of the property was perfectly proper.

Bratton v. Mitchell, 3 Pa. 50.
Cummings v. Williamsport, 84 Pa. 478.
Weidler v. Farmers' Bank of Lancaster, 11 S. & R. 134.

April 17, 1899. BEEBER, J. The Court in which this case was tried has the following rule: "If

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the plaintiff shall file with his declaration or statement, separate and apart from his declaration or statement, a specific averment of facts sufficient to support his claims, verified by affidavit, and serve a copy thereof on the defendant or his counsel of record, such items of claim and material averments of facts as are not denied by the defendant, by affidavit filed with or before plea pleaded, shall be taken as admitted." When the plaintiffs filed their statement they also filed with it, and served a copy on counsel of record for defendant, a specific averment of facts as allowed by the above rule of Court. In this specific averment they alleged that the property insured was destroyed by fire on a certain date, that immediate notice of the loss in writing was given to the defendant, that they, within sixty days after the fire, made a statement to the defendant giving all the information which the policy required, that on June 23, 1897, the agent of the defendant duly authorized to act met with the plaintiffs and adjusted, ascertained and agreed that a certain sum was due and payable by the defendant, that on this date the notice required had been given to the defendant, the ascertainment and estimate had been made by defendant's agent, duly authorized to ascertain, estimate and adjust said loss, satisfactory proof of loss had been received by defendant and all things required by the policy had been done by the plaintiffs.

The defendant in its affidavit of defence which it filed also as its denial required by the above rule alleged that the fire which had consumed the insured property "was caused by the acts of the plaintiffs who willfully and fraudulently set fire to the insured property," for the purpose of defrauding the defendant, that the plaintiffs "by false and fraudulent returns and statements of the value of the property" insured, and by willfully, falsely and fraudulently concealing from the defendant the fact that the property insured was set on fire by them fraudulently induced the defendant to adjust the loss and agree on a certain sum as due and payable to plaintiffs by defendant, and that defendant did not know of the said fraudulent and false returns and statements of the value of the insured property, nor that the property was set on fire by the fraudulent act of the plaintiffs for the purpose of defrauding the defendant until after the adjustment of the loss by the defendant.

From this statement of the pleadings it is clear that there were only two issues of fact to be tried, first, whether or not plaintiffs had fraudulently set fire to their own property for the purpose of defrauding the defendant, and, second, whether or not the defendant had been induced to agree upon the adjustment of the loss and upon the payment of a certain amount by the false and fraudulent returns and statements by the plaintiffs of the value of the insured property. All the other facts necessary to a recovery had been fully and explicitly set forth by the plaintiffs in their specific averment of facts, and as they had not been denied by the defendant they must be taken, under the above rule of Court, as admitted. The plaintiffs were no longer bound to prove any of the facts alleged in their averment which had not been denied. The Court and jury were compelled to assume that all these material and undenied facts in the averment were admitted to be true by the defendant, and confine the contest to these two issues of fact: Neely *v.* Bair, 144 Pa. 250; Whitehead *v.* School District, 145 Pa. 418.

The first four assignments of error are to the action of the Court in reference to the proofs of loss which were executed two days after the adjustment of the loss and the ascertainment of the amount due by the defendant. Bearing in mind what were the two issues of fact which the pleadings raised we do not think it can be successfully urged that the Court below erred in this respect. Having been executed two days after the adjustment and ascertainment of the amount due, they can hardly be said in themselves to have induced the defendant to adjust and ascertain the amount due. It is earnestly urged that because they contained false statements as to the origin of the fire and as to the encumbrances on the property it was error for the Court to say that nothing in the proofs of loss prevented recovering. But it must be remembered that the Court in its charge to the jury had said plainly and emphatically that if they were satisfied by the preponderance of the evidence that plaintiffs had fired their own property there could be no recovery. Having heard this part of the charge the jury could not have supposed that the Court meant, when it said that nothing in the proofs of loss prevented recovery, that the fact, if they found it to be a fact, that plaintiffs fired their property did not prevent a recovery. What was plainly meant and what the language clearly shows was that a false statement as to the origin of the fire made two days after the company had adjusted the loss should not prevent recovery. As to the mistaken or false statement in the proofs of loss in reference to the encumbrances, much could be said in favor of a view different from that entertained by the Court below if it had appeared that the proofs of loss had in any way induced the adjustment. The policy required the proofs of loss to state all encumbrances on the insured property. This clause

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does not seem to have been called to the trial Judge's attention when about to make the ruling complained of. What he evidently had before him was that part of the language of the policy in reference to the property becoming encumbered by chattel mortgage, and his construction of that language is unexceptionable. But the case does not require us to decide what the word "encumbrance" included. The defendant had an undoubted power to waive the proofs of loss. This can be done by acts as well as by agreement. Sometimes it is done by notifying the insured, in case of total loss, that the insurance would be paid in full: Stauffer *v.* Manheim Mut. Fire Ins. Co., 150 Pa. 531; sometimes by acts indicating a recognition of liability, or repudiating liability for other reasons: Lebanon Mut. Fire Ins. Co. *v.* Erb, 112 Pa. 149; sometimes by some authorized persons going to the scene of the fire, appointing appraisers as required by the terms of the policy, and promising payment on the finding of the appraisers: McGonigle *v.* Susquehanna Mut. Fire Ins. Co., 168 Pa. 1.

Where the pleadings in a case raise only two questions, neither one of which is as to the sufficiency or verity of the allegations in the proofs of loss, it is important to enforce the rule that no evidence shall be heard to defeat the recovery which the issues of fact do not require: Latimore *v.* Dwelling House Ins. Co., 153 Pa. 324. In the case now before us there was no question raised in the pleadings as to the form or truth of the proofs of loss. Had there been, the plaintiffs would have had an opportunity to show that the false statement as to encumbrances was mistakenly, inadvertently, or accidentally made, or that it was not fraudulently, willfully and knowingly made with a view to defraud the defendant, in which case the proofs of loss would not have prevented recovery: Franklin Fire Ins. Co. *v.* Updegraff, 43 Pa. 351; Cumberland Valley Mut. Protection Co. *v.* Mitchell, 48 Pa. 374. In view of the pleadings and issues in this case we think there was no error committed by the Court in the charge to the jury as complained of in the first four assignments of error, and they are therefore overruled.

The fifth assignment of error is to the admission in evidence of the affidavit of defence which was offered by the plaintiffs to show that the defendant adjusted the loss payable by it at a certain amount. We think this was properly admitted. The plaintiffs had stated in their averment of facts that defendant, by an agent duly authorized to act for it in the premises, had met with the plaintiffs and agreed that defendant's share of the loss was a certain amount. To this averment defendant replied that when it agreed to the amount of the loss for which it was liable it did not know that plaintiffs had fired their own property, and further, that it was induced to agree to this amount by false and fraudulent statements and estimates as to the value of the property insured. It did not intimate anywhere that its agent was not authorized to adjust losses. In fact its affidavit was a confession of authority by its agent to do a certain act, and a plea of avoidance of the effect of the act because of certain frauds. It made no difference in legal effect which one of the defendant's many agents made this agreement, nor what was his name, nor who was present. Plaintiffs had confronted defendant with the bald averment that it was done by an agent duly authorized. If defendant had intended to deny that it was done by its agent, or that he was authorized to do it, it should have said so. The plaintiffs then would have known that they would be required to prove the agency and the authority. But when they found defendant did not deny either, but rested on its right to repudiate the adjustment because of plaintiffs' fraud, they had a right to assume they would not be required to prove agency: Neely *v.* Bair, 144 Pa. 250. This assignment is overruled.

The seventh, eighth, ninth, tenth, eleventh and twelfth assignments are to the exclusion by the Court of certain offers of evidence. That part of the offer, embraced in the seventh assignment, to prove the conversations of the witness with the insurance agent Zeigler, out of the presence of the plaintiffs, was clearly inadmissible, nor could it be made admissible by offering to follow it up by proof of what Zeigler did afterwards in procuring the assignment to himself of the policies in which he was interested, and in concealing from defendant, when the adjustment was made, his knowledge of the charge that plaintiffs had set fire to the insured property. The witness by whom it offered to prove these conversations cannot be regarded as a conspirator whose acts and conversations under certain circumstances may become evidence against all in the conspiracy. What Zeigler did with the plaintiffs after he received the information, and whether he informed the defendant, at or before the time of the adjustment, of his knowledge of the charge that plaintiffs has set fire to the property, would have been relevant and admissible had the offer been to prove this alone, but to join with it an offer to prove what was clearly inadmissible rendered the whole offer inadmisible. It was not the duty of the Court to separate the admissible from the inadmissible and admit the former. Moreover, the defendant cannot complain for all the admissible part of its offer was subsequently put in evidence.

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Had the Court finally ruled as the eighth specification of error would seem to indicate, there might be room for alleging error, but an examination of the evidence immediately following shows that defendant was not satisfied with the ruling upon its offer embraced in this assignment for it immediately renewed it in effect and it was admitted. The witness was allowed to testify in full as to whether Zeigler had informed him, at the time of the adjustment, of the charge having been made that plaintiffs had set fire to the property, and of the fact that an assignment of certain policies had been made to Zeigler. The admission of this evidence cured any possible error in rejecting the offer embraced in this assignment.

By the ninth assignment of error it appears that a witness was asked by the Court whether certain doors of the building could be opened from the outside to which he replied that they could not; that he was particular in making them tight, and especially on that night. Counsel for defendant, whose witness he was, then asked him his reason for being so particular on that night which question was excluded by the Court upon objection. It was then further offered by defendant to prove by this witness that when he and another person left the building that night each said to the other "take a look at the factory to-night, for this is the last time you will see it," for the purpose of showing the suspicions of these two parties. This offer was also excluded. In this we think there was no error. It is too plain for argument that two persons cannot, by communicating their suspicions to each other, furnish evidence to convict third parties of a crime. Many witnesses had described the condition of the property for a few days before the fire which was entitled to whatever weight the jury chose to give, but we have been shown no authority and we can find none ourselves which requires the admission of what different persons told each other as to their suspicions.

The tenth assignment of error shows an offer to prove that shortly after the fire one of the plaintiffs told the witness and another person that they were talking too much about the fire, and if they did not stop it he would make trouble, and that the witness should keep away from one Robbins who was talking too much about the fire, for the purpose of showing fraud on the part of the plaintiffs and a fraudulent attempt to close the mouths of witnesses and prevent investigation. The Court excluded this because there was no effort to show what this talk was of which complaint had been made. We do not think the offer would sustain the purpose for which it was made. So long as we do not know what it was that these men were saying about plaintiffs we cannot say that plaintiffs' effort to stop their talking was evidence of fraud or of an attempt to close the mouths of witnesses or to prevent investigation. It was not charged that the plaintiffs tried to induce these witnesses not to testify on the trial. Under these circumstances it was not error to exclude this offer.

The eleventh assignment of error was to the refusal of the Court to allow the defendant to show by a witness, who had been in the employ of the plaintiffs, that on Saturday night when he visited the factory he found that part of a kindling pile had been removed, which part, on his return on Monday, he found had been replaced, and that on Saturday night at this same visit he noticed the smell of turpentine. This was offered to show or as tending to show, the fraudulent burning of the property of plaintiffs. We cannot see that it does either. The casual connection between removing and replacing a pile of kindling wood and the fraudulent burning of insured property is not apparent, especially when there is an interval of two days between the two occurrences. In any event the defendant cannot complain because it was fully shown by the evidence on both sides that one of the plaintiffs and his bookkeeper visited the premises after midnight within an hour or two of the fire under circumstances to say the least unusual. The spilling of the turpentine and its consequent smell were also admitted by the plaintiffs, so that the defendant, in spite of the refusal of the offer embraced in this assignment, had the benefit of everything included in this offer. Indeed, the proof of what it alleged to be the fact was finally stronger by other testimony offered by itself and by plaintiffs, for, as we have said, one of the plaintiffs and his bookkeeper were clearly shown to have been on the premises one or two hours before the fire, which we think much more likely to convince the jury of the truth of defendant's contention than its offered proof of the presence of some one, not known to anyone, on the premises during the Sunday preceding the Monday night in which the fire occurred. This assignment is overruled.

The twelfth assignment was abandoned at the argument. The sixth assignment becomes unimportant in view of the fact that defendant offered the map in evidence which was received. If it was error to allow the policy to be offered in evidence without offering the map with it, it was cured by the subsequent receipt of the map in evidence. This assignment is also overruled.

Judgment affirmed.

W. D. N.

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March, '99, 17. Superior Court. March 21, 1899.

Jacoby v. Providence Washington Ins. Co.

Fire insurance—Statement — Rule of court — Pleading—Act May 19, 1897, P. L. 67.

Where a rule of Court provides that with the plaintiff's statement shall be filed averments of the essential facts set forth by the statement, and requires that these averments shall be specifically denied by affidavit, an affidavit which sets up other than a specific denial is insufficient to prevent judgment for plaintiff.

The specific averment and affidavit of defence are competent evidence on the part of the plaintiff, where the latter does not deny the specific averments of facts.

The penalty prescribed by the 21st section of the Act of May 19, 1897, P. L. 67, is not properly enforced against an appellant who was one of many defending similar claims, chiefly on questions of fact, which, although determined adversely to them by the Court below, were such that an appeal was entirely consistent with good faith.

Appeal of the Providence Washington Insurance Company of Providence, R. I., from the judgment of the Common Pleas of York County, in an action of assumpsit where Adam Jacoby and Samuel F. Jacoby, trading as Adam Jacoby & Brother, were plaintiffs.

For the facts of the case see Jacoby *v.* West Chester Fire Ins. Company, ante p. 219.

On the trial the plaintiffs offered in evidence the specific averment of fact filed under rule of Court, and also affidavit of defence.

The defendant denied liability on the ground that the fire was deliberately caused by the plaintiffs and that they concealed, both at the time the insurance was taken and at the time of the adjustment of loss the fact that there were two liens upon the premises

Verdict for plaintiffs, $468.99 and judgment thereon. The defendant took this appeal and assigned error, inter alia, as follows:

The Court erred in its answer to the first point of defendant, as follows:

"Under the terms and conditions of the policy in suit, the making of an adjustment and estimate of the loss by the insured and a representative of the company, as set forth in paragraph four of specific averments of fact, did not, in itself amount to a waiver of the requirement in the policy that full proofs of loss as therein set forth and required, satisfactory to the company, should be made and delivered to the company at least sixty days before bringing of suit upon the policy." Answer—"We answer this point as follows: The statements contained in this point are affirmed. We think, however, the company has waived any defence raised by the point by not denying in this answer the furnishing to it of proof of loss mentioned in the specific averment of facts as therein contained." (First assignment of error.)

The Court erred in its answer to the second point of defendant, as follows:

"The proofs of loss furnished by the assured to the company must contain all the material facts, statements and descriptions called for in the policy; otherwise they are insufficient to fulfill the terms of the contract, or entitle the plaintiffs to recover; unless there shall have been a waiver of said requirements in writing by the company, or by an agent duly authorized in writing so to do, as stipulated for in the contract of insurance; and as this does not appear from the evidence in the case, the plaintiffs are not entitled to recover." Answer—"We answer this point as follows: The proof of loss mentioned in the point must be furnished unless the same is waived by the company. Defendant has not denied in his reply to the specific averment of fact that such proof of loss was furnished by the plaintiffs. That appears as an admission therefore, in this case." (Second assignment of error.)

The Court erred in refusing to charge that the adjustment of loss made by the agent of the company did not conclude the defendant from objecting to the insufficiency of the proof of loss. (Third assignment of error.)

And in refusing binding instructions in favor of defendant. (Fifth assignment of error.)

The Court erred in refusing to admit the proofs of loss in evidence on the ground that the defendant had served upon them the specific averments of facts which stated the proofs of loss had been furnished before the day of adjustment and there being no denial of the specific averment of facts it is an admission of the fact of the proof of loss required. (Eighth assignment of error.)

The appellees asked that the penalty provided by Act of May 19, 1897, P. L. 67, for appeals taken merely for delay, be imposed.

N. M. Wanner, for appellant.

The refusal of the Court to admit the proofs of loss in evidence was error.

Where an act alleged in the statement is admitted in the answer, coupled with an allegation avoiding its effect, and making it invalid, the affidavit of defence and the statement are admissible in evidence, but the defendant is not concluded thereby. He may prove as matter of defence anything which will avoid the legal effect or binding character of the alleged fact. This same rule of Court has been thus construed.

Neely *v.* Bair, 144 Pa. 258.

Another reason in support of this point is that

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the specific averments of fact did not set forth either the name or authority of the agent, by whose partial adjustment, and alleged receipt of the proofs of loss the defendant is to be conclusively bound. He who would bind another by the act of an agent must disclose who he is, and show his authority.

Cole *v.* Ins. Co., 188 Id. 345.
Everett *v.* Ins. Co., 142 Pa. 332.
Hays & Wick *v.* Lynn, 7 Watts, 524.
American Life Ins. & Trust Co. *v.* Shultz, 82 Pa. 46.
American Underwriters' Ass'n *v.* George, 97 Id. 238.
Central Pa. Telephone Co. *v.* Thompson, 112 Id. 118.
Insurance Co. *v.* Johnson, 23 Id. 72.

Where the policy requires that proofs of loss be furnished to the company, or to a general officer, delivery to a local agent is insufficient, and the latter need not send it to the company.

Edwards *v.* Ins. Co., 75 Pa. 378.
Trask *v.* Ins. Co., 29 Id. 198.

Though the Court has the power to make rules regulating its practice, they should not be enforced so rigidly as to work injustice or hardship.

Sterling *v.* Ritchey, 17 S. & R. 263.
Magill's Appeal, 59 Pa. 430.
Honeywell *v.* McGuire, 5 Kulp, 513.
Lewis *v.* Keck, 2 Northamp. 345.

The Supreme Court will review a case where the rules of the Court below are not properly administered. When the rights of parties rest upon the observance of Court rules and orders, as they do in this case, there is every reason why the Court below should be held to a careful construction of its rules.

Schrimpton *v.* Bertolet, 155 Pa. 640-641.
Brennan's Estate, 65 Pa. 16.

H. C. Niles, (with him *H. Keesey* and *Neff*), for appellees.

The facts upon which the plaintiffs' claim was based were in effect, admitted, and they had a right to rest upon the admission until evidence in avoidance thereof was introduced by defendant.

Neely *v.* Bair, 144 Pa. 250.

The company did not deny that they received these proofs of loss or assert that they returned them, or ask for anything more definite, and their failure to do so prevented them from raising any objection as to their sufficiency.

Davis Shoe Co. *v.* Ins. Co., 138 Pa. 73.

Proofs of loss are at most, a condition precedent not to the undertaking of the insurers, but to the right of action of the insured. A waiver may be inferred by any acts of the insurer evidencing recognition of liability.

Inland Ins. & Deposit Co. *v.* Stauffer, 33 Pa. 404.
Ins. Co. *v.* Erb, 112 Id. 149.
Gould *v.* Ins. Co., 134 Id. 588.

To constitute such fraud or false swearing or assertions in proofs of loss as will render the policy void, it must be willfully made in regard to a material matter, with the intention of thereby deceiving the insurer.

Ins. Co. *v.* Updegraff, 43 Pa. 350.

There can be no satisfactory explanation of the appellant's conduct except that this appeal was taken for the purpose of harrassing and delaying the plaintiffs in the collection of a claim, the justness and absolute correctness of which was not even disputed upon the trial.

This is just the evil which the 21st section of the Act of May 19, 1897, P. L. 72, was intended to remedy.

April 17, 1899. BEEBER, J. On September 13, 1897, suit was brought to recover a certain amount due as the loss payable by the defendant under its policy of insurance issued to the plaintiffs. On the next day a declaration and a separate specific averment of facts were filed and both served on the defendant's counsel of record some time before September 22. This separate specific averment of facts was filed in compliance with the rule of the Court in which the case was tried, which is as follows: "If the plaintiff shall file with his declaration or statement, separate and apart from his declaration or statement, a specific averment of facts sufficient to support his claims, verified by affidavit, and serve a copy thereof on the defendant or his counsel of record, such items of claim and material averments of facts as are not denied by the defendant, by affidavit filed with or before plea pleaded, shall be taken as admitted." Among the other material averments of fact found in the plaintiffs' specific averment was the following: "On June 23, 1897, the notice required had been given to the defendant, the ascertainment and estimate had been made by the defendant's duly authorized agents, and satisfactory proofs of loss had been received by the defendant, and all things had been done and performed by and on behalf of the plaintiffs as required by said policy."

On October 4, defendant filed its affidavit of defence, which was also its affidavit of denial as required by the above rule, in which it set forth two grounds of defence, first, that plaintiffs had set fire to the insured property, and, second, that defendant was induced to make the adjustment and fix the amount payable by it by the false and fraudulent returns of plaintiffs as to the value of the property insured. There was no denial of any of the other material averments of the plaintiffs.

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For the purpose of proving their case the plaintiffs offered in evidence their declaration and specific averment of facts and the affidavit of defence, which was objected to by the defendant. The Court admitted the papers whereupon plaintiffs rested. Defendant then offered in evidence certain proofs of loss furnished it by plaintiffs for the purpose of showing that no proofs of loss were furnished as alleged in plaintiffs' averment of facts on June 23, 1897; but that they were furnished on a subsequent date; that they were not such proofs of loss as are required by the policy and that they do not refer to the policy on which suit is brought. It also offered to prove that there were encumbrances on the real estate covered by the policy which were not set forth in the proofs of loss as required by the terms of the policy on which suit is brought. Upon objection by plaintiffs these offers were overruled. As the defendant offered no evidence to sustain either one of the defences which the pleadings raised the Court directed a verdict for the plaintiffs upon the ground that the pleadings contained sufficient admissions to entitle plaintiffs to recover without further proof.

The twelve assignments of error need not be noticed seriatim, as they all practically raise only one question, which is whether the Court erred in refusing to allow the defendant to put in evidence the proots of loss for the purposes for which they were offered. It is plain to us that the pleadings put at issue only the two questions which we have mentioned already. The plaintiffs had stated in their averment that on June 23 satisfactory proofs of loss had been received by the defendant. The defendant must have known when it made its affidavit of defence whether the proofs of loss were satisfactory or not, for it is admitted that they were received on June 24, and defendant did not file its affidavit of defence until October 4. It had all this time to satisfy itself whether the proofs of loss were satisfactory or not. When confronted with the blunt averment that it had received satisfactory proofs of loss, it ought to have denied it if it were not so, and especially so when it knew that the rule of Court would give every undenied material averment the force of an admission. Not denying it the plaintiffs were bound to assume it was admitted and therefore they would conclude they were not required to prove it. The same is true as to the false or mistaken statement in the proofs of loss in reference to the encumbrances. If there were encumbrances not mentioned in the proofs the defendant had another reason to object to them, and if it had done so on this ground, the plaintiffs would at least have had an opportunity to show, if they could, that the omission was due to oversight, or accident or that it was innocently, although mistakenly made and not for a fraudulent purpose. To put any other construction on this rule of Court would make it a pitfall into which unsuspecting parties, entirely able to prove every material fact of their case if called upon to do so, but not prepared to do so because not called upon, might fall.

This rule of Court when properly enforced is well calculated to prevent the waste of the public time and to relieve litigants from unnecessary burdens. Every defendant in that Court has an opportunity to raise any defence that the facts will warrant. He is at liberty to call on the plaintiff to prove any material fact which he can deny by affidavit and it is to the advantage of every one that this should be done. The issue is then reduced to the narrowest possible compass and each party knows in advance what must be proved. We are satisfied that the Court below properly enforced this rule and therefore the assignments of error are overruled.

We cannot persuade ourselves that this is a proper case to impose upon the appellant the penalty provided by the 21st section of the Act of May 19, 1897, P. L. 72, intended for those who sue out an appeal merely for delay. The appellant was one of nineteen companies who resisted payment on account of considerable evidence which can honestly be said to show that plaintiffs set fire to the insured property. The case of Jacoby *v.* West Chester Fire Ins. Co., decided at this term, was one where this issue was tried. It is true that trial resulted in a verdict in favor of the plaintiffs, but the evidence in that case and the rulings of the Court during the trial were such that an appeal to this Court was entirely consistent with good faith. As we do not think it would be proper to impose the penalty in that case we do not see any reason why we should subject the present appellant to any different treatment.

Judgment affirmed.

W. D. N.

March, '99, 34. Superior Court. March 21, 1899.

Jacoby v. North British and Mercantile Ins. Co.

Fire insurance policy—Admission—Statement—Evidence—Affidavit of defence—Rule of court—Act June 27, 1883, P. L. 165.

An agreement between counsel in a suit on a policy of fire insurance that the amount claimed by plaintiff was what defendant owed, if liable at all, relieves plaintiff of the necessity to prove the adjustment or extent of his loss.

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Under the Act of June 27, 1883, P. L. 165, evidence of proof of loss which is sent to the agent of the company who countersigned the policy when issued is sufficient.

A witness may be asked on cross-examination as to his making on other occasions statements different from that of his testimony at the trial.

Under the provision in a policy that it shall be void if the insured make misstatements as to encumbrances on the property, defendant is not relieved of liability by a mere failure on the part of the insured to enumerate the encumbrances at the time the application for insurance is made. It must appear that misstatements as to encumbrances were made willfully and knowingly.

Ellis *v.* Ins. Co., 7 Pa. Super. Ct. 264, followed.

Under a rule of Court which provides: "If the plaintiff shall file with his declaration or statement, separate and apart from his declaration or statement, a specific averment of facts sufficient to support his claims, verified by affidavit, and serve a copy thereof on the defendant or his counsel of record, such items of claim and material averment of facts as are not denied by the defendant, by affidavit filed with or before plea pleaded, shall be taken as admitted," the affidavit of defence is not admissible as defendant's evidence of the facts set forth in the affidavit.

Appeal of the North British and Mercantile Insurance Company of London and Edinburgh, from the judgment of the Common Pleas of York County, in an action of assumpsit, wherein Adam Jacoby and Samuel F. Jacoby, trading as Adam Jacoby & Brother, were plaintiffs.

This was an action on a policy of fire insurance.

On the trial the facts appeared as follows: The plaintiffs had a policy for $1000 in the defendant company. The property insured was destroyed by fire on June 15, 1897. There were twenty-three other policies at the time in force on the property, aggregating $16,000. Adjustment by agents of nearly all of these companies ascertained the loss to be $14,416.26, the pro rata amount allotted to the defendant was $901.02. The defendant denied participating in the adjustment and also denied that any proofs of loss were ever sent to the home office. The plaintiffs produced evidence to prove that Weiser, an agent of the defendant, was present at the time of the adjustment with the other agents in making up proofs of loss.

The plaintiffs offered in evidence the policy in suit, which was objected to by the defendant because its execution had not been proved, nor the agency of the parties signing as such. Admitted. (Fifth assignment of error.)

The Court admitted against objection of defendant evidence that proofs of loss were delivered to the agent who negotiated and countersigned the policy of insurance in defendant's company. (Sixth assignment of error.)

The plaintiffs, in cross-examining the witness Weiser, who denied that he had filled out proofs or had taken part in an adjustment, asked whether he had not said that an adjustment of loss has been made and that defendant company was found to owe $901. Objected to by defendant on the ground that the question does not tend to contradict anything testified to before by the witness. The question was allowed. (Eighth assignment of error.)

The witness was also asked, under objection, whether it was not usual custom in regard to the defendant and every other company not to notify the company of the loss, and to show that the proofs of loss are properly made out and forwarded to the company without any specific instruction or authorization from the company to that effect? The question was admitted for the purpose of throwing light on whether or not proofs of loss were made up. (Ninth assignment of error.)

The defendant offered the affidavit of defence in evidence to show the defendant's denial of receipt of any notice of proof of loss, and the defendant's denial of being represented by any agent at adjustment. Objected to by plaintiffs. Objection sustained. (Tenth assignment of error.)

The defendant offered in evidence records of the Court of Common Pleas showing unsatisfied judgments against the plaintiffs aggregating $4500 at the time of making the proof of loss and which, under the terms of the policy, he was required to set forth in the proof of loss. Objected to. Objection sustained. (Eleventh assignment of error.)

The defendant presented a point for charge, as follows:

"There is no evidence in the case to show that the company defendant, or any of its officers, received any proofs of plaintiffs' loss at the general office; and if they had actually been delivered to the agent Weiser, as testified to by the plaintiffs, and he did not send them to the general office, or to the company defendant, the conditions of the policy have not been complied with, and plaintiffs cannot recover." Answer—"We answer this point as follows: There is no proof in the case of the receipt of the proof of loss at the general office of the company. The balance of the point is not correct, and is refused." (Third assignment of error.)

The defendant asked for binding instructions in its favor, which were refused. (Fourth assignment of error.)

Verdict for plaintiffs, $901.02 and judgment

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thereon. The defendant took this appeal and filed assignments of error as above indicated.

N. M. Wanner, for appellant.

The burden was upon the plaintiffs to show Weiser's authority when they sought to bind the company by his acts.

Amer. Underwriters' Ass'n *v.* George, 97 Pa. 238.
Hays & Wick *v.* Lynn, 7 Watts, 524.
Amer. Life Ins. & Trust Co. *v.* Shultz, 82 Pa. 46.

Even adjustments and promises made by general officers of the company, not in writing and endorsed upon the policy, as required by its conditions, have been held not to amount to a waiver of any breach of the conditions of the policy.

Everett *v.* Ins. Co., 142 Pa. 332.
Hocking *v.* Ins. Co., 130 Id. 170.
Ins. Co. *v.* Conover, 98 Id. 384.
Ins. Co. *v.* Weiss Bros., 106 Id. 20.

If plaintiffs had even produced the proofs of loss alleged to have been furnished, their contents would not have been admissible as evidence of the amount of loss. Where the other evidence is meagre and unsatisfactory as in this case, the Court will reverse a judgment for the plaintiffs.

Cole *v.* Fire Assurance Co., 188 Pa. 345.
Sutton *v.* Fire Ins. Co., 188 Id. 380.

The Court refused the defendant's offer to prove these encumbrances, because it held that that the encumbrances contemplated in the above mentioned clause of the policy were chattel mortgages on personal property only, but this is not the usual construction of the word "encumbrance" in Pennsylvania, where chattel mortgages as a general rule are invalid. The question should have been submitted to the jury with instructions that false answers and concealment of the existence of these encumbrances would avoid the policy.

Ellis *v.* Ins. Co., 7 Pa. Super. Ct. 264.
Heffron *v.* Ins. Co., 132 Pa. 580.
Cumberland Valley Mut. Protection Co. *v.* Mitchell, 48 Id. 374.
Insurance Co. *v.* Schmidt, 119 Id. 449.
Hill *v.* Ins. Co., 103 Id. 282.
Chaflin *v.* Ins. Co., 100 U. S. 81.

The false statement, to bar recovery need not be made with the intention to cheat and defraud.

H. C. Niles, (with him *Horace Keesey* and *Neff*), for appellees.

The agency of Weiser is sufficiently established to prove the receipt of proofs of loss by defendant.

Act June 27, 1883, P. L. 165.

The failure of the plaintiffs to enumerate the judgments against them in the proof of loss was not such fraud as to void the policy.

7 Am. & Eng. Ency. of Law, p. 1047.

May 17, 1899. BEEBER, J. Although the pleadings in this case raised many issues of fact, when the case came to trial the only question tried was whether notice of the fire and proofs of loss had been sent to the defendant. The plaintiffs were relieved of the necessity of proving an adjustment or the extent of their loss in view of the defendant's admission at the trial, that the amount claimed in the plaintiffs' statement was the share due by the defendant in case it was liable at all. This renders immaterial the first assignment of error, which is the refusal of the Court to affirm the point submitted by defendant, asking the Court to say nothing done by Weiser at the time of filling up the proofs of loss could be binding on the defendant as an act of adjustment of the loss. As the question of adjustment was no longer in the case, it was immaterial whether the acts of Weiser on that occasion amounted to a binding adjustment or not. In view of the rule of Court set forth in the appellees' paper book, which is in force in the Court in which this case was tried, the acceptance of the policy in evidence, which is the subject of the fifth assignment, was proper. The refusal of the defendant's offer in evidence of the affidavit of defence as testimony to prove the defendant's denial of the receipt of notice of the fire and of the proofs of loss, which is the subject of the tenth assignment, was right. No attempt has been made to show that the affidavit is evidence of the facts alleged in it, either under the said rule of Court, or under any general rule of evidence.

The third and sixth assignments go to the sufficiency of the evidence to establish the plaintiffs' contention that proofs of loss were sent to the defendant. The testimony on the part of the plaintiffs was to the effect that proofs of loss were made on a certain day by one Weiser, signed and sworn to by the plaintiffs, and then delivered to him, who was one of the members of the firm of Deininger & Weiser, local agents of the defendant, which firm had also countersigned the policy. All this evidence as to making out the proofs of loss was, of course, contradicted by Weiser, but the jury found for the plaintiffs. It is insisted by the defendant that this is not sufficient evidence, even if believed, to prove that the proofs of loss were sent to any of the officers of the company. The Court below correctly decided that it was sufficient to prove a compliance with the terms of the policy, and that it was expressly made so by the terms of the Act of June 27, 1883, P. L. 165, which provided that, where insured property was destroyed by fire in this Commonwealth, the conditions of the policy, as to notice of loss and furnishing of preliminary proofs, shall be considered complied with, if they

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are given to the agent of the company who countersigned the policy within a certain time.

The seventh, eighth and ninth assignments relate to the cross-examination of the defendant's witness. In his examination in chief he had testified that he had not filled out proofs of loss for the plaintiffs, nor had he sent any to the defendant. Plaintiffs sought to avoid the effect of this by asking him whether he had not, at a prior time, made a statement in reference to this matter contradictory to the one which he had just made on the stand. We think this was proper. It is common practice to show, if one can, that a witness on a prior occasion had made statements inconsistent with his present one. Such cross-examination is not admissible for the purpose of showing that the witness had deceived others, which was one of the announced purposes for which plaintiffs' counsel examined him in this way, but it is clearly admissible under all the authorities for the purpose of showing that his account of matters, as to which he is giving testimony, has not always been the same, which was the other purpose for which this examination was conducted. It is true such a witness has a right to explain any contradictions, if he can, and such right was exercised in this case—to such an extent in fact that we cannot believe that the defendant's case was weakened to any appreciable degree by this attempt to impeach the testimony of this witness. In any event, it is a legitimate way to impeach the testimony of a witness, and we must sustain this well-established rule.

The second assignment is to the refusal of the Court to affirm the fourth point of the defendant. So far as this point requested the Court to charge that the delivery of the proofs of loss to the local agents did not operate as a waiver of any defects in them, as it appeared "they were not sent to or received by the company," we think it would have been an error to have affirmed it, because to have done so would have been a declaration by the Court that it appeared that the proofs of loss had not been sent to or received by the defendant. This was the crucial point of the case. There was testimony that the proofs of loss had been given to the countersigning agent, which, under the said Act of Assembly, is a compliance with the conditions of the policy requiring proofs of loss to be sent to the company. It would have been plainly improper for the Court to affirm this point, which required it to assert that it appeared that proofs of loss had not been sent to or received by the defendant, when this was the very question to be decided by the jury, upon the conflicting evidence as to proofs having been made out and given to the countersigning agents.

During the cross-examination of one of the plaintiffs he said that, in those proofs of loss which he had given to the agent, nothing was said as to the existence of encumbrances against their insured property. Defendant then offered in evidence the record of two judgments against the plaintiffs, which were liens against the insured property, so far as it was real estate, for some years prior to the date of the policy, and continued so down to the time of making proofs of loss, for the purpose of showing that the plaintiffs were precluded from recovering because they had sworn falsely as to the encumbrances upon the insured property, which was in violation of that clause of the policy making "false swearing by the insured touching any matter relating to the risk, whether before or after loss" a defence to a claim upon the policy. The rejection of this offer is the eleventh assignment.

In the consideration of the question involved in the assignment, care must be taken to distinguish this case from those where a false statement is made in the application, upon the faith of which the policy is issued: Commonwealth Mut. Fire Ins. Co. *v.* Huntzinger, 98 Pa. 41; and from those where, in violation of a condition of the policy, an encumbrance falls upon the property, with or without the knowledge of the insured after the date of the policy and before loss, without notice having been given to the insured: Seybert *v.* Penna. Mut. Fire Ins. Co., 103 Pa. 282; Penna. Mut. Fire Ins. Co. *v.* Schmidt, 119 Pa. 449; Hench *v.* Ins. Co., 122 Pa. 128. In all the cases, of which these are types, it is uniformly held that false statement and subsequent encumbrances defeat the policy, whether they are made innocently or otherwise, or whether they fall with or without the knowledge and consent of the insured, but the present case belongs to neither one of these classes. It does not appear that the plaintiffs ever made any false statements upon the faith of which the property was insured, but it does appear by this offer that these judgments were encumbrances prior to the time of the issuing of the policy. In such a case it has been expressly decided that such judgments do not invalidate the policy: Dwelling House Ins. Co. *v.* Hoffman, 125 Pa. 626.

It is strenuously insisted that these encumbrances should have been submitted to the jury with instructions that false answers and concealment of the existence of these encumbrances would avoid the policy. But mere false answers or concealment of the existence of encumbrances, made in proofs of loss, do not defeat the policy. It must appear that the false answers were made willfully and knowingly, and with a view to cheat the company: Franklin Ins. Co. *v.* Updegraff, 43 Pa. 350. The case of Ellis *v.* Ins. Co., 7 Pa. Su-

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per. Ct. 264, cited by appellant, is easily distinguished from the present case. In that case the insured testified that she had knowingly made the false statements in her proof of loss. With this evidence in the case we said: "This is not the case of mistake of statement unwittingly or ignorantly made. Such mistakes are open to correction. Here the sworn misstatements are made and repeated on the witness stand, with knowledge that they are untrue. The guilty knowledge determines the fraudulent intent. . . . The fact of false swearing is thus proven, and where perjury is thus knowingly committed, the question cannot be submitted to the jury whether the intent was to defraud. The intent is demonstrated not only by the acts of the insured but by her admissions." In the present case the offered evidence did not show that there was a false statement in the proof of loss knowingly made, but an omission to state something. The witness did not say that he stated in the proofs of loss that there was no encumbrance, but that nothing was stated as to them. If the defendant wishes to take advantage of defects in proofs of loss, which it insists at the same time that it never received, it must stand charged with the duties of one who has received defective or unsatisfactory proofs. If the answer to the question in proofs of loss is ambiguous, or if there is no answer at all, and if the insurer wants specific, definite information, it is its duty to return the proofs with information as to the defects to be remedied, and ask for more specific proofs: Ins. Co. *v.* Cusick, 109 Pa. 157.

The jury have found, in effect, that the defendant did receive these proofs of loss. All the authorities show that it cannot hold the proofs of loss with knowledge of the defects in them, and then, on the trial, attempt to avail itself of the defects unless it has notified the insured and given him a chance to correct them. Failing in this, it will be presumed that it is satisfied with the proofs as received in the first instance.

The fourth assignment is to the refusal of the Court to give binding instructions to the defendant. No discussion of this is necessary. It was clearly a case for the jury.

Being of the opinion that the case was rightly tried, and that no reversible error was committed, all the assignments are overruled.

Judgment affirmed.

W. D. N.

Oct. '98, 41. Superior Court. November 22, 1898.

Collins v. Insurance Co.

Fire insurance—Risk covered—Damage by smoke and soot.

Where oil in an oil stove takes fire and burns in a way not intended or in a place not appropriate in the mechanism of such stove for such burning and damage results to articles insured against fire, such damage is within the contract of insurance against loss by fire.

In the contract of fire insurance the intention of the parties is to insure against loss where the cause insured against is a means or agency in causing the loss, even though it was entirely due to some other actual efficient cause which makes use of it, or sets it in motion, if the original efficient cause be not itself made a subject of separate insurance.

Improbability that a fact alleged could occur in a certain way is an argument to be addressed to the jury; it is not the province of the Court to reject the testimony upon the ground that it is too improbable to be believed.

Appeal of the Delaware Insurance Company of Philadelphia, from the judgment of the Common Pleas of Delaware County, entered in an action of assumpsit on a policy of fire insurance wherein T. S. Collins was plaintiff.

On the trial of this case, before CLAYTON, P. J., the facts appeared as follows:

Defendant issued its policy for $2000 for one year from July 3, 1896, to July 3, 1897, against loss or damage by fire on goods contained in No. 1717 West Third street, South Chester, Delaware county, Pennsylvania.

On January 10, 1897, a portion of the property insured was damaged through fire to the amount of $382.75.

There was no evidence that there was any loss or damage by ignition or the direct action of fire. The damage sustained by the plaintiff was caused by heavy smoke and soot from a coal-oil stove used for heating his parlor, in which it was alleged that the oil took fire when no one was in the room but which did not explode or set anything else on fire. The evidence was that when two members of the plaintiff's family came into the parlor they opened the stove door and found "the whole thing in a blaze and the oil cap had melted and the oil was running down where the fire was"; that water was dashed on the blaze and "the fire and water together just played havoc with the whole place."

The defendant asked the Court to charge:

"That in order to find the defendant liable under the terms of its policy the jury must be satisfied from the evidence that the plaintiff's loss was caused either by actual ignition of the property

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destroyed or by heat, smoke, or other consequence of fire out of its proper place, and not by such heat, smoke, etc., from a fire in a stove or other fireplace." Answer—"I affirm that point, gentlemen, unless the fire in the fireplace or stove is out of its proper place by some accident not under the control or within the knowledge of the insured. If the fire is out of its proper place by some accident and an ignition follows, there is liability." Also:

"If the jury believe that the damage to the plaintiff's property was caused solely by the smoke or heat issuing from an oil stove, and that the fire itself was confined entirely to the stove the verdict must be for the defendant." Answer—"That is affirmed with this qualification: If the fire was confined to the stove it must be confined to that part of the stove which was properly intended for fire, and if the fire by accident was displaced from its proper place the place where it is intended to be, and there was an ignition of some other part of the stove which was not intended to come in contact with the fire and it was injured or destroyed, and that was a consequence of the injury there can be a recovery. Now I will leave the case with you." (Second assignment of error.)

The Court charged:

"I say that if you find that what the plaintiff says is true, that the fire got by accident out of its proper place and burned some part of the stove that was not intended to come in contact with the fire, by the use of means to cut off the communication between the flame and the coal-oil, then you may find for the plaintiff. . . . But I hold and so charge you that if from any accident unknown to the plaintiff, and which he could not prevent by reasonable diligence, there was a displacement of the fire from where it ought to be so that a part of the stove which was not intended to come in contact with the fire was burned, that that is sufficient burning to make the company liable for all the consequences." (Third and fourth assignments of error.)

Verdict for the plaintiff for $404.95, and judgment thereon. The defendant took this appeal and assigned error as above indicated.

Edward S. Sayres, (*W. W. Montgomery* with with him), for appellant.

Where fire is employed as an agent, either for the ordinary purposes of heating the building, for the purposes of manufacture or as an instrument of art, the insurer is not liable for the consequence thereof, so long as the fire itself is confined within the limits of the agencies employed as from the effects of smoke or heat evolved thereby. There must be actual ignition outside of the agencies employed.

Wood on Fire Insurance, sec, 97.

Damage arising from excessive fire in the fireplace or receptacle provided for it, but where there was no ignition of the property insured, is not covered by an ordinary fire policy.

Millaudon *v.* New Orleans Ins. Co., 4 La. An. 15.
Gibbons *v.* Ins. Co., 30 Ill. App. 263.

An injury to goods in storage by reason of a failure to properly treat the heating apparatus of a building is not covered by a fire insurance policy.

Austin *v.* Drew, 4 Camp. 361.
American Towing Co. *v.* German F. I. Co., 74 Md. 25.

W. S. Sykes, for appellee.

The contention of the defendant is that actual ignition did not take place. Webster says "fire" is "the evolution of light and heat in the combustion of bodies; combustion; state of ignition."

The case of Gibbons *v.* Insurance Co., 30 Ill. App. 263, under our evidence, is directly in favor of appellee's case.

In many cases a loss by scorching paint, cracking glass, and blistering pictures or furniture, or heating and destroying other articles, may be proper loss when caused by heat or fire which, if carried farther would cause their destruction, which would be a loss covered.

Bennett Fire Insurance Cases, 104, note.
13 Ill. 676.
May on Insurance, sec. 402.

A fire in a chimney, caused by accidental ignition of soot, and smoke issuing from such fire is within a policy covering all loss or damage by fire to all goods contained in the building.

166 Mass. 67.

March 23, 1899. RICE, P. J. The plaintiff's goods were not burned but were damaged by smoke and soot; but it is well settled that a policy against "direct loss or damage by fire" may cover loss other than by actual burning, such as by water used to extinguish the fire, and by smoke from the fire. If, however, the fire itself be not insured against, as it ordinarily is not when it is kept within the place that is fitted and intended for it, there is no liability for such consequences as the escaping of smoke or gas.

We cannot do better than to adopt the illustrations used in a well-considered Massachusetts case. If a stove should be cracked and spoiled by a fire kindled in it to warm the house, or if a fire in a fireplace should crack the mantel, or scorch valuable furniture left too near it or injure property by its smoke which the chimney failed to carry off, or if a lamp should throw off soot or smoke in such quantities as to cause damage to property, in every such case it may be conceded, if the fire burned nothing but that which was intended to be burned for a useful purpose

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in connection with the occupation of the house, and if it did not pass beyond the limits assigned to it the insurance company would not be liable: Way *v.* Abington Mut. F. Ins. Co., 166 Mass. See also Austin *v.* Drew, 4 Camp. 360; Holt, N. P. 126; 6 Taunt, 436; American Towing Co. *v.* Ger. F. Ins. Co., 74 Md. 25; Scripture *v.* Lowell Mut F. Ins. Co., 10 Cush. 356; Gibbons *v.* Ins. Co., 30 Ill. App. 263; Wood on Fire Ins., sec. 97. The defendant's counsel argue that this case is governed by the same principle, because (1) there is no sufficient evidence that there was any fire except the burning of the wick of the oil stove; and because (2) even if the oil were burning, yet, as it was inside the stove, it cannot be said that there was actual ignition outside of the agency employed to heat the room.

As to the first branch of this proposition we remark that, not only was there no request to have the jury so instructed but the trial Judge would not have been warranted in doing so even if there had been such request. The defendant gave evidence to that effect, it is true, but it was not uncontradicted. On the contrary, the plaintiff gave evidence to show that the fire was not confined to the burning of the wick, but had extended to the tank in which the oil was kept that fed the wick, had melted off the cap, and was flaming up both from the inside and the outside of the stove. It is argued that it is improbable that this could have occurred without an explosion, or without the ignition of something in the room besides the oil in the stove. This is an argument to be addressed to the jury; it is not our province to reject the testimony upon the ground that it is too improbable to be believed.

The rule as stated in Wood on Fire Insurance, "that there must be actual ignition outside of the agencies employed" is not subject to criticism when properly understood. We cannot, however, assent to the proposition that if there was no ignition except in or on the stove there was no fire within the meaning of the policy. The fuel was oil and was intended to be consumed in a particular place, namely by a wick fed from a tank in which the oil was kept. It was no more intended to be burned in the tank than in the barrel or the can in which it was brought to the house and kept. If some malicious or careless person had dropped a match in the tank, or if the tank had leaked and the oil had reached some part of the stove where it was not intended to be, and in either case, there had been an ignition, and the furniture in the room had been damaged by smoke or soot, could there be any question that the efficient cause of the injury was a fire "out of place?" We think not. Of course the cause nearest in point of place and time was the smoke. So in the present case the dashing of water upon the flames was in a sense the cause of the greater part of the smoke and soot. But the active cause which, in the construction of fire insurance policies, is held to set in motion the train of events which brought about the result was the fire. The law does not go back of that to seek for the cause in the absence of fraud or gross negligence amounting to a fraud or to a breach of some condition of the policy. In suits brought on policies of fire insurance it is held that the intention of the parties must have been to insure against losses where the cause insured against was a means or agency in causing the loss, even though it was entirely due to some other active efficient cause which made use of it, or set it in motion if the original efficient cause was not itself made a subject of separate insurance: Lynn Gas and Electric Co. *v.* Meriden Fire Ins. Co., 158 Mass. 570. If, therefore, the smoke that did the damage proceeded from a fire "out of place" it is no answer to say that this originated in a fire in the place fitted and intended for it. Again, as was said in Way *v.* Abington Mut. Fire Ins. Co., "a distinction should be made between a fire intentionally lighted and maintained for a useful purpose in connection with the occupation of a building, and a fire which starts from such a fire, without human agency, in a place where fires are never lighted nor maintained, although such ignition may naturally be expected to occur occasionally, as an incident to the maintenance of necessary fire," etc. Hence it was held in that case that damage by smoke to insured property by the burning of soot in a chimney accidentally ignited by the burning of waste paper in a stove was within the terms of a policy against all loss or damage by fire. The same doctrine was recognized in American Towing Co. *v.* Ger. F. Ins. Co., supra, a case much relied on by the defendant's counsel, for in closing the opinion the Court said: "No doubt there are many instances were the insurer has been held liable for injury to building or furniture by heat or smoke, where heat or smoke has proceeded from fire outside of and beyond the limits of the place where it was intended by the contract of insurance to burn."

The question whether the smoke proceeded from a fire outside the place where, under the contract of insurance, it was intended to burn was for the jury under the evidence in this case. Without discussing the assignments of error in detail it is sufficient to say that it was submitted to them in a charge of which the defendant has no reason to complain.

All the assignments of error are overruled and the judgment is affirmed.

W. D. N.

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WEEKLY NOTES OF CASES.

VOL. XLIV.] *FRIDAY, JULY 14, 1899.* [NO. 15.

Supreme Court.

Jan. '98, 129. Supreme Court. February 20, 1899.

Creighton v. Scranton Lace Curtain Mfg. Co.

Bond—Judgment confessed—Fraud—Corporation—Director—Stockholder.

Where a bond is in a penal sum "as security for such sums as may be owing to the obligees from time to time," and the condition is that the defendant should pay such sums of money as should be owing or deliver such goods as the creditor should order, and in default judgment is authorized to be entered "for any sum or sums that may be due or owing to the said obligees," and judgment is entered upon the bond for the penalty and execution immediately issued for the full amount, there is sufficient to put the plaintiffs in execution to an explanation.

Other indebtedness than that for which the bond was given to secure between the obligor and obligee occurring since cannot be regarded as within the protection of the bond.

The only judgment on the bond which can be supported is that for the debt and to the extent which was the subject of the bond.

A judgment entered on a bond given to secure indebtedness by a corporation to a firm of which a member was a director in the defendant corporation, if attacked by another creditor of the defendant, puts the plaintiff in execution to explanation.

Appeal of Stephen Chappell, a stockholder of the Scranton Lace Curtain Manufacturing Company, from the judgment of the Common Pleas of Lackawanna County, entered in an action of assumpsit wherein William Creighton, Mark H. Birch and Benjamin F. Bailey, partners, doing business as Creighton & Birch, were plaintiffs.

On July 27, 1896, in conformity with a resolution duly passed at a meeting of the directors of the defendant corporation a bond was executed in the amount of $75,000. The bond recited:

"Whereas, Creighton & Birch . . . . loan this company large sums of money for which goods are to be delivered," and provided, "Now the condition of this obligation is such that if the Scranton Lace Curtain Manufacturing Company shall from time to time, and at all times hereafter pay to said Creighton & Birch, their heirs, executors, administrators or assigns such sum or sums of money as may be owing them, or either of them, or deliver to said Creighton & Birch such goods as they may order, and it shall be for a sum sufficient to pay the amount so owing, then this obligation to be void, or else to be and remain in full force and virtue."

To this bond was attached a warrant of attorney, by virtue of which judgment was entered on February 10, 1897.

A petition was then presented by Thomas A. Blithe and A. Nelson, creditors of the defendant, and Stephen Chappell, a stockholder therein. The petition set forth that an execution was issued on February 10, 1897, the same date as of the entry of the judgment, and that a levy and sale of the personal property of the defendant had been made; that the judgment had been confessed by collusion between the officers of the defendant and the plaintiff firm; that the senior member of the firm was a director of the defendant and voted for the execution of the bond in his favor; and that the defendant was indebted to one of the petitioners, Blithe, in $11,161.52.

The petition asked that the writ of execution be stayed and that the judgment be opened and that further "orders and decrees in the premises as the nature of the case required" be made.

Answers were filed by both plaintiffs and defendant, that of the plaintiffs admitted that William Creighton was a director of the company, while the answer of the defendant denied that the extent of indebtedness of Blithe was so great as set forth in his petition and also denied the averment of collusion with the plaintiffs in the giving of the bond.

The Lackawanna Trust and Safe Deposit Company, trustee for the bonds secured by a mortgage for $75,000 made by the defendant, by amendment of the record, was made plaintiff as trustee for Creighton & Birch and the company prior to the amendment on February 11, 1897, filed a bill averring the insolvency of the Scranton Lace Curtain Manufacturing Company and asking for the appointment of a receiver.

The Court dismissed the petition and refused to open the judgment. The petitioner, Chappell, appealed, and assigned as error the refusal to open the judgment.

John G. Johnson, (with him *Joseph P. McCullen* and *A. A. Vosburg* and *Dawson*), for appellant.

At the time of the meeting which authorized the execution of the bond to the plaintiffs the company was insolvent. The head of the plaintiff firm was a director of the corporation.

Directors of an insolvent corporation who have claims against the company as creditors must share ratably with the other creditors in a distribution of the company's assets. They cannot secure to themselves any advantage or preference over other creditors, by using their powers as

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directors for that purpose. These powers are held by them in trust for all the creditors, and cannot be used for their own benefit.

Morawetz on Corporations, (2d ed.) 178.
Mueller *v.* Fire Clay Co., 183 Pa. 450.

The judgment should have been opened so as to show that the real amount due was $62,870.08.

The petition for the opening of the judgment should have been granted. The questions raised were quite sufficient to support such action.

Schwartz & Graff's Appeal, 21 WEEKLY NOTES, 246.

Where the facts in dispute are material the Court should allow the judgment to be opened. The facts were material. The creditors claimed the indebtedness of the company was not as great as claimed, and that part of it was made up by including indebtedness of third parties.

Charles H. Welles, (*James H. Torrey* with him), for appellees.

The appellant, Chappell, has no standing. He does not allege in his petition the time at which he was a stockholder and that is essential to his case.

Gas Co. *v.* Gas Co., 145 Pa. 13.
Morawetz on Corporations, secs. 239, 240, 244.

Chappell had no standing under the law to dispute the distribution of the fund in the sheriff's hands arising from the sale under execution.

Act June 16, 1836, sec. 87, P. L. 777.
Act April 20, 1846, sec. 2, P. L. 411.
Shaw's Appeal, 46 Pa. 407.

Under the Act of Assembly of April 20, 1846, the "persons interested" who are entitled to an issue to try disputed facts are lien creditors only.

Housekeeper's Appeal, 49 Pa. 141.

The execution of the bond and warrant of attorney in favor of plaintiffs was not an abuse of the corporate power of the defendant. A corporation may prefer creditors the same as an individual, with this distinction, that if the preferred creditor is an officer the burden is upon him to show that the preference was in all respects fair and not collusive for the mere purpose of preference.

Cowan *v.* Plate Glass Co., 184 Pa. 7.

Insolvency as defined by the Supreme Court in a recent decision, is "insufficiency of assets when turned into money to discharge existing indebtedness."

Mueller *v.* Fire Clay Co., 183 Pa. 450.
Finch Mfg. Co. *v.* Stirling, 187 Id. 596.
Bowersox's Appeal, 100 Id. 438.

It was regular for the defendant to agree that the plaintiffs should pay the three notes and to regard the bond as security for this payment.

May 1, 1899. MITCHELL, J. The weight of the evidence is that the Lace Company, defendant, was insolvent in July, 1896, when it gave the bond on which the judgment was entered, and such, as we read it, was the opinion of the Court below. The company had previously received advances of money from plaintiffs, as security for which it had pledged manufactured goods by delivery to the plaintiffs, and by setting apart for them in the custody of Taylor its own assistant general manager. In July, 1896, plaintiffs becoming doubtful of the sufficiency of the security by the goods set apart in this manner, the board of directors passed the resolution under which the bond was given. Creighton, one of the plaintiffs, was also a director in the company and voted for giving the bond as a new security to his firm. The pledge of the goods for contemporaneous or future advances actually made upon the faith of them, was entirely lawful notwithstanding the fact that Creighton was a director: Cowan *v.* Plate Glass Co., 184 Pa. 1; Finch Co. *v.* Stirling Co., 187 Pa. 596, 601. Whether the security, agreed upon and taken at the time of such advances can subsequently, after insolvency, present or in contemplation, be exchanged for a new security more disadvantageous to the other creditors, is not so clear, but we have not that question now directly before us.

The bond was for a penal sum, "as security for such sums as may be owing to Creighton & Birch from time to time," and the condition was that the lace company should pay such sums of money as should be owing or deliver such goods as the creditor should order, and in default judgment was authorized to be entered "for any sum or sums that may be due or owing to the said Creighton & Birch," etc. In February, 1897, judgment was entered on the bond for the penalty and execution immediately issued for the full amount. This of itself under the circumstances was sufficient to put plaintiffs on explanation. The Court subsequently directed the judgment to be amended so as to show that it was for the penalty, and ordered the real debt to stand as liquidated at $62,670.08. This, however, did not help the case in the least. No such sum was due or owing. The utmost that plaintiffs could bring forward as a present debt on the day the judgment was entered was $54,329. The eight thousand dollars difference was made up by including certain notes of the lace company on which one Kemmerer, the president of the company was endorser, and which it was said that in some vague and not specified way, the plaintiffs had "obligated" themselves to pay and thus relieve Kemmerer. These notes were not in any possible view within the terms of the bond. They were not advances or "sums due or owing" when execution was issued for their amount, for they had not been paid and the alleged "obligation" to pay them was not

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shown to rest on any consideration or any circumstances that would justify the assumption of them as part of his preferred debt by a director with knowledge of the insolvency of his company present or impending. It is true that a failing debtor may secure a bona fide creditor against a contingent liability, but it is enough in the present case without regard to other objections that the bond did not undertake to do so.

On the whole case it is clearly one of presumptive fraud and illegality. This prima facies may be rebutted, but it calls upon plaintiffs for explanation. The ascertainment of the exact facts which may show a special equity and the good faith of the transaction should go to a jury.

We have considered the case on the merits because that was the course taken by the Court below. But appellee has raised the question of appellant's standing, citing: S. W. Gas Co. *v.* Fuel Gas Co., 145 Pa. 13. The circumstances necessary to enable a stockholder to assume the maintenance of the corporate rights as declared in that case do not affirmatively appear here, but the case differs in the fact that the rule for an issue to determine the validity of the judgment as against other creditors, was taken by an attaching creditor as well as by the stockholder, and it does not appear that the latter has ever been called upon to show his standing. He is entitled to an opportunity to do so.

The order discharging the rule is reversed and the rule reinstated with directions to award the issue prayed for, unless it shall appear that there is no party before the Court entitled to ask for it.

W. D. N.

Jan. '98, 382. Supreme Court. March 21, 1899.

Loughlin v. Conn.

Judgment—Opening of—Facts in dispute—Proper procedure.

Where the trial of an issue to determine what, if anything, is due on a judgment, will necessarily involve collateral matters of such a nature and so complicated that they cannot be satisfactorily determined by the verdict of a jury, the proper practice is to file a bill for an account, and to ask for an order restraining proceedings to collect the judgment until such account has been settled and the amount due thus ascertained.

Appeal of John Loughlin, plaintiff, from an order of Common Pleas No. 3, of Philadelphia County, making absolute a rule to open a judgment in which Samuel Conn was defendant.

The facts are stated in the opinion of the Supreme Court, infra.

The errors assigned were in not discharging, and making absolute, the rule to open judgment, and in not imposing terms on defendant when judgment was opened.

Charles J. Sharkey, (*F. Pierce Buckley* with him), for appellant.

Henry P. Brown, for appellee.

April 24, 1899. FELL, J. The judgment in this case was obtained in 1892 in an action on a promissory note of which the defendant, Samuel Conn, now deceased, was the accommodation maker. The rule to open the judgment was granted on the motion of the payee of the note. He alleged in his petition that after the date of the judgment he entered into an agreement with the plaintiff by which the whole amount of his indebtedness to the plaintiff, including the defendant's note on which judgment had been obtained, was fixed; that the plaintiff accepted his notes in settlement thereof, and agreed to hold four houses which were conveyed to him as security for the payment of the notes to account for the rents and to reconvey on payment of the notes. The petition further alleged that he had offered to pay the balance due by him, and that the plaintiff had refused to account or to reconvey the houses. It appears from the depositions taken in support of the rule that a settlement between the petitioner and the plaintiff involves an accounting by the latter for rents received and for taxes, interest on mortgages and the cost of repairs and alterations paid. The matter is still further complicated by a dispute as to the exact terms of the agreement, and by the inability of the plaintiff to reconvey because of judgments which have been entered against him since he took title to the real estate.

It is evident that the trial of an issue to determine what, if anything, is now due on the judgment will necessarily involve collateral matters of such a nature and so complicated that they cannot be satisfactorily determined by the verdict of a jury. For this reason the Court might have refused to grant the rule, or we think should have discharged it after hearing when the facts were fully developed. The proper practice in such a case is to file a bill for an account and reconveyance, and to ask for an order restraining proceedings to collect the judgment until an account has been settled and the amount due thus ascertained. Short of such a proceeding we do not see how there can be an intelligent and equitable adjustment of the matters in dispute. But as the order of the Court making absolute the rule to open judgment operates as a restraining order on the plaintiff, we do not find it necessary to reverse. The petitioner should at once proceed by

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bill to secure an accounting and an ascertainment of the amount, if anything, due. Assuming that this will be done we affirm the judgment.

W. C. S.

Oct. '98, 8. Supreme Court. November 14, 1898.

Gibson v. Fifth Avenue and High Street Bridge Company.

Eminent domain.

Whether lots purchased at different times by the same owner become one lot, or remain distinct though contiguous lots, depends upon the use made of them by the owner.

Where the owner of a property fronting upon a certain street and having upon it buildings, purchases lots adjoining it in the rear but having outlets on other streets, upon which she erects dwelling houses for the purpose of rental, which houses are connected by a common sewer which connects with the public sewer in the street upon which the front lot fronts, and receive gas and water through service pipes connecting with the mains on said street, and these are appliances used by the tenants of all the houses in common, the lots do not become one, so as to enable the owner to claim damages for injury to the rear lots by the erection of a public work in the street on which the factory fronts.

Appeal of the Fifth Avenue and High Street Bridge Company, defendant, from the judgment of the Common Pleas No. 1, for Allegheny County, in an action of trespass brought by Barbara Gibson.

This was an action to recover for injuries done to land of the plaintiff, Mrs. Gibson, by the erection in front thereof by the defendant of a bridge.

On the trial, before COLLIER, J., the facts appeared as follows: The plaintiff was the owner of a lot fronting on Fifth avenue, Pittsburgh, bounded by Mulberry alley on the west and Water street on the east. She subsequently bought lots fronting on each of the side streets, and adjoining the Fifth avenue lot. The plaintiff erected on her land buildings, so that at the time of the trespass complained of, the arrangement of the houses on the land of the plaintiff was as follows: A double frame dwelling upon Fifth avenue; a large frame building, used as a public hall and tenements, at corner of Fifth avenue and Water street; three frame tenements fronting upon Water street; one frame tenement about the centre of the land and one frame tenement fronting upon Mulberry alley. There were no fences or other division of the ground, but all of the land not occupied by the buildings was open for the common use of all the tenements.

There was a stable used as a coal house in common by the tenants, and a large water-closet also for the common use of all the tenants.

All of the houses were sewered through one common sewer, connecting with the public sewer in Fifth avenue, and was furnished with natural and artificial gas and water through one service pipe for each article, connecting with the main in Fifth avenue. There was also one large hydrant near the centre of the lot for the common use of all the occupants of the houses.

The defendant, a company authorized to build a bridge, placed a stone abutment in the cartway of Fifth avenue, and beyond it iron pillars to support a bridge, in a way more particularly described in the opinion of the Court, infra.

The defendant presented, inter alia, the following points, all of which were refused by the Court:

"1. That in this action the plaintiff has no right whatever to recover any damages for any alleged injury done to that portion of her property described as fronting on Mulberry alley 34 feet, and extending back, preserving even width, a distance of 70 feet, because she holds the title thereto by a separate and distinct title from that under which she holds the portion of her property fronting 100 feet on Fifth avenue, and because as to 40 feet in depth thereof, there lies between the said property and Fifth avenue a lot of ground owned by one Morton, who alone has title to the middle of Fifth avenue, subject to the public right of way.

"2. The plaintiff is not entitled to recover any damages for any alleged injury done by the construction of the defendant's bridge to that portion of her property which fronts 60 feet on Water street, beginning at a distance of 120 feet from the corner of Fifth avenue and Water street, and extending back from Water street toward Fifth avenue a distance of 70 feet, because she holds title to the said piece of ground by a separate and distinct title from that under which she holds her frontage of 100 feet on Fifth avenue, and because in point of fact, said property is held, used, occupied and enjoyed by her separately and distinctly from that portion of her property which fronts upon Fifth avenue aforesaid.

"3. The said plaintiff is not entitled to recover for any damages alleged to have been done by the construction of defendant's bridge to that portion of her property fronting upon Water street, and occupied by a double two-story frame dwelling beginning at a distance of about 78 feet from the corner of Fifth avenue and Water street, and the curtilage appurtenant to said house.

"4. The said plaintiff is not entitled to recover in this action any damages for any injury alleged to have been done by the construction of defendant's bridge to the house located in the middle of her property and the curtilage appurtenant

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thereto, because said house and curtilage do not front upon Fifth avenue, and having been upon the ground and by its use and occupation separated from her general property."

Verdict for plaintiff, $6800, and judgment thereon. The defendant took this appeal and assigned as error the refusal of the above points.

E. P. Douglass, (with him *J. S. Ferguson*, *E. G. Ferguson* and *H. H. Swaney*), for appellant.

It was error to allow the recovery for injury to the Mulberry alley and Water street lots, either directly or by considering them as parts of a large lot fronting on Fifth avenue.

It cannot be that it was intended by the makers of the new Constitution that persons engaged in the construction of public works under the right of eminent domain should be held responsible upon the allegation of noise, dirt, etc., in the operation of their works, to every person who, no matter how far distant he might be, might see fit to allege damage by reason of such inconveniences to his property. If, for instance, the title to the property on Water street beginning at the distance of 110 feet from the corner of Fifth avenue and extending 70 feet further along Water street, had belonged to some other person than the present appellee, could it be contended successfully that any legal damages could result by the construction of appellant's bridge? See—

Penna R. R. Co. *v.* Marchant, 119 Pa. 541.
McCutcheon *v.* Pitts. Junc. R. R. Co., 7 Atlantic R. 176.
Penna. R. R. Co. *v.* Duncan, 111 Pa. 352.

Johns McCleave, (with him *W. B. Rodgers* and *D. T. Watson*), for appellee.

It is obvious that the plaintiff's land was held as one single lot for the use of the various tenements erected upon it. There was no part of it divided or separated from the balance for the use of any one tenant, but the entire ground, not actually occupied by the houses, was open for the use of all the tenements, and the instruction of the Court was in strict accordance with the law.

But whether one lot or not, the plaintiff had the right to recover the damages done to the whole property by reason of the obstruction of the access to it. Fifth avenue is almost entirely blocked up by the defendant's bridge, and in crossing Mulberry alley the bridge is so low that it has made the approach to the property through Mulberry alley exceedingly inconvenient. For such injury to the means of access to and from this property this Court has decided that we have the right to recover.

In re Melon Street, 182 Pa. 404.

May 24, 1899. WILLIAMS, J. This was a proceeding to recover damages alleged to have been sustained by the plaintiff by reason of the erection of an approach to the defendant's bridge over the Youghiogheny river in the city of McKeesport. The bridge began in Fifth avenue. It was supported for a little distance by a solid pier of masonry occupying twenty-seven feet out of the sixty feet which was the breadth of the street, but as soon as the height of the bridge or approach was sufficient to admit the passage of teams underneath it, iron columns were substituted for the masonry and the approach was wholly sustained by these columns. Water street and Mulberry alley which bounded the plaintiff's property on the east and west, crossed Fifth avenue under the approach, and the elevation in front of plaintiff's property was from about nine feet to near eleven feet above the surface of Fifth avenue. The property which the plaintiff claims to be damaged by the building of the approach consists of a lot fronting on Fifth avenue extending from Mulberry alley to Water street, with buildings thereon opening on Fifth avenue; one or more lots fronting on Water street with three buildings thereon, and one lot fronting on Mulberry alley with a frame house thereon. The lot fronting on Fifth avenue had been owned by her husband in his lifetime. The lots on Water street and Mulberry alley she had purchased subsequently as an investment.

Her right to recover damages done to her Fifth avenue property by the approach is not denied, but her right to recover for her property on Mulberry alley and Water street is seriously disputed; and upon the question, so raised the contest was made in the Court below at the trial, and is now made here upon this appeal. The purchase and subsequent use of the lots not fronting on Fifth avenue might have made the entire block a single piece of property with a frontage on Fifth avenue, or they might have left them wholly distinct in use, though contiguous, as they were before the purchase of them by the plaintiff. What was the result in this case must depend upon what the purchaser actually did with them after her purchase. If the front building had been a manufactory, and she had purchased the Water street and the Mulberry alley lots to enlarge the capacity of her factory and so remodeled them and connected them with the original building as to make one business plant of the whole she could well have insisted that she had changed the use and character of the property she had purchased and practically and permanently annexed it to her original Fifth avenue property. But the property was a dwelling-house property held for rental by its owners before she bought it. It has been held by her for the same uses since she acquired title. She may find it more convenient to supply these house with water by a connection

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with her Fifth avenue supply pipes, but this does not change the use of the houses so supplied, or make them any more a single property than if each house had its independent supply connecting directly with the mains.

The defendant company brought the attention of the learned Judge to the question they sought to raise by a series of points in which he was asked to instruct the jury that the plaintiff could not recover damages for her Water street and Mulberry alley properties because she acquired and held them "by a separate and distinct title" from her frontage on Fifth avenue, and "because in point of fact said property is held, used, occupied and enjoyed by her separately and distinctly from that portion of her property which fronts upon Fifth avenue aforesaid." This instruction was refused. The jury was in effect told that neither the fact that she held these properties by a distinct and separate title, nor the additional fact that "said property is held, used, occupied and enjoyed by her separately and distinctly" from her frontage on Fifth avenue could prevent her from treating all her purchases as constituting a single piece of property fronting on the same street. This was a mistake. The evidence fully justified the point. It showed that the use of her dwelling on Water street and Mulberry alley was quite as independent and distinct from that of her property on Fifth avenue as it was before she purchased it, or as it would have been if the title had never passed from the original owners to her. There was no evidence upon which this question should have been submitted to the jury, and its submission was a mistake that requires us to reverse the judgment. The property upon Fifth avenue was injured to some extent by the approach to the bridge and for this injury her right to recover was clear; but the purchase of property on Water street, or on Mulberry alley, with a view to a rental of such piece of property in the same manner that it had been rented by the former owner, gave her no right to recover damages done to such property beyond that which would have existed if she had never become the owner of it. Upon this question the assignments of error are sustained, the judgment is reversed and a writ of venire facias de novo is awarded.

The opinion of which the above is a copy having been written by Mr. Justice WILLIAMS to whom the case was assigned, was read in consultation and approved, but owing to his sickness and absence, was not filed. The same is now adopted and filed as the opinion of the Court.

PER CURIAM.

H. B.

Jan. '98, 96. Supreme Court. May 9, 1898.

Reighard's Estate.
Clouse's Appeal.

Will—"Offer" and "opportunity"—Intention of testator—Specific performance.

A decree for specific performance of a contract to buy land will not be made where the title tendered is one which will expose the person holding it to litigation, or where the equities are against such a decree.

A. died seised of a farm and mountain land, to which he referred in his will in the following language: "My farm on which I now reside, and the mountain land belonging to the same I wish could be rented for say five years and then sold or should a good opportunity offer then the same shall be sold sooner, and I desire that Charles buy the same." His executors entered into a contract with P., by which they sold to him the land for the sum of $6500, payable in instalments, he to have possession of the property on April 1, 1896, "with the privilege to store goods on the premises by consent of the tenant and even to move sooner if arrangement" could be made with him. Such arrangement was made, and P. and his family entered upon the premises two or three days before the first of March, 1896. A few days thereafter he died, leaving to survive him a widow and two daughters, one of whom was a minor. Letters of administration were granted to his daughter, and the executors tendered a deed of the land described in their contract with her father and demanded that $3000, due by the terms of said contract, be paid. This the administratrix declined to do, on the ground that the estate of her father was insufficient to pay the debt created by it; that his widow and daughters had no estate of their own with which to discharge the debt; and that they were not qualified to operate or manage the farm. The executors then filed a petition in the Orphans' Court for a decree for specific performance. The Court refused the decree on the grounds that it was exceedingly doubtful whether the deed tendered would have conveyed a marketable title, and that no legislation pertaining to the Orphans' Court expressly authorized a decree of specific performance where the conditions were such as appeared in the case at bar:

***Held*, that the Court committed no error.**

Appeal of William H. Clouse and George M. Reighard, executors of the last will and testament of Solomon S. Reighard, deceased, from the decree of the Orphans' Court of Bedford County.

In the Orphans' Court a petition was filed by the executors of Solomon S. Reighard, deceased, praying that Carrie Pressel, administratrix of Aaron Pressel, deceased, be required to complete a contract made by her decedent for the purchase of certain land. The facts are stated in the opinion of the Supreme Court, infra.

The Court dismissed the petition. The petitioner took this appeal. The errors assigned were (1) "in holding that the Orphans' Court did

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not have jurisdiction;" and (2) "in not making the decree as prayed for."

John H. Jordan, for appellants.

When the Orphans' Court has jurisdiction to act upon the petition presented, all the parties to the transaction are subject to its jurisdiction.

Anshutz's Appeal, 34 Pa. 375.
Act June 16, 1836, sec. 19, cl. 8.
Dundas's Appeal, 64 Pa. 325.

As to power of sale, see—

Mussleman's Appeal, 65 Pa. 480.
Bell's Appeal, 71 Id. 465.

E. F. Kerr, (*McNamara* with him), for appellees, cited—

Miller's Appeal, 159 Pa. 572.
Shollenberger's Appeal, 21 Id. 341.
White *v.* Patterson, 139 Id. 438.
Bunn's Estate, 1 Kulp, 208.
Swayne *v.* Lyon, 67 Pa. 439.
Bumberger *v.* Clippinger, 5 W. & S. 314.
Speakman *v.* Forepaugh, 44 Pa. 373.
Freetly *v.* Barnhart, 51 Id. 281.
Mitchell *v.* Steinmetz, 97 Id. 251.

May 31, 1899. McCollum, J. The appellants are the executors of the last will and testament of Solomon S. Reighard, who died in November, 1894, seised, inter alia, of a farm of one hundred and fifty acres, and a piece of mountain land of twenty-eight acres situated in Bloomfield township, Bedford county. It was the manifest desire of the testator that this land should not be sold during the minority of his son Charles, and that when sold Charles should become the purchaser of it. He therefore suggested in his will that the farm and mountain land be rented for a term of five years, at the expiration of which term Charles, if living, would have attained the age of twenty-two years. The language of the will pertinent to this point is as follows: "My farm on which I now reside, and the mountain land belonging to the same I wish could be rented for say five years and then sold or should a good opportunity offer then the same shall be sold sooner, and I desire that Charles buy the same." It is upon this clause of the will that the appellants base their claim of a right, at any time after the testator's death, to sell said land whenever they are satisfied that they have a good offer for it. But there is a material difference between a good offer and a good opportunity. It is quite clear that the testator's controlling thought or desire in regard to the disposition of the farm and mountain land was that Charles should become the purchaser of it, but it is not clear that the testator intended that Charles should acquire it by outbidding all competitors, or by a purchase during his minority. The clause we have quoted from the will is somewhat obscure, but the appellant's interpretation of it is so obviously opposed to the testator's intention respecting the sale of the farm and mountain land, that the correctness of it may well be questioned.

On the 13th of November, 1895, the executors entered into a contract with Aaron Pressel by which they sold to him the land above mentioned for the sum of $6500, payable as follows, to wit: $3000 April 1, 1806, $2500 April 1, 1897, and $1000 April 1, 1898. No interest was allowed on the purchase money if the payments were made at maturity. Under the contract Pressel was to have possession of the property April 1, 1896, "with privilege to store the goods on the premises by consent of the tenant, and even to move sooner if arrangement" could be made with him. A satisfactory arrangement was made under which Pressel with his family entered upon the premises two or three days before the first of March, 1896. He died on the 6th of March, 1896, leaving to survive him a widow and two daughters, one of whom was a minor. On the 13th of March, 1896, letters of administration were issued to his daughter, Carrie Pressel, to whom the appellants on the first of April tendered a deed of the land described in their contract with her father, and of whom they demanded the three thousand dollars due by the terms of said contract on that day. The administratrix declined to accept the deed or make the payment as requested. Her reasons for refusing to assume the contract were that the estate of her father was insufficient to pay the debt created by it; that his widow and daughters had no estate of their own from which to discharge the debt, and that they were not qualified to operate or manage the farm. In the reasons assigned for the refusal there is no taint of fraud or misrepresentation and nothing but stubborn facts.

The appellants, being anxious to enforce the contract, petitioned the Orphans' Court for a rule upon Carrie Pressel, administratrix of Aaron Pressel, deceased, to appear and show cause why a decree for specific performance should not be entered, and why she should not be required to pay the purchase money called for by said contract. The rule was granted and the administratrix filed an answer to it. Upon hearing and due consideration of the petition and answer the learned Judge of the Orphans' Court filed an opinion in which he said in substance that it was exceedingly doubtful whether the deed tendered would have conveyed a marketable title, and that no legislation pertaining to the Orphans' Court expressly authorizes a decree of specific performance where the conditions are such as appear in the case at bar. He therefore discharged the rule to show cause and denied to the appellants the decree petitioned for.

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Whether the executors of Solomon S. Reighard were authorized to sell and convey the farm and mountain land before his son Charles attained the age of twenty-one is a question which depends on the construction of his will. If any doubt of their authority to do so fairly arises from the will their contract with Aaron Pressel was not enforceable against him in his lifetime or against his legal representatives after his decease. In Swayne *v.* Lyon, 67 Pa. 436, the law on this subject is clearly stated by SHARSWOOD, J., as follows: "It has been well and wisely settled that under a contract for the sale of real estate the vendee has the right not merely to have conveyed to him a good but an indubitable title. Only such a title is deemed marketable; for otherwise the purchaser may be buying a lawsuit which will be a very serious loss to him both of time and money, even if he ultimately succeeds. Hence it has been often held that a title is not marketable where it exposes the party holding it to litigation: Ludwick *v.* Huntzinger, 5 W. & S. 51; Bumberger *v.* Clippinger, Id. 311; Colwell *v.* Hamilton, 10 Watts, 413; Speakman *v.* Forepaugh, 8 Wright, 363."

There is but one case cited by the appellants which has even a remote analogy to the case at bar. It is Bell's Appeal, 71 Pa. 465, and it relates to the same contract which was under consideration in Mussleman's Appeal, 65 Pa. 480. The learned Judge of the Orphans' Court referring to these cases, said: "Mussleman's Appeal, 65 Pa. 480, and Bell's Appeal, 71 Pa. 465, were cited and relied on for authority for the decree which the petitioners ask. Both cases grew out of the same transaction. It was a peculiar and a hard case. The executor had sold the land to Bell at public sale, after which the vendee took possession and cut valuable timber. All the equities were in favor of an enforcement of the contract and above all it was not the case of a deceased vendee. Neither party to the contract had died. It was a sale without the previous order of the Orphans' Court, which, it was conceded, was necessary, and on account of which defect the decree was resisted, but which the Supreme Court suggested could be cured by the Orphans' Court still ratifying the sale and then holding the vendee to his contract, instead of permitting him to escape a clear duty on a narrow technicality. It is not a precedent for the case at bar."

In the case before us, all the equities are against the enforcement of the contract. Pressel's estate at the time of his death did not exceed in amount $5000, and about one-half of it was on deposit in a bank which failed in the summer of 1896. The deposit was in the bank at the time of its failure and most all of it is lost. All that remained of the Pressel estate after the failure was not sufficient to pay one-half of the purchase money called for by the contract. Another circumstance worthy of notice is that since the first of April, 1896, the farm has been under a lease which secures the rentals to the Reighard estate. The farm is in the same condition that it would have been if the testator's desire concerning the disposition of it had been respected by his executors.

The second specification of error is dismissed.

The order discharging the rule to show cause why a decree for specific performance should not be entered is affirmed and the appeal is dismissed at the cost of the appellants.

W. C. S.

Jan. '98, 133. Supreme Court. January 4, 1899.

Keyser v. Reilly.

Contract — Compensation — Special services — Want of consideration.

K. alleged that he was employed by R. to sell a railroad and power plant for $160,000, for which he was to receive, in case of success, $1000, and that he reported that he could sell it for $150,000, whereupon R. accepted the offer of $150,000, and promised to pay K. $1000, and the sale was consummated. R. maintained that at the time of the sale, as well as afterwards, K. was in his employ, and whatever services he rendered, including those in connection with the sale, were within the scope of his employment, and that the alleged special contract, assuming it to have been made, was without consideration. The case was submitted to the jury under the following instructions: "The plaintiff's claim is based upon an alleged special promise to pay him $1000, to effect the sale of this railroad and power plant, and that is the thing you have to consider. If that promise was made by the defendant, he will have to live up to it, because the property was sold; and if he did not make the promise, the verdict ought to be for the defendant. If, after considering what has been said, you honestly believe R. made that promise to K. of $1000, your verdict ought to be for the plaintiff for $1000, with interest. If you believe he did not make that promise, your verdict ought to be a clear verdict for the defendant":

Held, that the case was properly left to the jury.

Appeal of John B. Reilly, defendant, from the judgment of the Common Pleas No. 1, of Philadelphia County, in an action of assumpsit brought by John W. Keyser.

This was an action to recover compensation for effecting a sale of a railroad. The facts appearing on the trial before BREGY, J., are set forth in the opinion of the Supreme Court, infra.

Verdict for plaintiff for $1170, and judgment thereon. The defendant took this appeal, and assigned error as follows:

"1. The Court erred in instructing the jury as

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follows: 'The plaintiff's claim is based upon an alleged special promise to pay him $1000 to effect the sale of this railroad and power plant, and that is the thing you have to consider. If that promise was made by the defendant, he will have to live up to it, because the property was sold; and if he did not make the promise, the verdict ought to be for the defendant.'

"2. The Court erred in instructing the jury as follows: 'If after considering what has been said, you honestly believe Mr. Reilly made that promise to Mr. Keyser, of that $1000, your verdict ought to be for the plaintiff for $1000 with interest. If you believe he did not make that promise, your verdict ought to be a clear verdict for the defendant. That is all.'"

M. Hampton Todd, for appellant.

The single question presented by the exception taken to the charge of the Court is, was there any consideration to support the alleged promise?

The plaintiff's statement of his cause of action and the testimony at the trial shows that at the time the alleged promise of the defendant to pay the plaintiff $1000 as commissions on the sale of the Geneva and Waterloo Electric and Power Plant he was in the employ of the defendant at the salary of fifty dollars per month, under a retainer that required him to assist the plaintiff generally in his business.

D. Webster Dougherty, for appellee.

Elkins *v.* McKean, 79 Pa. 493.
Carr *v.* Chartiers Coal Co., 25 Id. 337.
Harris *v.* Carter & Brooks, 3 Ellis & Blackburn, 559.

May 8, 1899. STERRETT, C. J. In his statement of claim, the plaintiff, among other things, avers, "that in the month of March, 1895, the defendant agreed with plaintiff that if he could succeed in negotiating a sale of certain 'corporate properties,' in which the defendant was then interested, to Messrs. Craig and Beebe for the sum of $160,000, he, the defendant, would pay plaintiff the sum of $1000. . . ." That thereupon he accepted said offer and entered into negotiations with Craig and Beebe for the purchase, by them, of said properties. That, as agent for defendant, he was offered by Craig and Beebe $150,000 for said properties, which offer he forthwith communicated to the defendant, who then and there agreed to accept the same, and also promised to pay plaintiff $1000 for his services when the sale was consummated. That shortly afterwards the sale was consummated by transfer of the properties to the purchasers and payment by them of the purchase money to the defendant; and that the latter, although often requested to pay the said sum of $1000 to the plaintiff for his services in effecting the sale, refused and still refuses to do so.

Other items of claim are embraced in the statement, but, not being pressed, the controversy was restricted to his claim under the special contract above stated.

Plaintiff testified fully and positively to the making of said special contract, and also to the complete performance of the same on his part.

As to his agency in conducting the negotiations which led up to the sale to Craig and Beebe for the consideration of one hundred and fifty thousand dollars, he was corroborated by Mr. Craig, one of the purchasers, who testified, in substance, that in connection with others he purchased the property at the price named, and that the negotiations leading thereto were conducted by the plaintiff. In reply to a question, as to what he and Keyser did, he testified: "I met Mr. Keyser on the train leaving Philadelphia some time in February, is my impression, 1895; he approached me with a view to having us entertain the purchase of the road and fixed the price at $160,000, which he thought he could consummate the deal at. I told him we would not consider that price, but we would consider $150,000. He said he would meet with his party and let me know the next day; he did not mention who the parties were. He did report the next day, and arranged for a meeting with Mr. Reilly, Beebe and myself. Mr. Beebe was an associate with me, and the purchase of the road was consummated." We "met Mr. Reilly in pursuance of that agreement and the sale was consummated."

While it was virtually conceded by the defendant that the plaintiff participated in the negotiations which resulted in the sale to Craig and Beebe, he denied that he promised to pay him for his services, and testified, in substance, that, at the time the sale was effected, and before as well as afterwards, plaintiff was in his employ, and whatever services he rendered, including any that he may have rendered in connection with said sale, were within the scope of his said employment, and that the alleged special contract, assuming it to have been made, was without consideration.

The burden was on the plaintiff to prove, to the satisfaction of the jury, the special contract under which he claimed, and that he complied with its terms and conditions. If the evidence relied on by him was believed by the jury, he was prima facie entitled to their verdict; but, before reaching that conclusion they would necessarily have to pass upon the conflicting testimony, including the credibility of defendant's evidence to the effect that he never agreed to pay plaintiff anything for his services in effecting the sale, etc.

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The disupted questions of fact thus presented were for the exclusive consideration of the jury, to whom the case was submitted under these instructions: "The plaintiff's claim is based upon an alleged special promise to pay him $1000, to effect the sale of this railroad and power plant, and that is the thing you have to consider. If that promise was made by the defendant, he will have to live up to it, because the property was sold; and if he did not make the promise, the verdict ought to be for the defendant."

"If after considering what has been said, you honestly believe Mr. Reilly made that promise to Mr. Keyser, of $1000, your verdict ought to be for the plaintiff for $1000, with interest. If you believe he did not make that promise, your verdict ought to be a clear verdict for the defendant."

Acting under these instructions, with all the evidence before them, the jury rendered a verdict in favor of the plaintiff for the full amount of his claim, including interest. By necessary implication, they found as a fact that the special contract was made as claimed by the plaintiff, and that its terms and conditions were complied with by him. The fact, thus established by the verdict, that the defendant did make the alleged special contract, points also to the conclusion that he was making provision for the rendition of special services for which no compensation was otherwise provided. It would be quite uncharitable to the defendant to suppose that he made the contract in question knowing that there was no consideration to support it.

No instructions were requested by the defendant on the alleged want of consideration to support the special contract. If such instructions had been asked, we think the Court would have been justified in refusing them on the ground that there was no sufficient evidence to go to the jury on that subject. The evidence as to the contractual relations between the plaintiff and defendant, at and about the time that the sale to Craig and Beebe was effected, was too vague and uncertain to warrant a finding that the special services rendered by the defendant, in effecting the sale, were within the scope of any contract between the parties at that time, other than the contract on which this action is founded.

The defendant has no just reason to complain of the learned trial Judge's charge. The specifications of error are not sustained.

Judgment affirmed.

W. C. S.

Oct. '98, 14. Supreme Court. January 24, 1899.

Commonwealth ex. rel. Howley v. Mercer et al.

Election law — Instruction to voters — Common Pleas—Jurisdiction of—County commissioners—Mandamus to—Act June 10, 1893.

The Act of June 10, 1893, P. L. 419, commonly called the "Baker Ballot Law," bestows no jurisdiction on the Court of Common Pleas to issue a mandamus to the county commissioners as to how instruction shall be given to voters by virtue of the authority of sec. 16 of the Act in the manner and form following the views of the Court, nor are the commissioners bound by the opinion of the Court of Common Pleas in such case; the interpretation of the law and the giving of instruction to voters is exclusively vested in the unhindered judgment of the county commissioners.

Appeal of J. C. Mercer et al., county commissioners, from the decree of the Common Pleas No. 2, of Allegheny County, entered upon the petition of Joseph Howley.

The facts of the case are set forth in the opinion of the Court.

S. B. Schoyer, (with him *N. S. Williams*, *S. Schoyer, Jr.*, *William Yost* and *G. W. Williams*), for appellants.

The Court below had no jurisdiction.

But even if the Court had jurisdiction in the premises, the direction of the Court as to the instruction to be given to the county commissioners is not warranted by the Act.

Compliance with the provisions of the Act of 1893 furnish the only safe guide to the intentions of the voter, and the facilities offered for such compliance are quite sufficient to render non-compliance inexcusable.

McCowin's Appeal, 165 Pa. 233.
Redman's Appeal, 173 Id. 59.
Flynn's Appeal, 181 Id. 457.
Gosnell's Appeal, 187 Id. 297.

D. T. Watson, *R. A. Balph* and *George W. Guthrie*, for appellee, were not heard.

February 27, 1899. DEAN, J. At the general election of November 8, 1898, there were two candidates for Judge of Court of Common Pleas No. 3, of Allegheny County. One was the regularly nominated candidate of the Republican party, and had a place in the Republican column on the ballot; the other it had been judicially decided was not the lawful nominee of either of the political parties having the right to a column; his name was therefore placed by itself on the ballot under the heading "non-partisan judiciary," with the square opposite the name, but the name of no other candidate for office was in the space above or below it. A blank column in which might be written by the voter the name of

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any candidate for any office, was on the extreme right of the ballot. But one name of a candidate for Judge appeared in the regular party column and that was the candidate of the Republican party; therefore a vote for the straight ticket of any other party by a cross in the circle at the head of the column was a vote for all candidates for offices to be filled, except for Judge; for that, no candidate would be voted for by the circle mark.

As the office to be filled was a highly important one, it may be assumed that nearly every voter desired to indicate by his ballot his choice for one or the other candidate. But with all those who did not want to vote the straight Republican ticket it was a matter of uncertainty how they should mark their ballots for Judge. The county commissioners, under the 16th section of the ballot law, undertook by advice of counsel to issue with the ballots certain instructions, in substance that a cross (X) marked in the square at the right of the name of each candidate indicated a vote for each candidate so marked; that a cross within the circle at head of the column indicated a vote for every candidate in that column; that those who did not desire to vote a straight ticket must not mark a cross in the circle at the head of the column, but must mark opposite the name of each candidate. The instructions also called attention to a number of provisions of the law in other sections. They further, in response to a request from plaintiff, disclaimed authority to give any other instructions specially applicable to the marking of ballots for Judge. It will be noticed the necessary inference from the instructions was that all voters who did not vote the straight Republican ticket and desired to vote for one of the candidates for Judge must mark a cross opposite the name of every candidate for the other offices voted for as well as opposite the name of the judicial candidate. After the refusal by the commissioners to give other or further instructions, as requested, that is, that the voter could vote for all the candidates in the column by a mark in the circle at the top of it, and then for one or the other candidates for Judge by a cross opposite his name, Howley, the plaintiff, presented his petition in the Court below setting out the facts substantially and averring that it was the duty of the commissioners to give instructions in advance fitting the special facts, and praying for a mandamus upon them. To this the commissioners made answer that they had given such instructions as were prescribed by the Act, and that the responsibility was thereafter on the voter to express his intention by his ballot; and they further denied the jurisdiction of the Court to award the mandamus prayed for. The issue thus raised was immediately argued, and the Court, although concurring in the interpretation of the Act with the petitioner, declined to issue the mandamus, because of the nearness of election day, but used this language: "I suggest to the commissioners, if they can conveniently do so, to give instructions to this effect, that where in the column of a party there is no candidate named for an office to be filled at the election, the voter may make a cross (X) in the circle above the column, and may also vote for a candidate for that office by a cross (X) at the right of his name." Then the commissioners, acting under the advice of counsel, declined to adopt the suggestion of the Court, whereupon Howley presented a supplementary petition, setting out the fact and praying for a peremptory mandamus, or such other process as would protect the voter in the exercise of the right of suffrage, as the Court was of opinion he was entitled to. On hearing that petition the Court decided: "It was the duty of the commissioners and their solicitor to submit to that opinion until reversed by a higher tribunal," and further directed that a restraining order be issued directed to the commissioners, prohibiting them from giving any instruction to voters inconsistent with it. Counsel for commissioners then moved to vacate the restraining order, which the Court, after hearing, refused; it being of opinion that it had jurisdiction to issue it, and that the interpretation put upon the law was a proper one and should have been followed by the commissioners in their instruction to voters. We now have this appeal by the commissioners from the decree restraining them from sending out the instructions adopted by them on the advice of their solicitor.

We are all clearly of opinion that the Court below had no such jurisdiction as it assumed in the matter. The 16th section of the ballot law is as follows:

"The county commissioners of each county shall provide for each election district in which an election is to be held one set of such ballots not less than seventy-five for every fifty and fraction of fifty voters therein, as contained upon the assessor's list. They shall also prepare full instructions for the guidance of voters as to obtaining ballots, as to the manner of marking them, and the method of gaining assistance, and as to obtaining the new ballots in place of those accidentally spoiled, and they shall respectively cause the same, together with copies of sections thirty to thirty-five inclusive of this Act, to be printed in large, clear type on separate cards, to be called cards of instruction."

It is wholly immaterial what definition is given

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the duties thus imposed on the commissioners, whether ministerial or discretional or a mixture of both, the authority to give instructions is undoubted, and the scope of it is clearly expressed. They shall give instructions for the guidance of voters as to the manner of marking the ballots. There is no authority conferred on the Courts to give in advance instruction to voters as to the manner of marking; there is no hint even given of authority to the commissioners to ask the advice of the Courts in the performance of this duty, nor of authority in the Courts to give such advice if asked. The Court here, however, did more than advise; it in effect commanded; advice is optional with the giver; that is he can advise or remain silent; it is optional with him to whom it is directed; that is, he can accept or decline it. The Court said: "But I suggest to the commissioners if they can conveniently do so to give instructions" in accordance with this opinion; they did not adopt the suggestion, then came an order backed by the power of the Commonwealth to enforce it. As long as the opinion of the Court took no other shape than that of advice or suggestion it was entitled to the respect which is accorded to that of all learned and reputable lawyers; as those to whom it is directed may follow it or not as they choose, we would not concern ourselves long with an appeal from advice; we would at once dismiss it. But when the advice, by an assumed judicial order capable of enforcement, takes the form of a positive law or rule of action, then an appeal lies to us and we are bound to determine whether the Court had jurisdiction. All the reasons given by the Court below and counsel in their argument, why the Court should have jurisdiction in such a grave matter before the ballot is cast and a possible error irremediable, are wholly without weight, for the statute withholds such jurisdiction from the Courts and expressly confers it upon other officers of the Commonwealth. The commissioners are not bound by the opinion; the Court itself was not bound by it. On a contest between candidates, after the election, as to the validity of the ballots cast under its advice, it could have wholly disregarded a plea of res adjudicata, and have adopted the opposite view; even the parties to the contest could well have argued that they never had had a judicial hearing on the question at issue. In what we have said, we decline to express any opinion as what instructions as to marking ballots, in view of the facts, the commissioners should have given the voters; we will not advise the Court below whether its advice was good or bad; we content ourselves with saying it had no jurisdiction to enter the restraining order. Therefore the decree for it is reversed and set aside at the costs of the appellee.

W. D. N.

Superior Court.

Oct. '98, 134. Superior Court. October 17, 1899.

Deacon v. Smaltz.

Promissory note—Maker, executor of endorser—Notice to maker of non-payment.

Demand on the maker of a promissory note and notice of non-payment are not equivalents, in the purpose of legal effect. The principal and distinctive purpose of a demand on the maker is not merely to lay ground for notice of dishonor to endorsers. The primary object is to obtain payment of the principal debtor as required by the contract. It is reasonable to suppose, in the absence of averment to the contrary that this is the object of a demand where the maker is the executor of the endorser, as the holder has a right to look to the maker alone. Where a defendant, who is both maker and executor of an endorser, is held in the latter capacity and denies notice as such, the question of intent of the demand is for the jury.

A statement set up that the defendant was the maker of a promissory note upon which his sister was endorser, and by whose will he was appointed executor of her estate. The note fell due after her decease, was presented to the maker, and payment demanded, which was refused, and answer made "it will be attended to." Thereupon the note was duly protested and the defendant as executor of the estate of his sister, the first endorser, was duly notified. The affidavit of defence denied the averment that the executor was notified, and averred that "no notice of the non-payment of said note was in fact given to or received by the said T. W. Smaltz, executor of the said Mary E. Smaltz, deceased, endorser of said note as aforesaid": *held*, the case was one for the jury.

Rice, P. J., and Orlady, J., dissent.

Appeal of Theophilus W. Smaltz, executor of Mary E. Smaltz, deceased, defendant, from the judgment of the Common Pleas No. 4, for Philadelphia County, in an action of assumpsit by Howard R. Deacon.

In this case the plaintiff filed a statement, which was demurred to. He thereupon filed an amended statement, as follows:

"The plaintiff, Howard R. Deacon, claims to recover of the defendant, Theophilus W. Smaltz, executor of Mary E. Smaltz, deceased, the sum of $442.06, with interest thereon from April 29, 1898, which is justly due and payable on the cause of action of which the following is a statement:—

"On the twenty-ninth day of April, A. D. 1896,

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one Theophilus W. Smaltz made his promissory note, of which the following is a copy:—

"$440.00. Philadelphia, April 29, 1896.

"Two years after date I promise to pay to the order of Mary E. Smaltz four hundred and forty dollars at northeast corner American and Cambria streets, without defalcation for value received.

"(Signed) T. W. SMALTZ.

"Endorsed.—Mary E. Smaltz, 1503 Girard avenue. Howard A. Deacon.

"And delivered the same to the said Mary E. Smaltz, and the said Mary E. Smaltz then endorsed the said note and delivered the same to the plaintiff for value in the ordinary course of business. The plaintiff is a bona fide holder of the said note for value.

"And the said Mary E. Smaltz, to wit, on the twenty-ninth day of July, A. D. 1897, died, having first made her last will and testament, which was afterwards, to wit, on the fourth day of August, A. D. 1897, at the city and county of Philadelphia, Pa., duly proved, and letters testamentary thereon were then and there duly granted to the defendant.

"The said Mary E. Smaltz did not in her lifetime pay any part of the said note, nor has the defendant since the death of the said Mary E. Smaltz paid any part of said note.

"At maturity of said note, to wit, April 29, 1898, it was presented to the maker at the northeast corner of American and Cambria streets and payment demanded, which was refused, and answer made, 'It will be attended to.'

"Whereupon the said note was duly protested and the endorsers and also T. W. Smaltz, executor of the estate of Mary E. Smaltz, deceased, the first endorser, duly notified.

"The costs of said protest were two dollars and six cents.

"Wherefore the plaintiff claims judgment against the defendant for $442.06, with interest thereon from April 29, 1898."

To this amended statement appellant filed the following affidavit of defence:

"Theophilus W. Smaltz, executor of Mary E. Smaltz, deceased, being duly sworn according to law, says that he has a just, true, and legal defence to the plaintiff's claim as set forth in his amended statement in the above case of the following nature and character, to wit:—

"1. That the demurrer filed by the deponent to plaintiff's original statement of claim filed in the said case has not been disposed of by the Court.

"2. That the averment in said recited statement that after the said note was duly protested T. W. Smaltz, executor of the estate of Mary E. Smaltz, deceased, the first endorser, was duly notified, is not true; that no notice of the non-payment of said note was in fact given to or received by the said T. W. Smaltz, executor of the said Mary E. Smaltz, deceased, endorser of said note as aforesaid.

"Plaintiff is therefore advised and believes and submits to the Court that the plaintiff is not entitled to recover the amount of said note and the protest fees thereof from this deponent, executor of the said Mary E. Smaltz, deceased, the endorser thereof as aforesaid.

"All of which is true, as deponent verily believes and expects to be able to prove on the trial of this case."

A rule was taken for judgment for want of a sufficient affidavit of defence, which the Court after argument made absolute. The defendant took this appeal, and assigned as error, inter alia, the making absolute the rule for judgment.

John Cromwell Bell, for appellant.

The averments in the affidavits raise a question for the jury.

Publishing Co. *v.* Hartranft, 3 Pa. Super. Ct. 60.
McPherson *v.* Allegheny National Bank, 96 Pa. 185.
Peale *v.* Addicks, 174 Id. 543.
Bank *v.* Ellis, 161 Id. 244.
Newbold *v.* Pennock, 154 Id. 591.

Protest of a promissory note is not necessary; what is necessary is that notice of non-payment shall be given the endorser.

Stephenson *v.* Dickson, 24 Pa. 148.
Arnold *v.* Niess, 36 Leg. Int. 437.
Falk *v.* Lee, 8 WEEKLY NOTES, 345.
Byles on Bills, pages 395-410.

It is also settled law that "notice does not mean mere knowledge, but an actual notification."

Byles on Bills (Sharswood edition), 411.
Bank *v.* Hale, 16 S. & R. 157.
Groth *v.* Gyger, 31 Pa. 271.
Bank *v.* Zahm, 16 WEEKLY NOTES, 552.
Bank *v.* Hartman, 16 WEEKLY NOTES, 555.

J. Quincy Hunsicker, for appellee.

The affidavit of defence is not responsive. It does not meet the plaintiff's averments, but is evasive.

The averments in the affidavit of defence ought to be as broad and comprehensive as are the averments in the statement which it attempts to answer. If it fail in this particular it is insufficient.

Bank *v.* Miller, 179 Pa. 412.
McConeghy *v.* Kirk, 68 Id. 200.
Moore *v.* Somerset, 6 W. & S. 263.

Knowledge in this case under all the circumstances ought to be regarded as equivalent to notice.

The exact point raised in this case seems not to have been heretofore decided in this State, and cases cited by appellant, viz., Bank *v.* Hale, and

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Groth *v.* Gyger, were cases where there was neither knowledge nor notice.

Caunt *v.* Thompson, 7 C. B. 400.

The principle was decided in an early English case, Porthouse *v.* Parker, 1 Campbell, 82, and affirmed by the Supreme Court in Bank *v.* Fulmer, 3 Pa. 403.

April 17, 1899. SMITH, J. The defendant is sued as executor of the endorser of a note. He is not called upon, therefore, to meet a claim against him personally, but to make defence to the testator's contract of endorsement. In law this contract is that if, upon due presentment at maturity, the note be not paid by the maker, the endorser, upon due notice thereof, will pay it. The question here raised is whether the defendant, as executor of the endorser, was duly notified of the non-payment of the note; more precisely, has such notice been adequately denied by the affidavit, so as to make this a question for the jury? The material averment of the declaration is: "At the maturity of said note . . . it was presented to the maker . . . and payment demanded, which was refused and answer made, 'It will be attended to,' whereupon the said note was duly protested, and the endorsers, and also T. W. Smaltz, executor of the estate of Mary E. Smaltz, deceased, the first endorser, duly notified." To this it is replied: "That the averment in said recited statement, that after the said note was duly protested, T. W. Smaltz, executor of the estate of Mary E. Smaltz, deceased, the first endorser, was duly notified, is not true. That no notice of the non-payment of said note was in fact given to or received by the said T. W. Smaltz, executor of the said Mary E. Smaltz, deceased, endorser of said note as aforesaid."

This case should not be made to turn on alleged statements of the maker at the time of demand. The material questions relate to a demand of the maker at maturity, non-payment and due notice thereof to the endorser. The demand is material only as the first step in the process of charging the endorser, and would be ineffectual for this purpose unless followed by due notice to the endorser. It is explicitly averred in the affidavit: "That no notice of the non-payment of said note was in fact given to or received by the executor of the endorser." The affidavit is in denial, as broad as the material averments of the declaration, and this has often been held sufficient to stay judgment: McPherson *v.* Bank, 96 Pa. 135. The averment in the declaration sets forth a circumstance which, it is contended, implies notice. But the direct and absolute denial of notice is certainly broad enough to meet an allegation from which, at best, notice is only to be inferred. This denial raises an issue of fact which the defendant is entitled to have submitted to the jury: Publishing Company *v.* Hartranft, 3 Pa. Super. Ct. 60.

There is a serious doubt, presented in the plaintiff's statement, as to what in fact was meant by the demand and the maker's response thereto. It is not alleged that the defendant was told that he would be held as executor of the deceased endorser, nor is any explanation given of the defendant's reply, "It will be attended to." This response to a demand resting on his direct personal liability, with no reference to his representative character, does not necessarily imply action in that character. Demand on the maker and notice of non-payment are not equivalents, in purpose or legal effect. The principal and distinctive purpose of a demand on the maker is not merely to lay ground for notice of dishonor to endorsers. The primary object is to obtain payment of the principal debtor, as required by the contract. It is therefore reasonable to presume in the absence of all averment to the contrary that this was the object of the demand in the present case. The holder had a right to look to the maker alone, and, under the statement that may have been the understanding of the parties. This question of intent was for the jury. The legal effect of demand on a maker who is also executor of an endorser of the same paper, is not a question for determination at this stage of the case; by the declaration that question is made to depend on an uncertain averment, resting in parol, which can be better understood when more fully and clearly presented. The defendant has denied, in unequivocal terms, a material allegation of the declaration, which goes to the whole claim, and this is sufficient to carry the case to the jury.

Judgment reversed and procedendo awarded.

Eo die. RICE, P. J., (dissenting). Before the note in suit became due, Mary E. Smaltz, the endorser, died, and letters testamentary were issued to Theophilus W. Smaltz, the maker. Suit was brought against him as executor of the endorser, and in his amended statement filed by leave of Court, the plaintiff averred: "At maturity of said note, to wit: April 29, 1898, it was presented to the maker at the northeast corner of American and Cambria streets and payment demanded, which was refused, and answer made, 'It will be attended to.' " This averment is not denied in the affidavit of defence, therefore the facts averred must be taken as admitted for present purposes. The question is whether the defendant had such notice of the dishonor of the paper as the law requires in order to bind him, as executor of the endorser.

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The object of notice is twofold; first, to give the endorser prompt information of the dishonor of the paper so that he may take measures for his own security; second, to warn him that the holder intends to stand on all his legal rights both as against him and the maker; for the latter reason mere knowledge is not equivalent to notice; but on principle as well as the great weight of authority the intention to hold the endorser need not be expressly asserted in the notice. When he receives notice from the proper source that the note has been dishonored he may and ought to infer that he will be held responsible. In the present case—to adopt with slight changes the language of the Court in Caunt *v.* Thompson, 7 Mann., Grang. & Scott, 401, 411—the defendant knew that the note was dishonored, and he knew it from the best source, namely, his own personal act in refusing payment when presented by the holder; and he knew from the same source that time had not been given to the maker, and that the holder had done nothing to indicate an intention to look only to the maker. Therefore, he had all the information coming from the proper source which notice ought to convey; and knowing that, he would also know that the holder had placed himself in a situation to call upon him as executor of the endorser for payment, from which, to adopt the view of the modern decisions, he might infer that he would be called upon. Indeed, it would not be going too far to say that he was called upon in both capacities and that when, after the paper was dishonored, he said, "It will be attended to," he was speaking in his representative capacity as well as for himself. "This," to quote further from Caunt *v.* Thompson, "is very different from the knowledge which has been spoken of as not being equivalent to notice, and is at least as much notice as the notice spoken of by ALDERSON, J., in Miers *v.* Brown. Indeed there would be some absurdity in requiring that the plaintiff should have stated to the defendant at the time when he dishonored the bill: 'Take notice that this bill has been dishonored by you.'" See also West Branch Bank *v.* Fulmer, 3 Pa. 399.

The case, it seems to me, might be rested here without further discussion were it not for the argument that the question has been ruled the other way in this Commonwealth in the cases of Juniata Bank *v.* Hale, 16 S. & R. 157, and Groth *v.* Gyger, 31 Pa. 271. In those cases it was attempted to hold the defendants as endorsers upon the ground of the knowledge which they, as administrators of the maker, had or were presumed to have of the non-payment of a note which fell due after their appointment. It does not appear in either of these cases that demand for payment was made upon the defendants personally and that coupled with their failure or refusal to pay was a promise to attend to the matter. There was no such unequivocal evidence of an intention on the part of the holder to stand on all his legal rights as appears in the present case. In the first case the trial Judge held that neither demand of payment nor notice of non-payment, was necessary to hold the endorsers in a case where they became administrators of the estate of the deceased maker before the day of payment. This was held to be error. In the second case the note was payable at a bank and was presented there. In Magruder *v.* The Union Bank, 3 Pet. 87, there was neither demand nor notice prior to bringing suit. In all of these cases there was knowledge, or presumed knowledge, on the part of the administrators of the non-payment of the notes at maturity, but that was all. The point decided was that mere knowledge is not equivalent to notice, and this, as a general proposition, is true, but I do not think this case comes within the principle.

The amended statement filed by leave of Court cured the defect in the original statement, and as the defendant filed an affidavit of defence to the latter there was no error of which he can now complain in permitting the amendment pending the demurrer.

For the reasons above suggested I would affirm the judgment. Judge ORLADY authorizes me to say that he concurs in the foregoing conclusion.

W. C. S.

March, '98, 30. Superior Court. March 11, 1898.

Smith et al., Executors v. City of Lebanon.

Municipality — Widening streets — Trespass — Practice.

Trespass is not the proper action to recover damages for the taking of private property in the widening of a city street, and a plaintiff in such an action cannot attack the legality of proceedings of viewers to which he had been party, after they had proceeded to final decree.

Appeal of the City of Lebanon, from the judgment of the Common Pleas for Lebanon County, in an action of trespass in which Savilla T. Smith and Cyrus Wolf, executors of the estate of Levi Smith, deceased, were plaintiffs.

The facts of the case as they appeared on the trial, before SIMONTON, P. J., were as follows: A confirmed plan of the borough of Lebanon which had been properly adopted, provided that "the streets and alleys shown on said plan and marked with red lines are intended to be and are hereby vacated."

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The borough by ordinance approved February 5, 1884, fixed the width of Church street, between Eighth and Tenth streets, at forty feet. At the time of the passage and approval of this ordinance Church street, between Partridge alley and Ninth street, and within the scope of said ordinance, was marked with red lines upon the plan so adopted and confirmed, but no proceedings, as prescribed in the Act of March 3, 1871, P. L. 173, had ever been instituted for the adjustment of party lines and said street was, after said vacation, used as a highway by the public as it always had prior thereto. It was a small street, which had been opened and laid out many years and had an average width of about twelve feet and, at its opening into Ninth street, a width of fifteen feet and four inches. On the south side of said street several houses stood and on the north side was the property of Levi Smith, enclosed by a fence.

The city of Lebanon (the successor of the borough of Lebanon) presented a petition to the Court of Common Pleas to appoint viewers to assess damages and benefits resulting from the widening of the street. The viewers made report to which exceptions were filed and were overruled by the Court. By these proceedings four and a half square perches of the land of the estate of Levi Smith, fronting on Church street, were taken. The thirty days for appeal had expired and no appeal was taken. The plaintiffs, the executors of Levi Smith, then brought this action in trespass to recover damages for the taking of said land.

Verdict and judgment for plaintiffs for $471.67. The defendant took this appeal.

W. D. Fisher, for appellant.

The Act of Assembly approved March 21, 1806, 4 Sm. L. 326, sec. 13, provides: "In all cases where a remedy is provided or duty enjoined, or anything directed to be done by any Act or Acts of Assembly of this Commonwealth, the directions of the said Acts shall be strictly complied with; and no penalty shall be inflicted or anything done agreeably to the common law in such cases further than shall be necessary for carrying such Act or Acts into effect."

The plaintiffs are not entitled to damages in this form of action.

Kell *v.* Gas Co., 131 Pa. 466.

T. H. Capp, (with him *C. R. Lantz* and *Schock*), for appellees.

October 24, 1898. PORTER, J. This action is for damages for a trespass on the plaintiff's lands. It is not a proceeding on condemnation to liquidate the damages for a taking of land for public use. On the trial the plaintiff set up that the proceedings previously had to widen the street upon which her property abutted, were void in law, and, therefore, the entering upon the land by the defendant to carry the widening into effect, was in fact a trespass for which she was entitled to damages. This proposition was rightly disposed of by the trial Judge. The proceedings of the viewers were held to be regular and the present plaintiff was a party litigant therein. The question of the legality of those proceedings could and should have been raised then. The road sought to be widened was in existence physically. True, it had, by an Act of Assembly, been declared vacated, but the adjustment of the party lines, therein provided to be made, had never been accomplished or attempted. The continuous use of the road by the public was sufficient ground upon which to base the proceedings to widen, in the absence of any complaint by the parties in interest, on this presentation the plaintiff had no case to submit to the jury on the question of trespass.

The testimony of the city engineer was, however, permitted to be offered in rebuttal. This disclosed somewhat indefinitely that the defendant in widening the street had not followed the lines of the plan attached to the report of the jury of view, but had, in setting back her fence, encroached upon the plaintiff's property. This was some evidence of an actual trespass, and led to the trial Judge submitting the case to the jury. In doing this, however, he inadvertently referred to the claim as if in some of its aspects it was one for damages for a taking of land for public use. This tended to mislead the jury as to their powers in determining the question of fact. There is but one proper way by which a municipality can condemn land to be used as a public highway, and that is by the proceeding provided by legislation. This, as we have said, is not such a proceeding.

We are of the opinion that the rights of the parties will be better determined by remitting this case for a new trial, when all the facts may be put before the Court in a more intelligible and orderly manner than they were on the former trial

The judgment is therefore reversed and a venire facias de novo awarded.

W. D. N.

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WEEKLY NOTES OF CASES.

VOL. XLIV.] *FRIDAY, JULY 21, 1899.* [No. 16.

Supreme Court.

Oct. '99, 45. Supreme Court. February 28, 1899.

Greenfield Avenue.

Constitutional law — Municipal improvements— Act May 22, 1895, P. L. 105.

The purpose of the Act of May 22, 1895, to enlarge the occasions on which the power to assess property owners for improvements which benefit their property is within the constitutional power of the Legislature, and is in harmony with the settled policy of the State that certain improvements incident to the growth and extension of cities shall be paid for in part at least by those who are specially benefited thereby.

Ordinarily the power to do any act includes the power to determine the method of doing it. Restrictions upon the forms of legislative expression are unusual, and are only imposed for specific and clearly defined ends. A provision of the fundamental law which attempts to regulate the form in which the legislative will is to be expressed in the enactment of laws is difficult of a just and reasonable application in all cases and is at best of very doubtful utility.

An Act of Legislature which is complete in itself —the purpose, meaning and full scope of which are apparent on its face—is valid although it may operate to alter, extend or even repeal a prior Act or may provide for the means of carrying its provisions into effect by a reference to a course of procedure established by other Acts of Legislature.

Appeal of the City of Pittsburgh, from the decree of the Common Pleas No. 3, of Allegheny County, sustaining the exceptions to the report of viewers appointed on petition of the appellant.

On the petition of the City of Pittsburgh, viewers were appointed to "ascertain the costs, damages and expenses and ascertain the benefits of paving and curbing on Greenfield avenue, from Second avenue to Curtin avenue, in the Twenty-third ward."

The viewers assessed benefits against the property owners $8456.54, and against the city of Pittsburgh, $9092.20.

Exceptions were filed by some of the owners of property to the effect that the benefits assessed were excessive, and, also, that the ordinance under which the improvement was made was illegal and beyond the power of the city to enact, in that the Act of May 22, 1895, under which the ordinance was passed, did not confer on the city the power to assess benefits.

Before the hearing of the exceptions a stipulation was filed, made by all the parties in interest, as follows:

"And now, December 19, 1898, upon the hearing of the exceptions filed in Court in the above case it is stipulated and agreed as follows:

"That the Court shall find as a fact that the ordinance for the improvement of Greenfield avenue under which said street was improved, the costs, damages and expenses whereof are sought to be assessed in this proceeding was passed without a petition therefor signed by a majority in number and interest of the owners of the abutting property, but the said ordinance was passed by the councils of the city of Pittsburgh and approved by the mayor thereof, and proceeded under by the city of Pittsburgh in strict and full compliance with all the terms and provisions of the Act entitled: 'An Act empowering cities of this Commonwealth to grade, pave, curb, macadamize, and otherwise improve the public streets or alleys or parts thereof within their corporate limits without petition of the property holders and providing for the payment of the costs, damages and expenses thereof,' approved May 22, 1895, P L. 105."

The Court sustained exceptions to the report of the viewers on the ground that the Act of 1895, did not confer the power upon the city to pass the ordinance in question, saying, inter alia:

"Prior to the Act of 1895 the city of Pittsburgh had no power to make local assessments to pay the cost of improving a street when the improvement was not petitioned for.

"The Act of 1895 does not confer the power—at all events does not confer it directly or in terms.

"If we seek to get at the intent of the Legislature, and thus conclude that by reference to the method of procedure, it intended by inference to confer the power, then we must conclude that it attempted to do this by extending the power specified in a former Act of Assembly to this case, without republication, and hence that the attempt was a futile one.

"In any event the power was not conferred, the assessment of benefits was unauthorized, and the exceptions must be sustained."

The city took this appeal and assigned as error the decree of the Court.

J. H. Beal, (with him *T. D. Carnahan* and *Clarence Burleigh*), for appellant.

The presumption is that an Act is valid and constitutional and those alleging its invalidity must show a clear, palpable and plain violation

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of the Constitution and must show it so plainly as to leave no doubt.

Sharpless *v.* Mayor, 21 Pa. 147.
Speer *v.* School Directors, 50 Id. 150.
Fletcher *v.* Peck, 6 Cranch, 87.
Penna. R. R. *v.* Riblet, 66 Pa. 164.

The Act shows a clearly expressed intent to authorize the assessment of benefits to pay the costs, damages and expenses of improvements made under the Act.

The broad scope that is given to the Acts of Assembly providing for municipal improvements and collection of the costs of the same is shown in Woodland Avenue, 178 Pa. 325, and McKee *v.* Pittsburgh, 7 Pa. Super. Ct. 397.

The Act not only shows an intention to authorize the making of benefit assessments, but in section 2 specifically authorizes them.

The Act being part of the general system of legislation relating to street improvements, it is to be so construed as to preserve the harmony of the system.

Neeld's Road, 1 Pa. 353.
Endlich on Int. Stat., secs. 40, 43.

If the Act does not give the power to make benefit assessments then it is meaningless and absurd, and under the rule of construction such an interpretation cannot be sustained.

Philadelphia *v.* Railway Co., 120 Pa. 197.
Gibson *v.* Jenney, 15 Mass. 205.
Sedgwick on Const. Stat., 196.

A thing within the intention of the makers of a statute is as much within the statute as if it were within the letter.

U. S. *v.* Freeman, 3 Howard, 565.
Potter's Dwarris on Stat., p. 145.
U. S. *v.* Wyngall, 5 Hill, 16.
People *v.* Hicks, 15 Barb. 153.
People *v.* Commissioners, 3 Hill, 599.

The Act is not made unconstitutional by the reference to existing laws for the mode of exercising the powers granted.

The constitutional provision forbidding such enactments has reference to express amendments only.

Stuart's Appeal, 163 Pa. 210.

The reference to the general law is simply to provide the details of the mode of procedure by which the costs, damages and expenses shall be ascertained and the benefits assessed. It does not extend or confer the provisions of the existing law within the meaning of the constitutional provision, but simply places the new power under the general law.

J. O. Petty, for appellees.

The second section of the Act of 1895 provides that all proceedings for the ascertaining of damages and assessment of benefits incident thereto, shall be as now provided by law in reference to payment of costs, damages and expenses of public improvements within municipal corporations.

The words "all proceedings for the ascertaining of damages and assessment of benefits incident thereto" can only mean the damages to be paid claimants after assessing their benefits.

It seems clear, therefore, that the Act cannot be sustained as an amendment to or as an extending of the provisions of the prior Act of 1891.

It is a principle universally declared and admitted, that municipal corporations can levy no tax, general or special, unless the power be plainly and unmistakably conferred.

Dillon on Municipal Corporations, sec. 763.
City of Philadelphia *v.* Greble, 38 Pa. 340.
Wistar *v.* Philadelphia, 80 Pa. 510.

All municipal corporations in Pennsylvania have the power to improve streets. In the absence of special and distinct authority to make assessment upon properties benefited, such improvement must be paid for by general taxation. The authority to make such assessments was conferred by the Act of 1891. The title to this Act clearly sets forth the power to assess properties benefited, and the Act itself is full and complete. This Act, however, does not take away from cities the power to improve streets at general expense. We have, then, the two systems of improvement.

S. H. Thompson and *A. E. Anderson*, (*R. B. Petty* with them), for Peebles Sub-School District, Mary E. Schenley and M. Flanigan, appellees.

May 8, 1899. MITCHELL, J. 1. The construction of a statute is a question of the legislative intent in its passage. The first subject of consideration in the present case, therefore, is whether the Legislature by the Act of May 22, 1895, P. L. 105, intended to authorize cities to improve streets partly or wholly at the expense of property owners specially benefited, without the latter's consent shown by a previous petition. This question admits of but one answer. The act is entitled, "An Act empowering cities . . . . to grade, pave," etc., "without petition of property holders," etc. The cities already had full power to improve their streets at the public expense without consent of the property holders, and if this was all the Act intended to give, it was utterly useless and superfluous. But further than this, if as some of appellees argue the Act was meant as "a wholesome restriction upon the making of improvements at the general expense," then we are forced to the extraordinary misuse of language in holding that an Act "empowering cities," etc., and making the affirmative grant that "all cities shall have power," etc., was meant only to put restrictions on powers already existing.

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Finally, in the construction suggested, the second section providing that the "proceedings for the ascertaining of damages, and the assessment of benefits incident thereto shall be as now provided by law" would be not only useless, but absolutely repugnant to the purpose of the Act.

2. The purpose of the Act was not only within the constitutional powers of the Legislature, but was also in harmony with and pursuance of the long settled policy of the State that certain developments and improvements in the growth and extension of cities shall be paid for in part at least by the parties who are specially benefited thereby. The system was well known to the legal profession, the Legislature and the public. See Washington Avenue, 69 Pa. 352. It was not in force in its full extent in all municipalities. The city of Pittsburgh by the failure of the Acts of 1887 and 1889 to get through the network of constitutional obstructions to needful legislation (see Wyoming St., 137 Pa. 494) was left without authority to assess benefits except under the Act of May 16, 1891, P. L. 75, which limited the exercise of such power to cases where the improvement was petitioned for by the property owners. The plain purpose of the Act of 1895 was to enlarge the occasions on which the power might be exercised. It did not expressly grant authority to assess for benefits. It was not necessary that it should do so. The power already existed but its exercise was restricted by certain conditions precedent, and the Act simply changed some of these conditions, taking away the requirement of a property holder's petition, and substituting restrictions on the ordinary passage of ordinances. In so doing it made no changes in the nature of the existing power, but extended the well understood system with its usual incidents as to damages and benefits, to new conditions as to its exercise. It may well be doubted whether if the Act had ended with the first section, it would not have carried the power to assess for benefits as an incident of the system, to be implied if not expressly excluded. But the second section puts all doubt at rest and shows beyond question that the intent was that the power should be accompanied by its usual incidents as to damages and benefits.

3. The intent of the Act being clear, and the purpose within the legislative province, was it rendered invalid by the form in which it was put? Ordinarily, the power to do any act includes the power to determine the method of doing it. This is the rule as to the forms of legislative expression. Restrictions upon such forms are unusual and are only imposed for specific and clearly defined ends. They are not to be construed beyond the prevention of the evil in view of which they were imposed. It was well said by the Court of Appeals of New York, in People ex rel. *v.* Lorillard, 135 N. Y. 285, "A provision of the fundamental law which attempts to regulate the form in which the legislative will is to be expressed in the enactment of laws is difficult of a just and reasonable application in all cases, and is at best of very doubtful utility. When the organic law has fixed the limits of legislative power and has placed some general and suitable restraints upon its methods of procedure, its proper office is generally fulfilled, but an attempt to prescribe the language or the forms to be used or observed by the Legislature in the enactment of statutes must inevitably result, either in the condemnation of numerous legislative acts, perfectly wholesome and just, or in the liberal exercise by the Courts of their undoubted powers to give to all laws a just and rational construction and meaning. A constitutional provision intended to operate as a restraint upon the Legislature, with respect to the language and forms of expression to be used in forming acts of legislation is not to be so construed as to embrace cases not fairly within its general purpose or policy, or the evils which it was intended to correct."

Section second of the Act of 1895 is as follows: "In exercising the power aforesaid all proceedings for the ascertaining of damages and the assessment of benefits incident thereto shall be as now provided by law in reference to payment of costs, damages and expenses of public improvements within municipal corporations," and the provision of the Constitution which it is supposed to contravene, is sec. 6 of Art. III.: "No law shall be revived, amended or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revived, amended, extended, or conferred, shall be reenacted and published at length."

That section has already been before this Court and in Searight's Estate, Stuart's Appeal, 163 Pa. 210, it was said, "The constitutional provision has reference to express amendments only. Its object, like that of section two of the same article requiring each Act to have its subject clearly expressed in the title, was to secure to the legislators themselves and others interested, direct notice, in immediate connection with proposed legislation, of its subject and purpose. The Constitution does not make the obviously impracticable requirement that every Act shall recite all other Acts that its operation may incidentally affect, either by way of repeal, modification, extension or supply."

This construction is the one universally given, so far as we have been able to learn, to the same or similar provisions in the constitutions of other States. See People *v.* Banks, 67 N. Y. 568; Peo-

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ple *v.* Lorillard, 135 N. Y. 285; Matter of Union Ferry Co., 98 N. Y. 139; Campbell *v.* Board of Pharmacy, 45 N. J. L. 241; People ex rel. *v.* Mahaney, 13 Mich. 481, 496; State *v.* Gaines, 1 Lea, (Tenn.) 734; Blakemore *v.* Dolan, 50 Ind. 194; People ex rel. *v.* Wright, 70 Ill. 388; Birmingham Rw. Co. *v.* Land Co., 114 Ala. 70; Denver Circle R R. Co. *v.* Nestor, 10 Col. 403; Cooley on Constitutional Limitations, chap. 6, p. 180, (6 ed. 1890). And the rule deducible from all the cases may be stated as follows, in terms slightly varied from those of DEPUE, J., in Campbell *v.* Board of Pharmacy, supra. An Act which is complete in itself—the purpose, meaning and full scope of which are apparent on its face—is valid, although it may operate to alter, extend or repeal a prior Act or may provide for the means of carrying its provisions into effect by a reference to a course of procedure established by other Acts of the Legislature.

The Act of 1895, section second, prescribes that the proceedings under section first shall be "as now provided by law" in reference to public improvements within municipal corporations. There was a method provided by law for such cases. It was part of a system, well known and long established, which involved certain principles of claims for damages, of liabilities to assessments for benefits, and certain modes of procedure to liquidate amounts in the two classes of cases. These rested partly on the constitutional guarantee to owners whose property was taken for public use, partly on statutory authority to assess, partly on statutory methods of procedure, and partly on common law principles as declared applicable to the whole subject by the Courts. No Legislature could undertake to foresee, enumerate and re-enact all the statutes, much less the rules of common law that might be affected by the new Act or be applicable to aid in carrying it out. They were not required to do so. The procedure was part of a system, and the Act in changing in some particulars the conditions under which the system should be applied, adopted and referred to the procedure as a part of such system by which its object should be put in operation. This case is not at all within the mischief of blind, ignorant, misleading or deceptive legislation which the constitutional provision was intended to prevent.

We are of opinion that the learned Court below took a narrower and more literal view of the words of the section than its purpose requires.

Judgment reversed and procedendo awarded.

W. D. N.

Jan. '98, 117. Supreme Court. January 12, 1899.

Darwood v. Union Traction Co.

Negligence—Crossings.

Plaintiff was driving along a street which crossed a street railway, the view of which was obstructed by an awning at a corner store, and by articles hanging therefrom; he stooped to look, but not low enough to command a view of the street on which the railway was, and drove on, and when his horse's head was at the track saw an electric car of the defendant some 115 feet off; he made no attempt to stop, but tried to cross the track; his wagon was struck on the hind wheel by the electric car, which approached at an unusually rapid rate, endeavoring to make up time, without slowing up and without having given any warning. The plaintiff was thrown out and very seriously injured. There was evidence that had the plaintiff stooped low enough to have looked when he reached the house line, he would have seen the car considerably more than 115 feet away, and that from the house line to the track of the defendant was some twenty-two feet:

***Held*, that the plaintiff was guilty of contributory negligence and that a verdict was properly directed for the defendant.**

Appeal by Joseph E. Darwood, plaintiff, from the judgment of the Common Pleas No. 1, for Philadelphia County, in an action of trespass in which the Union Traction Company was defendant.

On the trial of this cause, before BREGY, J., the plaintiff showed the following case:

The defendant maintained a street railway on Nineteenth street, which crosses Carpenter street in the city of Philadelphia. Nineteenth street was about 50 feet wide from house to house, the distance from the house line to the curb was twelve feet, and from the curb to defendant's track ten feet four inches. On the northwest corner of the streets was a grocery store, around the front of which was an awning with a flap suspended from the top rail, from which on the morning of February 10, 1896, were suspended chickens, hams and sides of beef, obstructing the view northward on Nineteenth street from Carpenter street. On the morning above mentioned the plaintiff, a milk man, was driving a milk wagon east on Carpenter street above Nineteenth, at a rate of four or five miles an hour and with his horse under control, which horse he testified was trained to stop at the sound of a car bell. As he approached the corner he heard no bell, and looked out of his wagon, but did not bend low enough to look under the articles hanging in front of the corner store. When he got to the first point at which he had a clear view of Nineteenth street to the north, he saw an electric car of the defendant approaching at a very rapid rate, and then being by a telegraph pole which subsequent measurement showed to be 115 feet from

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the crossing. Another wagon was immediately behind him. He kept on and as he was crossing the track was struck on the rear wheel of his wagon, thrown out and very seriously injured. The electric car was behind time, was going very fast in the endeavor to make up its loss, did not attempt to slow up on approching the crossing and gave no warning by ringing its bell. The plaintiff admitted that if he had bent very low he might have seen under the articles in front of the grocery store and up Nineteenth street. He also, on cross-examination, said that when he saw the car his horse's head was on the track, that he made no effort to back him, and that he could not pull him back, that he was a "stubborn horse in that way," and that he thought he could get across. It also appeared that the distance from the horse's head to the seat where the plaintiff sat and drove was thirteen feet.

The plaintiff having closed, the defendant presented no evidence, but asked for binding instructions in its favor. The Court charged the jury that there was no doubt at all of the negligence of the defendant and directed a verdict for defendant solely on the ground that the plaintiff was guilty of contributory negligence.

Verdict for defendant. The plaintiff took this appeal and assigned as error, the direction of a verdict for defendant.

Henry Budd, (*William C. Stoever* with him), for appellant.

As the Court below held the defendant guilty of negligence, that matter need not be argued. The only questions are: (*a*) Was Darwood guilty of contributory negligence in not stooping low enough? (*b*) Did this action, if negligent, contribute to the accident? Whether his action was negligent or not was for the jury, especially in view of the fact that it does not appear exactly how far he could have seen, or that an ordinarily prudent man having a right to expect the usual warning of the coming of a car and on the alert for it, would have naturally regarded it as his duty to have got around or under an obstruction for the purpose of sight when a clear earspace existed, and no warning was given. There is no rule of law requiring a person about to cross a car track to look for approaching car at the house line of the street on which the track is laid. The house line may be the best place at which to look; it may be a very bad place. The pavement may be clear or it may be blocked; there may be a row of trees so planted that from the angle of vision at the house line there will practically be a wall interposed between the eye and a car which is at any considerable distance up or down the street. In this connection the attention of the Court is incidentally invited to the rule laid down as to the place of looking in Ehrisman *v.* Railway Co., 150 Pa. 180. . . . . "In the case of steam roads, a question sometimes arises as to the proper place to stop, look and listen. Where there is a fair doubt upon this question, we have held that it must be submitted to a jury. But no such case arises in the case of city railways. If the citizen looks just before he crosses, he avoids all danger of accident."

(*b*) But even if it was negligent not to have stooped on the arrival at the house line, did that contribute to the accident? In other words, if he had stooped, and if he had seen the car, would he have been bound to have stopped, and would it have been negligence for him to go on across the track? If that question is answered in the negative, then it seems that whatever his action in not stooping was, it was not contributory negligence. In view of this, whether, in any event, Darwood was required to look on reaching the house line was for the jury. It does not appear how far off he would then have seen the car. He certainly would have seen it a considerable distance further off than 115 feet, and then his action in crossing the track would have had to be determined by the rule of ordinary care. The rule applicable to him—is, was his conduct such as that which would have characterized an ordinarily careful driver?

McLaughlin *v.* Traction Co., 175 Pa. 565.

In other words, was the distance such as would have justified an ordinarily careful driver in going across the track? Taking even the worst case for Darwood, he was endeavoring to cross a track and to go twenty feet, while the car was going nearly six times that space. That, even under the circumstances, when there was no stoppage of the car, no slowing up until it was right upon him, his judgment was not so much at fault is shown by the fact that he was struck on the hind wheel, when one slight turn would have brought him to a position of safety. If negligence cannot be presumed against a defendant from the mere fact of the occurrence of an injury, so neither can it against a plaintiff. Whether Darwood had a right to assume that he could properly cross in the time allowed him was for the jury.

Jackson *v.* Traction Co., 33 WEEKLY NOTES, 481; s. c. 159 Pa. 399.
Callahan *v.* Philadelphia Traction Co., 184 Pa. 425.

Jackson *v.* Traction case seems to rule the present case, as had the car been going at the proper rate there is no question Darwood would have got over safely. But it is said he knew the car 115 feet away was coming very fast and he was bound to assume that that rate would be continued and that nothing would be done by those

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in charge of the car in the way of doing their duty. The contrary is the law. Every person has a right to assume that a car will be slowed up on approaching a crossing; and the obligation to so slow up is fixed by law.

Kline *v.* Traction Co., 181 Pa. 276.

And he had a right to assume that the car would slow up; the law does not require any one to assume that another will violate the law, and in determining whether the plaintiff acted as an ordinarily careful man would act, this right of assumption, if we may so call it, must be taken into consideration.

Reeves *v.* D. L. & W. R. R. Co., 30 Pa. 454.
Railroad Co. *v.* Hummel, 44 Id. 375.

Was then the plaintiff guilty of negligence of which an ordinarily careful man would not have been guilty. A car may even be stopped about its length, some twenty feet or so. Darwood had every right to believe that he could cross in perfect safety when the car was 115 feet off, or, at least, it was a question for the jury whether he had not this right. At the time he saw the car he would have had to have gone some twenty feet to be in a position of entire safety, that is to say, the horse's head was then about on the track, and from the horse's head to the seat where Darwood sat, it was testified was thirteen feet, and some seven feet back of the seat would give the size of an ordinary milk wagon. Darwood possibly might have turned his horse's head up or down the street. He could not well go back because there was a wagon following him. He went on. Was this an imprudent act? It is to be noted that what he undertook to do was to go with a light wagon one foot, while the car was going nearly six feet, even if no action were taken on the part of those who controlled the car to check its speed in any way. Was this an act of which an ordinarily prudent person would not have been guilty? "A reasonable man can be guided only by a reasonable estimate of probabilities."

Pollock on Torts, 27.

Wheelahan *v.* Traction Co., 150 Pa. 187, distinguished, is not like this case. In that case the obstruction was the hood of Wheelahan's own wagon, and he by not leaning forward, knowingly confined his view to some twenty-five or thirty feet. In Smith *v.* Traction Co., 40 WEEKLY NOTES, 486; 42 Id. 351, the collision occurred at night with a brilliantly lighted car visible some fifty feet off and coming on a down grade.

The case of Darwood was properly for the jury under the rulings in—

Fisher *v.* Monongahela R. R., 131 Pa. 292.
Philpott *v.* Pa. R. R., 175 Id. 570.
Penna. R. R. Co. *v.* Werner, 89 Id. 59.
Gibbons *v.* Wilkes-Barre Ry. Co., 155 Id. 279.
Downey *v.* Traction Co., 161 Id. 131.

To sum up: (1) The omission of Darwood to stoop, so as to look under the obstruction on the pavement on the corner of Nineteenth and Carpenter streets, was not negligence as matter of law; (2) the said omission did not contribute to the accident. There is a distinction between a condition and contribution; (3) Darwood had a right to assume that he could pass the track safely when he saw the car 115 feet off; (4) he had a right to assume the car would be slowed up; (5) in any event, whether he was justified in such assumption is for the jury; (6) there was evidence that the judgment of an ordinary man would have been that he could have safely passed in front of the car; (7) in all cases of doubt as to the propriety of directing a verdict, the case should go to the jury.

Thomas Leaming, (*William Henry Lex* with him), for appellee.

If the plaintiff's ipse dixit were accepted that he could not see without stooping until his horse was upon the track, and if his argument that he was not obliged to stoop, were to be accepted as true in point of fact and as good law, nevertheless he was negligent; inasmuch as he admits that he drove his horse upon the track without having the horse under control and without having, for reasons satisfactory to himself alone, observed whether anything was approaching.

The mere presence of electric conveyances imposes a higher degree of caution than formerly upon those about to drive across such tracks.

Winter *v.* Federal, etc., Pass. Ry. Co., 153 Pa. 26.
Omslaer *v.* Pittsburgh Traction Co., 168 Id. 519.

Giving the plaintiff the advantage of his statement, that when he was on the track with his horse beyond control he saw the car near a telegraph pole, which he subsequently measured and found to be one hundred and fifteen feet away,—it remains perfectly uncontraverted that the collision between the two, taking everything most favorably for Darwood, was at least partly his fault, and that therefore the lower Court was correct.

Smith *v.* Electric Traction Co., 187 Pa. 110.

Plaintiff presents one argument which is perhaps wholly within the realm of metaphysics. It is, in the abstract, that a plaintiff is not guilty of contributory negligence, having a casual relation to the result, if his negligence would have been unproductive of disaster had the defendant not also been negligent. In the concrete, the proposition is, that while Darwood's act in driving upon a track with a horse beyond control, and without having looked for a car, was negligence on his part, yet it was not negligence contributing to his injury, for the reason that he was justified in expecting that the defendant would not also be negligent in having its car, to some extent, as un-

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controllable as his own horse. It is evident that if the defendant had not been negligent and Darwood had been injured by driving his horse against the car, then his failure to recover in the lower Court would not have been because of his contributory negligence, but for the reason that there was no negligence on the part of the defendant. Or, as it was put, by Chief Justice BLACK, nearly fifty years ago, in Penna. R. R. Co. *v.* Aspell, 23 Pa. 147: "There is no form of writ known to the law (and the wit of man cannot invent one) in which the plaintiff will be allowed to recover for an act not done or caused by the defendant but by himself."

January 30, 1899. PER CURIAM. On the trial in the Court below, the defendant offered no testimony, and consequently the case was disposed of solely on plaintiff's evidence, part of which tended to prove that defendant was guilty of negligence in carelessly running its car at an unsafe rate of speed, etc. This, without more, would have necessitated a submission of the case to the jury; but it also appeared, by undisputed evidence, that the plaintiff himself was guilty of negligence which contributed to his injury. In view of this undisputed fact, the learned trial Judge rightly held that plaintiff could not recover, and accordingly directed the jury to find for the defendant. The evidence of plaintiff's contributory negligence was such that a verdict in plaintiff's favor was unwarranted, and, if found, could not have been sustained. It therefore follows that there was no error in directing the jury to find for the defendant.

Judgment affirmed.

Jan. '98, 422, 423. Supreme Court. March 27, 1899.

Union Improvement Co. v. Markle. Appeal of Markle et al.

Contract — Contribution — Cost of construction — Interest.

A contract was made for the building of a tunnel, the expense of which was to be borne by one party, and interest was to be paid by the other on one-third of the amount expended. The contract omitted to state the time from which the interest should be computed. The contention of one was that the interest should not commence until the tunnel was completed, while the other was of opinion that the interest should be paid from the commencement of the work upon the instalments as paid:

Held, **that, as the parties were jointly interested in defraying the actual cost of construction, interest should be allowed as the expenditures were made, and the proper mode of ascertaining the time from which the interest payments should be computed under such circumstances was by equating the date of all the expenditures on account of construction and allowing interest from that date.**

Appeal of George B. Markle, John Markle, Alvan Markle, Clora Markle and Ida Markle (children of George B. Markle, deceased), William Lilly and Elisha P. Wilbur, trading under the name and style of G. B. Markle & Co., defendants, from the judgment of the Common Pleas No. 4, of Philadelphia County, in an action by the Union Improvement Company.

This was an amicable action in which the facts were agreed upon by a case stated. The facts sufficiently appear in the following opinion of the Court, delivered by ARNOLD, P. J.:

"The plaintiff, being the owner of the Ebervale Coal Mines, which were full of water, leased them to the defendants on November 19, 1889, reserving royalties, the duty to mine coal (and consequently, to pay royalties) not to begin until the mines should be so far cleared of water as to be workable. In order to drain the mines the defendants agreed to construct a tunnel, which should be the property of the defendants during the continuance of the lease, and on the expiration thereof become the joint property of the parties to the agreement, in the proportion of two-thirds to the defendants and one-third to the plaintiff. All sums received from other parties for the use of the tunnel, after deducting expenses of keeping it in repair, are to be divided annually between the plaintiff and defendants in the same proportions, that is, one-third to the plaintiff and two-thirds to the defendants.

"It was further agreed that in consideration thereof, that is, the construction of the tunnel, the plaintiff would allow the defendants to make monthly deductions from the royalties on coal from the Ebervale lands until the total amount of deductions should reach the sum of $133,333.34, interest being allowed the defendants on their expenditures up to that amount, and charged them on the monthly repayments until the deductions should cease. It was declared to be the intention of the parties that the plaintiff should contribute only $133,333.34, with interest, no matter what the actual cost should be. The construction of the tunnel was commenced on December 31, 1889, and it was completed on October 31, 1895, at a total cost of $423,815.35. Deductions of royalties in the payment of the contribution of the plaintiff toward the building of the tunnel commenced on November 14, 1895, and continued until October 14, 1898, the total amount deducted being $151,388.30. As the date from which interest should be computed on the expenditures was not fixed by the agreement, the parties have, by the case stated, submitted it to us to determine.

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"The plaintiff contends that it did not become liable for interest until the completion of the tunnel, to wit, October 31, 1895, and alleges that it has overpaid defendants $6860.34, for which it asks judgment.

"The defendants contend that the plaintiff should be charged with all the interest on the first items of expenditure up to $133,333.34, which were incurred between December 31, 1889, and November 14, 1892, and that so charging it, the plaintiff owes the defendants $26,027.27.

"The respective calculations are these:

PLAINTIFF'S CLAIM.

The plaintiff asks credit for royalties deducted	$150,242.89	
And interest on the items of deduction from the time when made to October 14, 1898	12,445.05	
		$162,687.94
The plaintiff admits its obligation to contribute the sum of	$133,333.34	
And interest from October 31, 1895, to October 14, 1898	23,644.45	
		156,977.79
Difference claimed by plaintiff		$5,710.15

DEFENDANTS' CLAIM.

The defendants claim from plaintiff its contribution of	$133,333.34	
And interest from dates of expenditure of the first items amounting to that sum	56,532.06	
		$189,865.40
Deduct royalties	$150,242.89	
And interest as above	12,445.05	
		162.687.94
Difference claimed by defendants		$27,177.46

"As above stated, the defendants contend that the plaintiff should be charged with the whole of the interest on the first items of expenditure, amounting to $133,333.34. To this the plaintiff answers that if the expenditures are not apportioned, then it should be charged with interest only on the last items of expenditures, amounting to $133,333.34, which were incurred between April 1, 1894, and October 31, 1895, in which case it would be entitled to $1820.28 from the defendants.

By this calculation plaintiff allows its contribution	$133,333.34	
Interest from April 1, 1894, to October 31, 1895	31,174.88	
		$164,508.22
Deduct royalties	$150,242.89	
Interest as above	12,445.05	
		$162,687.94
Difference		$1,820.28

"There is another mode of calculation presented in the case stated which seems to us to be more equitable and more in accord with the intention of the parties as gathered from the lease and agreement of the parties. Before stating it we will give our reasons for adopting it. The paper executed by the parties on November 19, 1889, is a paper of dual character and purpose. It is a lease of the mines, with the covenants thereunto relating, and also an agreement to construct a tunnel, which tunnel should be the property of the defendants during the continuance of the lease, and after the expiration thereof the joint property of both parties, the defendants to own two-thirds and the plaintiff one-third. This division of interest indicates that it was estimated that the tunnel would cost about $400,000, of which the plaintiff was to contribute only one-third, with interest, no matter what the actual cost should be. It did cost $423,815.35, or within 6 per cent. of the estimate. As the ownership and cost of construction are in such close accord, it seems just and equitable that the interest on the cost of construction should be borne in the same proportion as the cost itself, and, therefore, adopting another calculation presented in paragraph (*e*) of the case stated, we make it:

Plaintiff's contribution to cost of tunnel	$133,333.34	
Interest on its proportion of each expenditure from the date when made	42,756.60	
		$176,089.94
Deducting royalties	$150,242.89	
And interest as above	12,445.05	
		$162,687.94
Difference due to defendants		$13,402.00

"In regard to the interest, while it is true that interest does not begin to run until default is made in the payment of the principal, yet this is always subject to the agreement of the parties. Here the plaintiff agreed to allow interest on the expenditures, the only matter not being fixed being the date from which the interest was to be calculated. In the absence of such date, as the interest was to be allowed on the expenditures, we think that it was meant that the interest should run from the date when those expenditures were made. As to the contributions of the plaintiff, there was and could not have been any default, because the defendants were to pay themselves by deducting royalties when and as earned. If none were earned the plaintiff was not bound to contribute. As the tunnel was constructed and the royalties earned, we have a case for the application of the rule for the equation of payments and interest.

"The contention of the defendants that the plaintiff should be charged with interest on the first $133,333.34 is not reasonable, nor is the counter contention of the plaintiff that it should be charged only on the last $133,333.34. The rule for the equation of interest according to the proportions of principal chargeable to each party for the construction of the tunnel, seems to us to be

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the only sensible solution of the question. We therefore enter judgment in favor of the defendants for $13,402, with interest from October 14, 1898."

The defendants took this appeal. The error assigned was:

"1. That the learned Court below erred in computing interest on the proportion of each expenditure made in the construction of the tunnel from the date upon which it was made, as particularly mentioned in paragraph (*e*) of the case stated, instead of allowing interest from the dates of the expenditure of the first items, amounting to the sum of $133,333.34, as computed in clause (*b*) of the case stated."

Richard C. Dale and *John G. Johnson*, for appellants.

The question in the present case is one of construction. The words to be construed are:

"In consideration whereof the party of the first part (the Union Improvement Company) shall allow to the parties of the second part (G. B. Markle & Co.), to make monthly deductions from the royalties hereinbefore stipulated to be paid on coal mined and shipped from the Ebervale lands . . . . until the total amount of such deductions shall reach the sum of $133,333.34, interest being allowed them on their expenditures up to that amount and charged them on the monthly repayments when such deductions shall cease. It being the intention of this clause that the party of the first part shall be liable to contribute only the said sum of $133,333.34 with interest no matter what the actual cost may be."

The question at issue is a novel one, but to us the reasons given are conclusive of the obligation of the lessor for interest upon the first expenditures up to $133,333.34 from the date when the expenditure was made. The only ground for adopting the method of computation accepted by the Court below is the theory that it was understood between the parties that the cost of the tunnel was to be $400,000, of which the lessor would contribute one-third, and that hence they are to be treated as if obligated to contribute one-third of each several expenditure. We have pointed out that this assumption is without foundation. The assumption failing, the computation based upon it must fail also. The true view to take of the relation of the parties is that the sum over $133,333.34 was entirely at the risk of the lessees. It happened, it is true that the writ was a little over three times the amount chargeable to the lessor. This was a mere accident, and can throw no light upon the legal rights of the parties.

Thomas Hart, Jr., for appellee.

May 8, 1899. GREEN, J. The only question between these parties is the determination of the time from which the interest on the amount which was to be contributed by the plaintiff to the cost of the tunnel, should be computed. It is quite singular that so important an omission from the contract of the parties as this is, should happen in an instrument otherwise so carefully prepared. There is no dispute that interest is to be allowed to the defendants on the moneys expended by them in the construction of the tunnel, up to the amount of $133,333.34. The language of the sixteenth article of the contract on this subject is: "Interest being allowed them on their expenditures up to that amount and charged them on the monthly payments when such deduction shall cease. It being the intention of this clause that the party of the first part shall be liable to contribute only the said sum of one hundred and thirty-three thousand three hundred and thirty-three dollars and thirty-four cents, with interest, no matter what the actual cost may be." The plaintiff contends that interest should not commence to run until the tunnel was completed, which was October 31, 1895. But it required six years to construct the tunnel and the defendants were constantly expending their money from the commencement of the work which was December 31, 1889. As the plaintiff was to become the owner of a one-third interest in the tunnel from the expiration of the lease to the defendants, and as they were to get the benefit of the increased royalties which would result to them from the coal in the Ebervale mines if the tunnel was successfully opened, it was entirely equitable that they should share in the expense of its construction. But they were not to pay anything towards the cost of construction while it was being built, and in point of fact the defendant paid the entire cost of construction which amounted to $423,815.35. Now if the plaintiff was to be an owner, and was to pay part of the cost of construction, and was to pay also interest on a defined part of the cost, it is difficult to say why the interest to be paid should not be computed while the expenditures of the defendant were being made. We do not discover any sufficient reason for holding either that the interest should be paid on the first sum of $133,333.34 that was expended, or that it should be deferred until the last sum of that amount was paid out. There is nothing of that kind in the agreement, and as the parties were jointly interested in defraying the actual cost of construction, it is far more conscionable, and more reasonable, that interest should be allowed as the expenditures were made. The proper mode of ascertaining the time from which the interest payments should be computed in such cir-

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cumstances would be by equating the date of all the expenditures on account of construction, and allowing interest from that date. This was the method adopted by the learned Court below, and it meets with our entire approval.

The argument that interest could not commence to run until after the completion of the tunnel, because the lessor was to pay nothing unless the tunnel was opened successfully, is of no force. By the absolute terms of the contract the lessor was to contribute if the tunnel was successfully opened, and that is the contingency which has transpired. The obligation of the lessor to contribute is therefore just as complete as if there had been no alternative condition. As the lessor agreed to contribute to the actual expenditures in the event which has transpired, and to pay also interest on the expenditures, it is but reasonable that the interest payments should be computed as of the time the expenditures were being made. If any other time was intended it should have been expressed in the agreement. If the tunnel was not a success there could not be any interest due because there would then be no principal due, and the contention that interest would not commence to run until after completion in the event of non-success, is fallacious, because in that event interest could never commence.

Judgment affirmed.

W. C. S.

Superior Court.

Oct. '98, 171. Superior Court. December 7, 1898.

Brownback v. Borough of North Wales.

Constitutional law—Police power—Peddling—Ordinance prohibiting without license.

Whilst a prohibition of unlicensed peddling which operates impartially and without distinction between classes, or residents of different civil subdivisions, or of different States, is a proper exercise of the police power of the State, yet a prohibition which arbitrarily excepts certain classes, or residents of certain localities, from its operation, is invalid, as a denial of the equal rights of others.

An ordinance which provides for the licensing of all persons selling or offering to sell on the streets, or soliciting orders from house to house, and makes no discrimination on any ground, but bears upon all persons impartially, conforms to all the requirements essential to the validity of such a provision as a police regulation.

Appeal of the Burgess and Town Council of the Borough of North Wales, defendants in error, from the judgment of Common Pleas of Montgomery County, in an action brought into said Court by Harvey Brownback, as plaintiff, in error.

The burgess and town council of the borough of North Wales brought action before a justice of the peace against Harvey Brownback to recover a penalty for violation of a borough ordinance providing "for the licensing of all persons selling or offering for sale upon the streets, or soliciting orders from house to house for any goods, wares or merchandise in the borough of North Wales," the annual license fee fixed therein being $12.25, and an auction license $12.25 per day. The justice gave judgment against the defendant. A certiorari was then issued by the defendant, and the record brought into the Common Pleas. The facts were submitted to the Court under an agreement in the nature of a case stated as follows:

"That on July 5, 1897, the town council for North Wales enacted the following ordinance: 'License ordinance. An ordinance to provide for the licensing of all persons selling or offering for sale upon the streets, or soliciting orders from house to house for any goods, wares or merchandise in the borough of North Wales.

" 'Section 1. Be it ordained and enacted by the town council of the borough of North Wales, in town council assembled, and it is hereby enacted by authority of the same, that on and after the passage of this ordinance all persons selling or offering for sale at retail upon the streets of the borough of North Wales, any goods, wares or merchandise, or any person soliciting orders from house to house for any goods, wares or merchandise, or any persons offering at public sale or auction any new goods, wares or merchandise within the borough of North Wales, shall be required to procure a license from the clerk of council granting such privileges.

" 'Section 2. The fee for an annual license shall be $12.25, and the fee for an auction license shall be $12.25 per day.

" 'Section 3. It shall be the duty of the clerk of council to keep a record of all licenses issued, the kind of license (annual or auction), the amount received and the date of issue on the stub of the book containing the license blanks.

" 'Section 4. All annual licenses shall expire on the first Monday of March of each year; and all holders of annual licenses which shall have been in force a fractional part of the year, at the time of expiration, shall upon taking out a renewal of said license, have deducted from the fee as many twelfths as there were unexpired months in the original license. All licenses are not now transferable.

" 'Section 5. All moneys derived from the issuing of licenses (less 25 cents for each license issued, which is to be clerk's fee for issuing same),

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shall be paid by the clerk of council into the borough treasury for the use of the borough.

" 'Section 6. Any person or persons failing to comply with the requirements of this ordinance shall be fined the sum of $5 for each offence, which sum, together with the cost of prosecution, shall be recovered as debts of like amount are now by law recoverable.

" 'Section 7. All ordinances or parts of ordinances inconsistent herewith are hereby repealed.'

"That the same was lawfully approved by the burgess and advertised.

"That the plaintiff in error, Harvey Brownback, was a salesman employed by the Atlantic & Pacific Tea Company and was notified by the burgess of North Wales to take out a license under said ordinance. Said company is a partnership having its place of business in the city of Philadelphia, in the State of Pennsylvania. From this place of business, in the city of Philadelphia, the Atlantic & Pacific Tea Company deliver all goods sold as is hereinafter set forth. The Atlantic & Pacific Tea Company were assessed by the mercantile appraiser of the city of Philadelphia for the year 1897 and for many preceding years, and have paid the license duty so assessed, and a mercantile license has been granted to them by said mercantile appraiser according to the provisions of the Acts of the General Assembly in such cases made and provided. The Atlantic & Pacific Tea Company have no place of business in the county of Montgomery, and neither they nor the said Harvey Brownback had taken out a license under the said ordinance in the borough of North Wales.

"That on September 10, 1897, the said Harvey Brownback, as agent and salesman for the Atlantic & Pacific Tea Company, went to the residences of several persons in said borough of North Wales and solicited orders from them for tea, coffee and groceries, to be delivered at such residences in two weeks. From several customers, who were neither dealers nor merchants he obtained such orders upon the Atlantic & Pacific Tea Company and entered the orders in his order book for delivery in two weeks. The goods so ordered were packed at the place of business of the said Atlantic & Pacific Company in Philadelphia, and set apart for the respective purchasers. On September 24, 1897, the goods so packed were delivered by the Atlantic & Pacific Tea Company to the said Harvey Brownback at their place of business in the city of Philadelphia in a delivery wagon, and were driven by him to the borough of North Wales and there delivered to the respective purchasers at their places of residence. That the said course of dealing was a regular course of dealing, the said Harvey Brownback having a regular route from which he made deliveries every two weeks of goods ordered on his previous trip two weeks before. That the said Harvey Brownback did not carry with him in said wagon goods for sale to casual purchasers and made no deliveries except on goods ordered and set apart in the manner above specified.

"If the Court should be of opinion that under the foregoing facts the defendant violated the said ordinance, and that said ordinance is valid so far as it applies to the defendant under the foregoing facts, then the Court shall enter judgment affirming the proceedings before the justice, otherwise judgment to be entered setting aside the proceedings. Each party reserving the right of appeal to the Superior Court."

The Court entered judgment setting aside the judgment of the justice. The defendant in error took this appeal, assigning as error the said action of the Court.

Montgomery Evans, (*James B. Holland* and *John M. Dettra* with him), for appellants, cited—

Com'th *v.* Teller, 144 Pa. 545.
Borough of Warren *v.* Geer, 117 Id. 207.
City of Titusville *v.* Brennan, 143 Id. 642.
Sharon Borough *v.* Hawthorne, 123 Id. 106.
Com'th *v.* Gardner, 133 Id. 284.
Sayre Borough *v.* Phillips, 148 Id. 482.
Bank *v.* Mangan, 28 Id. 452.
Mott *v.* R. R. Co., 30 Id. 9.
Forepaugh *v.* R. R. Co., 128 Id. 217.
Rothermel *v.* Meyerle, 136 Id. 250.

M. M. Gibson, (*N. H. Larzelere* with him), for appellee, cited—

City of Davenport *v.* Rice, 39 N. W. Rep. 191.
Town of Spencer *v.* Whiting, 28 Id. 13.
Com'th *v.* Farnum, 114 Mass. 267.
Horn *v.* Com'th, 2 Dist. Rep. 176.

April 24, 1899. SMITH, J. A prohibition of unlicensed peddling which operates impartially, and without distinction between classes, or residents of different civil subdivisions, or of different States, is held to be a proper exercise of the police power of the State: Com'th *v.* Brinton, 132 Pa. 69; Com'th *v.* Gardner, 133 Pa. 284; Com'th *v.* Harmel, 166 Pa. 89. But a prohibition which arbitrarily excepts certain classes, or residents of certain localities, from its operation, is held invalid, as a denial of the equal rights of others: Com'th *v.* Snyder, 182 Pa. 630.

The exercise of the police power directly by the Legislature, and by municipalities under legislative authority, stands on the same ground and is subject to the same conditions. "If a statute or municipal ordinance is in reality directed only against certain persons who are engaged in a given business, or against certain communities, in such a manner as to discriminate between the

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persons who are engaged in the same trade or pursuit, in aid of some at the expense of others, such statute or ordinance is not a police but a trade regulation; and it has no right to shelter itself behind the police power of the State": Sayre *v.* Phillips, 148 Pa. 482. But if the prohibition is directed against the business, by whomsoever undertaken, does not prohibit but regulates, is reasonable in scope, general in application, and impartial in operation, it meets all the tests of its validity recognized by our Supreme Court: Com'th *v.* Harmel, 166 Pa. 89.

As subjects for regulation under the police power there is no substantial difference between the sale of commodities, with their attendant delivery, from house to house, and the solicitation of orders to be filled by future delivery. The essentials to the validity of a statute or ordinance for their regulation are the same.

In Warren *v.* Geer, 117 Pa. 207, it was held that a borough, incorporated under the general borough laws, had power to pass an ordinance requiring persons selling or soliciting orders from house to house, to be licensed. In Titusville *v.* Brennan, 143 Pa. 642, an ordinance forbidding unlicensed sales or solicitation of orders, except sales by sample to manufacturers or licensed dealers of the city was sustained. While the Supreme Court of the United States held this ordinance invalid so far as it affected interstate commerce, the Supreme Court of our State has said: "We do not understand that the decision of the Supreme Court of the United States is binding upon our Court so far as the Titusville ordinance concerns the citizens of this Commonwealth. The ordinance, by reason of the reversal, is inoperative only so far as it affects one soliciting orders for a business house in another State." In Sayre *v.* Phillips, 148 Pa. 482, an ordinance forbidding unlicensed sales or solicitation of orders, except by residents of the borough, was held invalid by reason of the exception; this being pronounced an attempt to regulate trade in the interest of residents, under pretence of police control. In Shamokin *v.* Flannigan, 156 Pa. 43, a like ordinance, with an exception substantially similar, was for the same reason held invalid.

In considering the principle that governs prohibitions of this kind, the Supreme Court of our State, in Sayre *v.* Phillips, supra, said: "The ordinance professes to prohibit all persons from engaging in the business of peddling or selling goods from house to house, by sample or otherwise, without a borough license, and it fixes the price of a license at a figure that makes it, as it evidently was intended to make, the ordinance amount to prohibition. So long, however, as it bears upon all persons impartially, it may fairly claim to be a police regulation intended to destroy a business that was regarded as injurious; but at the end of the prohibiting section of the ordinance a proviso may be found which exempts all residents of the borough of Sayre from its operation. This proviso converts the police regulation into a trade regulation. The ordinance taken as a whole, does not prohibit an injurious business, but an injurious competition. That the resident dealer or peddler may enjoy a larger trade, the non-resident peddler is shut out."

In the case before us, the ordinance provides for the licensing of all persons selling or offering to sell on the streets, or soliciting orders from house to house. It makes no discrimination on any ground, but bears upon all persons impartially. In brief it conforms to all the requirements which, in the cases cited, have been held essential to the validity of such a provision as a police regulation. As was said in Com'th *v.* Harmel, supra, of the Act of February 6, 1830, P. L. 39, prohibiting the peddling of clocks without license. "It is directed against all persons. It does not distinguish between the citizens of different civil subdivisions of this State, or between citizens of Pennsylvania, and those of any other State. It is directed against the business, by whomever undertaken. It does not prohibit the business, but regulates it. The regulation is reasonable, it is impartial in its operation. It is general in its application. It meets the tests required by Millerstown *v.* Bell, 123 Pa. 151, by Sayre Borough *v.* Phillips, 148 Pa. 482, and by Welton *v.* Missouri, 91 U. S. 275."

The argument that the ordinance does not operate uniformly as to all persons, since it discriminates against citizens of Pennsylvania, while inoperative as to non-residents of the State, and should, therefore, be pronounced invalid, cannot prevail. It must be remembered that "the jurisdiction of a State is co-extensive with its territory; co-extensive with its legislative powers. Its laws and judicial decrees are paramount over persons and property within this jurisdiction. But they have no extra territorial force, and the legal presumption is that they were intended to operate within the limits of the State": Brewing Co.'s License, 8 Pa. Super. Ct. 141. It follows, therefore, that in regulating the public business and the affairs of the citizens of this State, the ordinance in question is strictly within the constitutional limitations applicable thereto, and within the powers of our State Legislature. If it is injurious to the interests of our own citizens the remedy for its correction rests with the Legislature or the borough council. It is not material here, that the Philadelphia house from which the purchases were made paid a mercantile li-

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cense tax in that city. This gave them no greater right, under the ordinance than that enjoyed by licensed merchants of the borough. Moreover, while the salesman is described as an agent, it is quite apparent that the nominal principal dealt wholly with him, and not at all with the several purchasers; that practically he was a middleman, buying of the Philadelphia house and selling to his customers on orders previously obtained. But he and his principal are subject, in common with all others, to the regulation of the business provided for by the ordinance. The objection that this provides for no control or supervision of the business, applies with equal force to the prohibitions which have heretofore been held valid, and cannot well be raised in this instance. The judgment of the Common Pleas is reversed, and the judgment of the justice is reinstated, all costs to be paid by the defendant.

W. C. S.

Feb. '99, 4. Superior Court. February 15, 1899.

Susquehanna Mutual Fire Insurance Co. v. Clinger.

Practice — Filing of statement — Sufficiency of — Non pros. — Amendment — New cause of action — Laches.

Where a defendant files an affidavit of defence to a statement, even if it be a defective one, he cannot afterwards treat it as no statement and enter a judgment of non pros. for want of a statement.

Where it is desired to question the sufficiency of a statement, the defendant should do so either by his affidavit of defence or by demurrer. It cannot be raised upon a motion for a non pros. on the ground that no statement at all has been filed.

Where a "copy of claim" set out merely certain premiums specified as due upon certain specified policies as due from defendant to plaintiff, an amended statement setting out a contract by the terms of which the defendant was to collect and pay over premiums, and alleging his failure to pay over certain specified premiums, being the same as those set forth in the "copy of claim" does not introduce a new cause of action, and is properly allowable as an amendment.

There is no fixed rule as to the length of delay that will prevent plaintiff's proceeding. It is a question of discretion controlled by the facts of the particular case, and the decision of the Court below will not be reversed unless there is a manifest abuse of discretion.

Appeal of H. J. Clinger, defendant, from the judgment of the Common Pleas of Lycoming County, in an action of assumpsit by the Susquehanna Mutual Fire Insurance Company.

The plaintiff, the Susquehanna Mutual Fire Insurance Company, on April 7, 1885, filed a paper endorsed "copy of claim," as follows:

Harrisburg, Pa., July 28, 1884.

H. J. Clinger, To Susquehanna Mutual Fire Insurance Company, Dr.

1881.		
April 15.	To Prem. on Pol. 4012, Twp.	$20.00
	* * * *	
Aug. 22.	To Prem. on Pol. 4240	30.00
		$857.17
	CREDIT.	
May 28.	By ret. prem. on Pol. 4205	$29.17
		$828.00
	Commissions	207.00
		$621.00

The defendant filed the following affidavit of defence:

"H. J. Clinger, the above named defendant, being duly sworn according to law, doth depose and say that he has a just and legal defence to the whole of the plaintiff's claim or demand, the nature or character of which is as follows: That he is not indebted to the company plaintiff in any amount whatever, and that the premiums which make up the statement of claim were never received by him, but some of them may have passed through his hands, as secretary of the Union Insuring Company, Limited, which was a limited co-partnership entered into and doing business under the laws of Pennsylvania, and that he is not liable for any part of the claim filed by the plaintiff in this suit."

On January 7, 1896, the plaintiff entered a rule on defendant to plead in five days. On January 11, defendant filed a præcipe for a non pros. under rule of Court 96, allowing a non pros. to be entered where a declaration had not been filed within a year from the first day of the term to which the action was brought; and, the prothonotary refusing to enter judgment, took a rule to show cause why a non pros. should not be entered. On March 28, 1896, the plaintiff presented an amended statement which set out an oral contract as follows:

"The said Susquehanna Mutual Fire Insurance Company was to furnish to said H. J. Clinger, from time to time, a supply of blank (numbered) fire insurance policies of said company, and allow said H. J. Clinger 25 per centum of the gross amount of premiums of business done by said H. J. Clinger for the said company, the said H. J. Clinger to report each policy of said company as they were issued to the home office of said company, at Harrisburg, Pa., and collect the premiums therefor forthwith, and on receipt of the said reports by the said company, the premiums were to be charged on their books to the account of said H. J. Clinger, and after every thirty to forty days after the said premiums were thus charged, said H. J. Clinger was to make re-

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mittances for the same to the said company. That the said contract thus made and entered into was the usual and customary contract of agency between fire insurance companies and their local agents, of which the said H. J. Clinger was cognizant; whereby the said Susquehanna Mutual Fire Insurance Company, by their usual course of dealing, and by virtue of said contract, treated the said H. J. Clinger as their debtor for the premiums of policies delivered to and issued through him," and alleged performance by plaintiff and a breach by defendant in not paying over said premiums; and attached to the statement the same list of premiums unpaid as was included in the first statement. The Court allowed the amended statement to be filed and discharged the rule for the non pros. The defendant pleaded and the case went to trial before SAVIDGE, P. J., the defence being that the defendant was not individually liable as he had not acted individually as the plaintiff's agent, but only as the secretary of the Union Insuring Company, Limited, which was the plaintiff's agent. The question of agency and contract was submitted to the jury. Verdict and judgment for plaintiff, $957.91.

The defendant took this appeal, assigning as error, inter alia, the discharge of the rule for non pros., the allowance of the amended statement, and certain portions of the charge, which sufficiently appear in the opinion of the Court, infra.

T. M. B. Hicks, (*W H. Spencer* with him), for appellant.

If the "copy of claim" was a statement, then the amended statement introduced a new cause of action barred by the statute of limitations.

A new cause of action, or one barred by the statute of limitations, cannot be introduced by amendment; even when such amendment is allowed without objection, the Court is bound subsequently to declare the effect of it; and no recovery will be permitted upon it, even though the statute was not pleaded.

Wright *v.* Hart, 44 Pa. 454.
Tyrrill *v.* Lamb, 96 Id. 464.
Kaul *v.* Lawrence, 73 Id. 410.
Kille *v.* Ege, 82 Id. 102.
Leeds *v.* Lockwood, 84 Id. 70.
Grier *v.* Assurance Co., 183 Id. 334.
Furst *v.* Building Ass'n, 128 Id. 183.
Fairchild *v.* Furnace Co., 128 Id. 485.
Walls *v.* Walls, 170 Id. 48, 59, 60.

The test of the propriety of an amendment is, "Did the plaintiff so state his cause of action originally as to show that he had a legal right to recover what he subsequently claims?"

In the case at bar, the new statement gives as the cause of action the breach of a special or particular parol contract, the existence of which is nowhere even hinted at in the "copy of claim."

But the "copy of claim" was not a statement.

The action of the Court below in refusing a non pros. was an abuse of discretion and therefore should be reversed.

Rentzheimer *v.* Bush, 2 Pa. 88.
Gannon *v.* Fritz, 79 Id. 303.
Waring *v.* R. R. Co., 176 Id. 172.

James B. Krause, for appellee.

The amended statement did not set out a new cause of action; both statements were for premiums, for amounts and for policies which are identical.

March 23, 1899. BEEBER, J. On April 7, 1885, the plaintiff issued a summons in assumpsit against defendant returnable April 27, 1885, and on the same day in which the writ issued it filed what purported to be a copy of its claim. On April 27, the return day of the writ, two counsel entered their appearance for the defendant. On May 12, 1885, defendant filed his affidavit of defence to the whole of the plaintiff's claim in which he said that he was not indebted to the plaintiff in any amount whatever "and that the premiums which make up the statement of claim were never received by him." Nothing further was done of record by either party until about ten years and nearly eight months afterward when, on January 7, 1896, plaintiff entered a rule on defendant to plead in five days. On January 11 defendant's counsel went to the prothonotary's office and filed a præcipe for a non pros. under the 96th rule of Court, allowing a non pros. to be entered in any action in which no declaration or statement had been filed within two years from the first day of the term to which the action was brought, but the prothonotary refused "to enter same for reason that a statement has been entered already, to which affidavit of defence has been filed." On the same day a rule to show cause why a non pros. should not be entered was obtained from the court. On March 28 an amended statement was presented and ordered filed, and the rule to show cause was discharged. The case then proceeded in the usual way until a trial was had when on November 26 a verdict was returned for plaintiff for the amount of its claim with interest less some small credits not necessary to mention.

The first copy of claim filed by plaintiff, to which defendant filed an affidavit of defence upon the merits, consisted of an itemized bill setting forth that defendant was indebted to plaintiff for the premiums therein set forth upon certain numbered policies of certain specified dates, to which was appended an affidavit of the plaintiff's secretary saying that the account was just and true, and that the amount therein named was due and owing to the plaintiff. The amended statement

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of claim which plaintiff was allowed to file consisted of a statement of the contract between the parties by which defendant became the agent of the plaintiff for placing policies and collecting premiums, alleged that plaintiff, in pursuance of this contract, received from defendant reports of policies issued by defendant, charged him with the premiums upon these policies, and then attached a copy of this account for premiums which was exactly the same as the one constituting the copy of claim first filed.

The first five and the twelfth, thirteenth and seventeenth specifications of error complain of the Court below because it refused to enter a non pros. and allowed the amended statement to be filed. It is very clear to us that the rule of Court relied on to justify the entry of a non pros. was not intended to apply to a case with the record as it was in this case. It applies where there has been no declaration or statement filed. A defendant who had already filed an affidavit of defence to a statement, even though it may be a defective statement, was hardly in a position to allege that no declaration or statement had been filed. If he had wished to raise the question as to the sufficiency of the statement he could have easily done so either by his affidavit of defence or by a demurrer. Such a question is not raised by a motion for a non pros. upon the ground that no statement at all had been filed. Clearly the Court was right in refusing to enter the non pros. Nor can there be any valid objection because the Court allowed the amended statement to be filed. The act of March 21, 1806, allows amendments to be made at any time before trial. Of course an amendment that introduces a new cause of action cannot be allowed. We do not think the amended statement in this case violated this rule. The cause of action in this case was the failure of the defendant to comply with an express or implied promise to pay over these premiums. In each statement filed the same premiums were demanded. Whilst a declaration upon one bond or note cannot be amended by adding a count upon another, a count upon the original consideration of a contract may be amended by adding a count upon any note or bond given for it. Until recently it was quite common to include in one declaration a count for goods sold and delivered and a count upon a promissory note given for the same goods, and it was never successfully contended that such a declaration contained different causes of action. So long as the breach of the same contract is alleged it is the same cause of action even though in one instance it may be alleged to be a written contract and in another an oral contract. So long as the plaintiff in this case sued to recover the same premiums in each of his statements so long was he suing for the same cause of action. Much of the confusion that has resulted in considering this question as to whether a proposed amendment introduces a new cause of action is due to the fact that the difference between the contract and the evidence of it has not always been kept in mind. A contract may be in writing or by parol, and yet it cannot accurately be said that either the writing or the words of mouth are the contract. They are only the evidence of it. Therefore we have not proved that a proposed amendment introduces a new cause of action when we show that it alleges a contract in writing whilst the original statement filed alleged a parol contract. The test is, is the contract, for breach of which suit is brought, the same, not is the evidence of the contract the same: Cunningham *v.* Day, 2 S. & R. 1; Coxe *v.* Tilghman, 1 Whar. 282; McAdam *v.* Orr, 4 W. & S. 550; Wilhelm's Appeal, 79 Pa. 120.

It is observed, furthermore, that plaintiff was lulled to sleep as to the sufficiency of its statement by the fact that defendant, with counsel of record, had filed an affidavit of defence in which no intimation whatever is found as to the insufficiency of the claim in form. It was not until more than ten years afterwards, and then only when ruled to plead, that defendant discovered that the statement of claim was insufficient. Within a reasonable time after defendant's first objection as to the form of the statement he was furnished with a new one. The fact that the case was not proceeded with during that ten years, so far as we can discover, was no more the fault of the plaintiff than of the defendant. Each had it in his power to speed the action at any time. There is no fixed rule as to the length of delay that will prevent plaintiff's proceedings. It is a question of discretion controlled by the facts of the particular case, and the decision of the Court below will not be reversed unless there is a manifest abuse of discretion. If we are compelled to say anything on this subject, we would say that from an examination of the evidence and from the verdict of the jury, we would consider it a grave injustice to the plaintiff had it not been permitted to submit its evidence to a jury.

The sixth specification of error complains because the learned Judge erred in telling the jury that it was admitted that the policies were placed by the defendant. Taking this language complained of in connection with the other part of the charge where it was explained to the jury that defendant's contention was that these policies were placed and premiums collected by the Union Insuring Company, Limited, we do not think any harm was done to the defendant. The jury could not have understood the Court to say that de-

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fendant admitted his liability. The evidence conclusively shows that there was no question as to the policies having been issued and premiums collected, and the charge of the Court, taken as a whole, could not possibly be understood as meaning to instruct the jury that defendant had admitted any personal liability. There is no merit in this specification.

The remaining specifications of error in substance complain of the Court's instructions upon the question of the liability of the defendant or of the Union Insuring Company, Limited. The defendant's contention was that he was not personally liable because these premiums were collected by the Union Insuring Company, Limited, that the contract was between the plaintiff and this company, and that if any one was liable it was this company. To meet this contention of the defendant the Court clearly pointed out to the jury what was the evidence on this subject. The Court in substance told the jury that if the contract was between plaintiff and defendant, plaintiff could recover, but that if it was between plaintiff and this other company, then plaintiff could not recover. Whether defendant was agent or broker, or Union Insuring Company, Limited, was agent or broker was of no importance in this issue. The question was whether defendant or some one else withheld premiums due. The jury found that defendant withheld them. It is of no importance whether he withheld them as agent or as broker. We are of opinion that the charge of the Court was a fair, adequate, and clear statement of the issues between the parties. Upon evidence satisfactory to us from a careful reading of it, and evidently satisfactory to the Court below from having heard it, the jury found for plaintiff. There was no mistake in law made and, therefore, judgment is affirmed.

W. C. S.

Common Pleas.

No. 1, J. '99, 254. June 26, 1899.

Dornenhower v. Stevens.

Practice— Statement— Copy of paper—Evidence —Stamps— War Revenue Act of June 13, 1898.

Where a statement relies upon an instrument as the ground of recovery, the copy of the instrument set forth in the statement must show affirmatively that the instrument is one which, if offered in evidence, would be admitted.

A promissory note which has not been stamped in accordance with the Act of Congress of June 13, 1898, is not admissible in evidence in the Courts of Pennsylvania.

Rule for judgment for want of sufficient affidavit of defence.

The statement in this case set forth a claim to recover on nine promissory notes given by the defendant to the plaintiff, at different dates between September 19, 1898, and January 5, 1899. The notes were set out at length, but did not appear to have been stamped according to law, and the statement did not aver that they had been stamped.

The affidavit of defence was in nature of a demurrer to the effect that the statement did not set out any cause of action upon which plaintiff could recover, because "the statement alleges the action to be brought upon nine certain promissory notes alleged to have been given by the defendant to the plaintiff at various times from September 19, 1898, to January 5, 1899, both inclusive, and it nowhere appears that the said notes or any of them have been stamped in accordance with the Act of Congress in such case made and provided, to wit, the Act of June 13, 1898."

Joseph T. Bunting, for rule.

The affidavit is insufficient; it does not allege that the notes were not stamped.

Henry Budd, contra.

The statement must be assumed to set out a full and correct copy of an instrument sued on. If the copy show an instrument which, if offered in evidence at trial, would be rejected, judgment cannot be given.

The words of sec. 14 of the war revenue Act of 1898, disqualifying an unstamped instrument as evidence, are precisely those of the earlier war revenue Act, under which it has been held that disqualification applied in State as well as Federal Courts.

Chartiers & Robinson Turnpike Co. v. McNamara, 72 Pa. 278.

This decision, although one the constitutional views expressed in which do not commend themselves to counsel for defence, is, nevertheless, binding in this State.

Bunting stated that he was advised that the notes had been duly stamped.

PER CURIAM (BIDDLE, P. J., and BEITLER, J.). Rule discharged, with leave to plaintiff to amend and require affidavit of defence to amended statement.

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WEEKLY NOTES OF CASES.

VOL. XLIV.] *FRIDAY, JULY 28, 1899.* [No. 17.

Supreme Court.

Jan. '99, 76. Supreme Court. March 8, 1899.

Wagoner's Estate.
Heckscher's Appeal.

Estates—Contingent interest—Right of holder to compel filing account—Trustees—Act April 17, 1869.

The Act of April 17, 1869, P. L. 70, giving the owner of contingent interest in the personal property of a decedent the right to require an executor or administrator to file an account of the trust in one year, does not confer upon one, who has not established the possession of such an interest with reasonable certainty, the right to interfere. A proceeding will not be sustained where the manifest purpose is not to protect a right, but to establish one.

Testator bequeathed securities to trustees in trust for sole and separate use of S. for life, with remainder to the heirs of her body. A. and B., sons of S., were made trustees. On September 26, 1887, they executed a blank power of attorney to transfer certain of these securities, and on the same day delivered them to X., a firm of which A. was a member, taking the firm's receipt therefor; the cestuis que trustent assented to this. On March 19, 1890, X. pledged these securities to C. to secure a loan of $24,000, warranting in writing the title to same. Later A. was removed from the trust and C. subsequently petitioned the Orphans' Court to require B., the remaining trustee, to file an account and show cause why he should not be removed:

***Held*, that the petition should be dismissed, as C. did not have such a present interest as is required by the Act of April 17, 1869, to maintain the same.**

Appeal by August Heckscher, from a decree of the Orphans' Court of Northampton County, dismissing his petition for an account and to remove trustee.

The facts as set out in the petition are stated in the opinion of the Supreme Court, infra.

Brentano Clemens filed an answer averring that, under the facts as stated, petitioner had no standing to file his petition nor to get the relief asked for.

The Court, SCHUYLER, P. J., after hearing and argument, dismissed the petition.

This appeal was then taken and the above action of the Court assigned as error.

James W. Wilson, for appellant.

The right to an account is secured to the owner of a contingent remainder in personal property by the provisions of the Act of April 17, 1869, P. L. 70, entitled, "An Act for the protection of contingent interests."

Since that Act a legatee having but a contingent interest has the right to call an executor to account.

1 Rhone's Orphans' Court Practice, p. 20, sec. 26.
Albertson's Estate, 1 WEEKLY NOTES, 188.
Hartman's Appeal, 90 Pa. 203.

Under the Act of 1869, a contingent remainderman may cite trustees appointed in place of executors.

Hartman's Appeal, supra.

And he may cite testamentary trustees.

Dugan's Estate, 15 WEEKLY NOTES, 550.
Brewster's Practice, O. C., sec. 4488.

Russell C. Stewart, (*Frederick Green* with him), for appellee.

The petitioner has no standing in the Orphans' Court.

Johnston *v.* Price, 172 Pa. 427.
Ahl's Appeal, 129 Id. 50.
Hartman's Appeal, 90 Id. 203.
Guaranty Trust & S. D. Co. *v.* Powell, 150 Id. 16.

May 25, 1899. FELL, J. The facts necessary to the understanding of the questions presented by this appeal may be briefly stated. The appellant loaned $25,000 to the firm of George K. Sistare's Sons on the pledge as collateral of securities which were held under the provisions of the will of David D. Wagoner upon an active trust for the testator's daughter for life and for the remainder-men. The loan was procured and the securities pledged by Harold Clemens, one of the trustees, who was a member of the firm of George K. Sistare's Sons. Brentano Clemens, the other trustee, instituted proceedings in equity to recover the securities for the trust estate. The master found that the pledge had been made without the knowledge of Brentano Clemens or Susan B. Clemens, who had a life interest, and for a purpose not connected with the trust, and that the appellant had legal notice of the abuse of trust. The decree recommended by him, requiring a return of the securities, was made by the Court of Common Pleas and affirmed by this Court. See Clemens *v.* Heckscher, 185 Pa. 476. The defendant in the proceeding mentioned is the appellant here. In substance his contention is that notwithstanding the fact that the pledge of the securities was invalid as affecting the trust, still it constituted an assignment to him of the individual interests, of Harold, Brentano and Susan B. Clemens in the securities, and that he is therefore the present owner thereof and entitled to an account. In assertion of this right and evidently for the purpose of establishing his claim as the owner of the interests mentioned he petitioned the Orphans' Court, under the Act of

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April 17, 1869, for a citation directed to Brentano Clemens, who is now the only trustee. This appeal is from the order dismissing the petition.

The Act of 1869 has received a very liberal construction in order that full effect might be given to its purpose to protect contingent interests. In Keene's Appeal, 64 Pa. 268, it was said that the owner of any possible contingent interest would come within its clear intent and spirit; and in Hartman's Appeal, 90 Pa. 203, it was held to apply to estates in the hands of trustees, although its words limit its application to estates held by executors and administrators. While there has been a latitude of construction to protect contingent interests, the Act has not been and should not be extended to confer upon one who has not a clear title to an interest the right to interfere in the management of a trust estate.

The interest to be protected may be even remotely contingent, but the possession of an interest should be established with at least reasonable certainty, and a proceeding under the Act should not be sustained when its manifest purpose is not to protect a right but by means thereof to establish one. We are of opinion that the petition was properly dismissed because it did not appear that the petitioner had such an interest as to bring him within the intent of the Act of 1869.

The decree is affirmed at the cost of the appellant.

W. M. S., Jr.

Jan. '98, 93. Supreme Court. March 30, 1899.

Humphreys v. Sutcliffe et al.

Malicious use of civil process—Bills and notes.

Where a writ of attachment is prematurely issued, it is not necessarily illegal, but is a proper and precise writ where the facts are sufficient to authorize its issue.

Where there is no proof of malice or malicious use of process, but the actual facts and circumstances which were plainly present, entirely dispel any inference of malice, there can be no recovery of damages for the issuing of the writ.

***Semble*, an action commenced on a promissory note on the day of its maturity is not premature if the note is payable at a bank, or if payment is refused after demand on that day.**

Appeal of William H. Humphreys, plaintiff, from the judgment of the Common Pleas No. 3, of Philadelphia County, in an action against Henry Sutcliffe and Thomas Sutcliffe, trading as Sutcliffe & Co., to recover damages for the improper issuing of a writ of foreign attachment.

The plaintiff in 1894, was a resident of Philadelphia, engaged in the manufacture of woolen yarn in the city of Camden, New Jersey. In the course of his business he became indebted to the defendants, residents of England, for wool purchased of them through one Branston, their agent in this country. Plaintiff gave Branston his promissory note for £1297.7.8, to the order of the defendants, payable at the National Provincial Bank of England, London, which fell due on August 4, 1894; the note was sent by Branston to the defendants, who had it discounted by a bank in London, and on August 4, when it fell due, the note was protested at the request of the London bank, the holder and owner of the note at that time. On the same day, August 4, 1894, about 11 A. M., Branston, acting for the defendants, made affidavit that the plaintiff was indebted to the defendants upon said note, that he believed the plaintiff was not a resident of the State of New Jersey, and caused a writ of foreign attachment to be issued out of the Circuit Court of Camden by virtue of which the sheriff on the same day at "11.55 o'clock in the forenoon," attached the stock, fixtures, machinery, etc., of the plaintiff at his manufactory in Camden. On August 10, 1894, the Court granted an order on the plaintiff to show cause why the writ of attachment should not be dissolved; and on September 14, 1894, the rule to show cause was made absolute and "the said writ of attachment and all proceedings had and done thereon were set aside and discharged." From this decision the defendants appealed to the New Jersey Supreme Court, which Court, on June 8, 1895, affirmed the judgment of the Court below. The defendants appealed to the Court of Errors and Appeals, which Court on September 13, 1895, affirmed the judgment of the Court below. In the meantime much of the yarn was destroyed by moths, and other damage to plaintiff resulted from the attachment. For this cause the plaintiff brought suit. At the trial a non-suit was entered.

Plaintiff appealed. The refusal to take off this non-suit and to permit certain testimony to be admitted, was assigned as error.

Leoni Melick, (*Sheldon Potter* with him), for appellant.

The effect of quashing an execution that is merely irregular or voidable is to place the execution plaintiff in the position of having caused the acts done under the execution prior to the quashing to be done without warrant of law.

7 Am. & Eng. Enc'y of Law, 148.
Kerr *v.* Mount, 28 N. Y. 658.
Day *v.* Bach, 87 Id. 56.
Chapman *v.* Dyett, 11 Wend. 31.
Hayden *v.* Shed, 11 Mass. 500.
Collett *v.* Foster, 2 H. & N. 355.
Barker *v.* Braham, 2 W. Bl. 866.
Milliken *v.* Brown, 10 S. & R. 188.
Bevan *v.* Eldridge, 2 Miles, 353.
Taylor *v.* Jacoby, 2 Pa. 495.

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Sutcliffe *v.* Humphreys, 58 N. J. 42.
Jones *v.* Brown, 167 Pa. 396.
Thomas *v.* Shoemaker, 6 W. & S. 179.
McCullough *v.* Grishobber, 4 Id. 201.
Coaks *v.* White, 11 WEEKLY NOTES, 271.
Foster *v.* Sweeny, 14 S. & R. 386.

Even if it were necessary for the plaintiff to show malice and want of probable cause, that evidence was adduced from which the jury would have been justified in finding both malice and want of probable cause.

Herman *v.* Brookerhoff, 8 Watts, 241.
Leahey *v.* March, 155 Pa. 462.
McCarthy *v.* DeArmit, 99 Id. 71.
Reihofer *v.* Loeffert, 159 Id. 376.
Barnett *v.* Reed, 51 Pa. 196.

David W. Sellers, (*Henry C. Terry* with him), for appellees.

Upon the question whether or not a suit can be lawfully brought upon a promissory note upon the last day of grace, the authorities are conflicting, and although there had been no decision in New Jersey bearing directly upon the subject before the issuing of the writ in this case, the weight of authority in other jurisdictions seems to sustain the validity of such proceedings. The text-book writers are practically unanimous in favor of bringing such suits upon the happening of certain conditions, all of which are present in this cause.

Parsons, Notes and Bills, Vol. II., 461.
Daniel, Neg. Inst., secs. 1207, 1209, 1211.
Bagley on Bills, 345.
Story on Promissory Notes, 267.
Chitty on Bills, 365.
Byles on Bills, 131.

July 19, 1899. GREEN, J. This action was brought to recover damages for the malicious use of legal process without probable cause. The process issued by the defendants against the plaintiff was a writ of foreign attachment under which certain woolen yarn in large quantity, the property of the plaintiff, was seized and injured while in custody under the writ. The process was issued by the defendants against the plaintiff on Saturday, August 4, 1894. On that day a promissory note given by Humphreys to Sutcliffe & Co. for £1297.7.8, payable at the National Provincial Bank of England, London, fell due and was not paid but protested. The time at which the writ of foreign attachment was issued was after the close of bank hours in London, though during bank hours in this country. Six days later, on August 10, 1894, the defendant applied to the Court out of which the writ issued, to wit, the Circuit Court of Camden, New Jersey, for an order to show cause why the writ of attachment should not be dissolved and this rule was subsequently made absolute. On appeal the action of the Circuit Court was affirmed by the Supreme Court and afterwards, on September 13, 1895, by the Court of Appeals. It was claimed by the plaintiff in the present action that the stock of woolen yarns seized under the attachment was destroyed by moths during this interval and for the damages thus sustained the present action was brought.

On the trial the plaintiff was non-suited because there was no evidence of malice or of want of probable cause in the issuance of the writ of attachment. It is contended for the plaintiff that he is entitled to recover damages without proof of malice or want of probable cause, and also that under the evidence the jury would have been justified in finding both malice and want of probable cause.

The first contention raises the question whether the writ was properly issued on the same day when the note fell due and was protested. On this question the authorities are conflicting, most of them holding that in the case of notes payable at bank, an action can be brought on the day of maturity after protest, and others holding that the whole of the day of maturity must be allowed before suit can be brought. The Court of Appeals of New Jersey held that the writ was prematurely issued in this case on the day of maturity of the note, and that it was therefore proper to dissolve the attachment. This decision, however, was not based upon any prior decision of the New Jersey Courts, but upon a ruling to that effect by the Court of Appeals of New York, and a decision of this Court in Taylor *v.* Jacoby, 2 Pa. 495. The latter case was a judgment by confession under a warrant of attorney annexed to a note payable one day after date and was likened in the opinion to the case of a bond, where as a matter of course the obligor has the whole of the last day in which to make payment and is not in default until the day has ended. But the present case was that of a note payable at a bank, and it was dishonored and subject to protest when it was not paid, at the close of banking hours on the last day of grace. In that class of cases the preponderance of the authorities is that suit may be brought after demand and refusal on the last day of the maturity of the note. In 2 Parsons on Bills and Notes, 461, the rule is thus stated, "On this point the rule may not be positively determined by authority, but there is strong reason for holding that a party bound to pay has the whole of the day of maturity; and that without demand and refusal, an action can not be maintained unless it is brought after sunset, or perhaps after business hours on that day. We are, however, of opinion that, after demand and refusal on that day, an action may at once be main-

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tained; for he has declared that he will not pay and can want further delay only to arrange the means of avoiding payment. But without such prior demand and refusal an action commenced on the day of maturity is premature, unless the note is payable at a bank, when it seems that suit may be commenced after bank or business hours." In the very copious note (*e*) to the foregoing text the author has collected a large number of decisions both in England and the United States, in which the rule stated in the text was adopted. In one of the most prominent of them: Greeley *v.* Thurston, 4 Greenl. 479, the Court said: "Upon consideration, we adopt the views of Mr. Justice BULLER; and it is our opinion that bills of exchange and negotiable notes should be paid on demand, if made at a reasonable hour on the day they fall due; and if not then paid, that the acceptor or maker may be sued on that day, and the endorser or drawer also, after notice given or duly forwarded." The question did not arise in Taylor *v.* Jacoby, because that was not an action founded upon a note payable at bank, and there was no demand and refusal to pay, but the judgment was entered up and execution issued on the day of the maturity of the obligation. Other text writers express the same views as above cited from Parsons on Bills and Notes, and the Courts of last resort in many States have ruled in the same way. But it is not necessary to pursue the question, as it is not essential to the determination of this case. It is only important to refer to the matter in another connection, and that is, as it affects the question of malice or the malicious use of legal process. It certainly cannot be said that when a creditor issues a process of foreign attachment in the circumstances which are appropriate to the issue of that writ, he has been guilty of issuing illegal process or of doing so with malice or with a malicious purpose, resulting simply from the issue of the process. In this case the note was payable at a bank on a given day, payment of the note was demanded and was refused, the debt due the payees of the note was put in jeopardy and, as vigilant creditors looking to the security of their claim, they had a perfect legal and moral right to take the speediest measures that were possible to secure the payment of their debt. At the very best that can be said for the contention of the present plaintiff, it was a gravely doubtful question whether his creditors might not issue their writ at the time they did. There was no decided case in New Jersey ruling that question, it was eminently a commercial question in the law relating to negotiable securities, with the great preponderance of the adjudged cases in favor of the issue of the writ at the time it was done, and it was issued in circumstances from which there was no occasion for the debtor to suffer any damage or loss whatever. He admits that the writ could properly issue in one day more, and he asserts that he would have paid the debt on Monday following, the second day after the writ was issued, if it had been insisted upon. Conceding that the writ was issued too soon, therefore, if the debtor suffered any injury from the attachment of his property it was of his own choosing, and because of his continued dereliction in not paying his lawful debt, which he does not pretend to dispute, and for the payment of which he continued liable whether the writ was issued too soon or not. The attachment would have been dissolved at once upon his performing his plain legal duty of paying his debt two days after the writ issued. It is quite apparent, therefore, that there is no meritorious ground of recovery in this action by reason of any oppressive action of the defendants. It remains only to see whether it has such technical merit as will require a reversal of the judgment of the Court below.

The non-suit was granted upon the ground that there was no proof of malice in the case and no want of probable cause shown. In the leading case of McCullough *v.* Grishobber, 4 W. & S. 201, it was held that a domestic attachment may issue upon a debt which is not due and payable, if there be in other particulars a sufficient ground for it. When process issued is legal, the plaintiff is answerable only for a malicious abuse of it; and where the circumstances afford no inference of malice, actual malice must be proved. In an action for maliciously suing out a writ of domestic attachment, it is enough for the defence that the suspiciousness of the plaintiff's conduct had made recourse to an attachment a measure of reasonable precaution, irrespective of the fraudulent intention of the debtor.

Such is the syllabus of the foregoing case, and yet it is cited for the appellant as authority to support his contentions. It was decided that although the debt was not due when the writ of attachment was issued, if the other circumstances were such as to justify the issuing of the writ, it was not illegal under the Act, and there could be no recovery without express proof of malice. It was also held that the circumstances afforded no inference of malice. The Court said: "If, then, the defendants were competent to sue out the attachment, or, in other words, if the writ was not originally illegal, little more remains to be decided, for it is conclusively settled, that where the process is legal, the plaintiff is answerable only for a malicious abuse of it; and that where the circumstances afford no inference of malice, as

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in Gibson *v.* Chaters, (2 Bos. & Pul. 129), actual malice must be proved. Of actual malice in this case there is not a shadow; and what are the circumstances?" The Court then reviews the circumstances and shows that the conduct of the debtor was such as to give rise to a suspicion that he intended to do the things which subjected his property to seizure under the domestic attachment law. It was held that, under the law, although the debt was not due when the attachment was issued, the other requirements of the statute were present, and although the jury had found as a matter of fact that the debtor had not done the things that subjected him or his property to the process of domestic attachment, still, because there was ground to apprehend that he had done those things, and no proof of malice, he could not recover. It does not necessarily follow that because a process is prematurely issued it is necessarily illegal, if the right to issue it was apparently existing. So here it was perfectly true that there was a highly probable and apparent right to issue the writ at the time it was issued, the manifest preponderance of judicial decisions and text writers' opinions declared and supported the right; there was no opposing decision of the New Jersey Courts; and all the circumstances were present which authorized the issue of the writ. How can it be said that the issue of the writ was so palpably wrong and contrary to law as to make it absolutely illegal? It was not illegal in itself in the slightest degree; it was the precise and appropriate writ to issue in just such circumstances.

In Mayer *v.* Walter, 64 Pa. 283, the distinction upon this subject is carefully pointed out in the opinion delivered by Mr. Justice SHARSWOOD as follows: "There is a distinction between a malicious use and a malicious abuse of legal process. An abuse is where the party employs it for some unlawful object, not the purpose which it is intended by the law to effect; in other words a perversion of it. . . . On the other hand legal process, civil or criminal, may be maliciously used so as to give rise to a cause of action where no object is contemplated to be gained by it other than its proper effect and execution. As every man has a legal power to prosecute his claims in a Court of law and justice, no matter by what motives of malice he may be actuated in doing so, it is necessary in this class of cases to aver and prove that he has acted not only maliciously, but without reasonable or probable cause."

In Eberly *v.* Rupp, 90 Pa. 259, an action to recover damages for the unlawful issue of a writ of estrepment, there was a recovery in the Court below, but we reversed the judgment without a venire. Mr. Justice GORDON delivering the opinion said: "It is true injury may result from the writ of ejectment. In the one case the defendant may be hindered in the exercise of his business; in the other, he may, from the cloud thrown upon his title, be prevented from making an advantageous sale of his property. . . . In fact, the plaintiff has little of which to complain, for she might on application to the Court have had the writ dissolved; neglecting to do so, if injury resulted, she has herself to blame. . . . And although legal process may, by its malicious use, give rise to a cause of action, yet even in such a case, there must not only be a malicious use, but there must be no reasonable or probable cause for such process, since if there be such cause, the intention goes for nothing."

These citations dispose of all the serious contentions in the present case. We are of opinion that the writ of attachment was not necessarily illegal simply and only because it was prematurely issued; that as an open question it was apparently strictly legal; it was the proper and precise writ to issue in the circumstances of the case as all the facts which are sufficient to authorize its issue were present, and lastly there was not only no proof of malice or malicious use of the process in the case, but the actual facts and circumstances that were plainly present entirely dispelled any inference of malice. We find no error in the several assignments and they are all dismissed.

Judgment affirmed. W. C. S.

Jan. '98, 396. Supreme Court. February 23, 1899.

Gunster, Assignee v. Jessup et al.

Official bond — Payment by sureties — Charge of Court.

J. was cashier of a bank which made an assignment to plaintiff for the benefit of creditors. The assignee brought suit upon his official bond to recover six items of alleged loss to the bank by reason of the defalcation and other misconduct of the cashier. The bond was in the penal sum of $25,000, but the sureties claimed that they had paid money to a much larger amount and that the whole amount of the money thus paid came to the assignee.

Held, that while it does not appear that there was any specific appropriation of any particular payments made by the bondsmen, it is very clear that those made were largely in excess of the whole penalty of the bond, and were actually applied to the extinguishment of the cashier's indebtedness; the jury having decided in favor of defendants upon these facts.

Held, that the Court committed no error in submitting to the jury for decision, the question whether the bond had been paid or not.

Appeal of George H. Gunster, assignee for the benefit of creditors of the Scranton City Bank,

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plaintiff, from the judgment of the Common Pleas of Lackawanna County, in an action against George A. Jessup, William H. Jessup, Ellen B. Jessup, heir and representative of Albert Beardsley, deceased, and Harriet F. Throop, Theodore G. Wolf and Everett Warren, executors of B. H. Throop, deceased, upon a cashier's bond.

The facts are stated in the opinion of the Supreme Court, infra.

Errors were assigned that the Court did not direct a verdict for the plaintiff; and also submitted to the jury for decision the question whether payments made by the sureties had not fully liquidated the bond.

Samuel B. Price, (*Charles H. Welles* with him), for appellant.

Everett Warren and *James H. Torrey*, for appellees.

July 19, 1899. GREEN, J. It must be constantly borne in mind that this is an action only on the official bond given by George A. Jessup for the faithful performance of his duties as cashier of the Scranton City Bank. The penal sum of the bond was $25,000 and the action is brought against the cashier and his sureties. The bank having made an assignment for the benefit of creditors to the present plaintiff, he brings this action to recover six items of alleged loss to the bank by reason of the defalcations or other misconduct of the cashier while he was filling the office. The amount alleged to be thus lost to the bank is some seven or eight thousand dollars, which with interest added would amount at the time of the trial, to something over $13,000. The defence set up by the sureties is, that they, in their capacity as bondsmen upon this bond, paid money to the assignee or money that was received by him, to an amount greater than the whole penalty of the bond in discharge of their obligation as such bondsmen, and therefore there can be no further recovery against them, no matter what may be the amount or character of the defaults of the treasurer. If this defence was true as a fact the plaintiff could not recover. On the trial the substantial controversy turned upon the question whether the defence was true as a matter of fact, and the learned Court below, after a very careful explanation of the issue, and the matters in controversy, to the jury left to them the decision of the question. The final instruction to the jury was in these words: "Well, gentlemen, you will inquire and decide in the first place, whether the bond of twenty-five thousand dollars, upon which these defendants are liable, has been paid by money contributed by them, or any of them, that found its way into the hands of the assignee and that was intended by the parties to go on the debt represented by this bond, and if you find that it has thus been paid, then you will find a verdict for the defendants. If you find that the bond has not been paid then you can inquire whether it has been paid in part. For instance, if the whole has not been paid, but a part of the bond has been paid, then the bond stands good for as much as is unpaid, and if that amount is less than what the plaintiff has proved here that he is entitled to under the bond, you will find in favor of the plaintiff only as much as he is entitled to. But if you find that the bond has not been paid, then you will inquire whether the plaintiff has made out his claim in whole or in part."

It was fully shown on the trial that the several persons who were bondsmen, had, in point of fact, paid money to a much larger amount than twenty-five thousand dollars, and it was also shown that the whole amount of the money thus paid came to the assignee. But there were some complications and some questions that were developed by the testimony growing out of the fact that much larger and other sums were paid which also came to the assignee, and in which payments other persons than these bondsmen participated. The cashier had subjected himself to a criminal liability by his transactions in conducting the affairs of the bank, and an indictment was found against him for those criminal acts. In order to avoid the consequences of these criminal acts a large amount of money was raised by friends of the cashier, and by realizing sales of certain coal options which he held and turned over to two trustees to act for him. It was claimed by the defendants that the total of the sum raised and paid over to the assignee was about $144,000, and it was claimed by the plaintiff that the total shortage account of the cashier was $168,000. A great deal of testimony was taken in the development of the various contentions of the parties upon these subjects, and especially upon the point whether the moneys paid by those persons who had signed the cashier's bond as sureties, were really paid in discharge of their obligations as bondsmen. The allegation that the total shortage of the cashier was $168,000 is denied absolutely by the defendants and it was fully testified on the trial that it was never claimed to be more than $145.000 at the outside, and that when inquiry was made of the assignee as to what was the total amount he replied that it was $136,000. It was also testified that the money that was raised and paid by the defendants, was raised for the purpose of paying off and discharging the entire indebtedness of George A. Jessup to the bank. While it does not appear that there was

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any specific appropriation of any particular payments made by the bondsmen, it did appear very clearly that the payments they did make were largely in excess of the whole penalty of the bond and the payments being actually applied to the extinguishment of George A. Jessup's indebtedness to the bank, we think the learned Court below was entirely right in submitting the question whether the bond had been paid or not to the jury for their decision. It is not necessary to review the testimony in detail nor to dwell upon its various aspects. It certainly did raise the question of actual payment of the whole amount which could in any event be claimed under the bond, and the jury has decided that question in favor of the defendants. This verdict was satisfactory to the learned Judge who tried the case, and it is satisfactory to us. The case was twice tried and the first verdict being against the defendants was set aside by Judge McPherson, who presided at the trial, because he regarded it as against the weight of the evidence. After a careful examination of the testimony we are of opinion that the verdict on the last trial was just and proper. We do not think that there is any error on the part of the Court in the matters covered by the several assignments and they are therefore dismissed.

Judgment affirmed.

W. C. S.

Jan. '98, 400. Supreme Court. March 28, 1899.

Quaker City National Bank v. Hepworth.

Trust for benefit of creditors—Promissory note—Payment of.

B. confessed judgment for $15,500 to D. as trustee, to secure D. for $1400, which B. owed him, and for $14,100, which B. owed the plaintiff bank. Sale was made and the stock of goods purchased by D. as trustee for the bank with the full knowledge and consent of the bank, and the business carried on as such trustee for more than a year. Suit was then brought by the bank upon a promissory note of B., defendant. The defendant claimed upon the trial that he should be allowed to show what the stock of goods purchased under the execution was worth, what it was sold for, what was done with the proceeds, and if he could establish facts which entitled him to claim that the bank had received or ought to have received satisfaction for the note in suit out of the subsequent management and disposition of the goods by the trustee, he should have opportunity to do so. The trial Judge gave binding instructions to the jury to find a verdict for the plaintiff for the full amount of the claim.

***Held,* to be error.**

Appeal of John W. Hepworth, trading as John W. Hepworth & Co., defendant, from the judgment of the Common Pleas No. 3, of Philadelphia County, in an action by the Quaker City National Bank upon a promissory note.

The facts are stated in the opinion of the Supreme Court, infra.

A verdict having been rendered in favor of the plaintiff, this appeal was taken, the action of the Court, Finletter, J., in directing a verdict, being assigned as error.

John G. Johnson, for appellant.

The evidence disclosed a duty on the part of the bank to protect the appellant's note.

Inasmuch as the property purchased at the sheriff's sale was greatly in excess of the amount of the execution, and inasmuch as the bank used this property in carrying on a new business, instead of selling the same, it was charged with its value as though the same had been converted, and qua the defendant, his note was paid.

S. Davis Page, (with him *Edward P. Allison* and *Boies Penrose*), for appellee.

Datz's retention of the goods and machinery purchased at the sheriff's sale on his judgment as trustee and his continuous effort to realize the debt due by Boulter to his own firm as well as to the bank by carrying on the business or by the sale of it, is not pertinent to this investigation.

The fact that the holder had other collateral securities for the same debt more than sufficient to cover it, from which, however, the debt had not been realized, is not a ground of defence on the part of the maker.

Lord *v.* Ocean Bank, 20 Pa. 384.

As against a holder for value an accommodation maker can defend only on the ground of actual payment.

Philler *v.* Patterson, 168 Pa. 483.

The refusal of the offers of evidence and declination of the instructions asked and the direction of a verdict for the appellee, are sustained by the facts and the law applicable thereto.

Braden *v.* O'Neill, 183 Pa. 462.
McCracken *v.* Roberts, 19 Id. 391.
Maynard *v.* National Bank, 20 Weekly Notes, 272 at 274.

July 19, 1899. Green, J. There is no question that when Boulter confessed the judgment for $15,500 to Datz as trustee it was done to secure Datz for only $1400, which Boulter owed him, and for $14,100 which Boulter owed the bank. Datz was therefore trustee for the bank under this judgment to the extent of $14,100 and that fact was perfectly well known and understood by the bank. Clark, the cashier, being examined as a witness, testified as follows:

"Q. What was the indebtedness of Boulter to the bank? A. $14,100. Q. That was the indebtedness in 1897, was it? A. Yes, sir. Q. That included all that he was indebted to the bank both

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on made and endorsed notes, did it not? A. Yes, sir. Q. It included this note amongst others of $1200, dated March 29, 1897, made by Hepworth & Co., to the order of Boulter payable three months after date and endorsed by George H. Boulter? A. That is right. Q. When did you first hear that a judgment was confessed to William P. Datz, trustee, for $15,500, which included $14,100 being all the indebtedness of Boulter to the bank? A. I understood that Mr. Boulter had confessed judgment to Mr. Datz as trustee for the amount that the bank was owing, and for his own indebtedness sometime about the time that note was given. Q. Did you know of the levy under that judgment? A. No, sir. Q. You knew nothing at all about the sale of property under that judgment? A. Nothing about it. Q. You knew nothing of what was done with that property? A. All I knew was Mr. Datz had bought it in and was operating it since. That is all. Q. Acting as trustee for the bank. You know that? A. Certainly. Q. He has acted therefor since, having bought the property in under that judgment, and for the benefit of that judgment, with the full knowledge and approval of the bank? A. Certainly."

The witness having stated the items which constituted the indebtedness of Boulter to the bank, and which included the $1200 note in suit was asked as to what efforts the bank made to get their money out of the business which Datz as trustee, with Boulter as manager, carried on subsequently to the sheriff's sale of Boulter's goods to Datz as trustee, and said, in reply to a question: "A. The only inquiry that we made was that Mr. Datz had a judgment, and we tried to get the amount out of it. Q. What attempt did you make to get it? A. We knew that Mr. Datz was running the plant, and they have paid us some $900. . . . . Q. Do you mean to say that you did not call upon the trustee to account for the large amount of property sold at that sale? A. No account except that there was about $900 paid off on account. Q. How was the business run? A. By Mr. Datz, trustee, as I understood. Q. Who manipulates the business? A. Boulter as the manager, I believe. . . . . Q. You knew he was trustee of the bank? A. Yes. Q. You knew he had bought the property in at sheriff's sale? A. Yes. Q. You knew he was running the business in the name of Datz, trustee? A. Yes. Q. You knew Datz was trustee for the bank of upwards of $14,000? A. Yes, sir. . . . . Q. Did you know George Boulter was acting as manager of the business? A. Yes, certainly."

William P. Datz, who was the trustee named in the judgment was asked: "Q. Did you have any conversation with him (Clark) on the subject of the sheriff's sale before the sale took place? A. Yes, sir. Mr. Clark and the president of the bank both knew that Mr. Boulter had confessed judgment to me for the bank's claim. Q. Did you attend the sheriff's sale? A. Yes, sir. Q. You bought in the property as trustee? A. My counsel did. Q. For you as trustee? A. Yes, sir. . . . . Q. Having bought that as trustee for the bank what did you do in the way of carrying out your trust with the property? A. I have been running the plant since under my name as trustee. Q. Did you attend there, or did Mr. Boulter run it for you? A. Mr. Boulter has run it as manager."

Under the foregoing testimony, without considering the personal testimony of the defendant, it is not easy to see how the conclusion can be resisted that Datz, the plaintiff in the judgment, took the judgment, held it and bought in all the stock of goods, as trustee for the bank, with the full knowledge and consent of the bank, and also carried on the business as such trustee for more than a year. As it seems to us now the jury might well find that the bank, having control of the property, through their trustee carried on the business and were properly responsible for the manner in which it was conducted and for its results. It seems to us a fair question for the jury was raised under the testimony, to inquire into the operations of the trust, and we think that the defendant should be at liberty to show what the stock of goods was worth, what it sold for, what was done with the proceeds, and if he could establish facts which entitled him to claim that the bank had received, or ought to have received satisfaction for the note in suit out of the subsequent management and disposition of the goods by the trustee, he should have the opportunity to do so. But all inquiry of this kind was shut off by the binding direction of the learned Court below to the jury to find a verdict for the plaintiff for the full amount of the claim. We think, in the peculiar circumstances of this case, this was error and that the case should have been submitted to the jury on all its facts. For obvious reasons we can not here discuss the facts nor decide the merits of the respective contentions.

We sustain the first, second, third, sixth and seventh assignments, the others are dismissed.

Judgment reversed and new venire granted.

W. C. S.

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Jan. '98, 414. Supreme Court. February 23, 1899.

Commonwealth v. Keller.

Criminal law — Homicide — Evidence — Uncommunicated threats — Photographs — Calling of eye-witnesses.

In a trial of an indictment for murder where there is evidence of threats of violence having been made by the deceased against the defendant, in his absence and not communicated to him, it is sufficient for the purposes of the jury that the court should inform them as to the effect of the evidence as indicating the condition of feeling between the defendant and the decedent when they approached each other. It is on this ground that testimony as to such threats is admissible.

A photograph of the deceased may be admitted in rebuttal of testimony that the defendant was a smaller man than the deceased, but before it is admitted there should always be proof of care and accuracy in taking the picture and of its relevancy to the issue before the jury; that is to say, where the size of the original of the picture is the object of its introduction, this accuracy can be secured, if the witness identifying the picture is included in the photograph and in such an attitude that his own size relative to that of the deceased is shown.

While it is the duty of the district attorney, in a capital case, to present all the testimony on the material facts, whether averse or favorable to the defendant. the court may, in its discretion, limit the number of witnesses to be called, and while it is the right of the defendant to have all of the facts connected with the killing fully and fairly disclosed by the prosecution, it is not his right to have them reiterated indefinitely by all the persons who saw the occurrence, and where sixteen eye-witnesses to the killing have been examined, the district attorney may omit to call another witness, although his name is endorsed as a witness on the bill of indictment.

Appeal of Joseph Keller, from the judgment of the Court of Oyer and Terminer of Lackawanna County, upon an indictment charging in the first count murder, and in the second count manslaughter.

The facts of the case appearing upon the trial, before EDWARDS, J., were as follows: The defendant on the morning of July 31, 1898, became involved in a quarrel with one Meyers. Meyers, after creating a disturbance, was persuaded to return home. Later in the day Meyers, seeing the defendant upon the highway, remarked to witnesses that he would head the defendant off, and threatened his life. The men encountered each other later, and Meyers advancing in a menacing attitude, Keller fired four shots from a pistol which he was in the habit of carrying, and killed Meyers.

The defendant requested the Court to require the Commonwealth to call a witness whose name was on the bill of indictment and who had not been called by the prosecution, the evidence having disclosed the fact that he had been an eye-witness to the shooting. The Court refused to direct his calling. (Fourth assignment of error.)

There was evidence showing that the size and weight of the deceased was superior to that of defendant. To rebut this the Commonwealth offerred a photograph to contradict what the witness had sworn to on the subject of his superior weight and size. This was admitted. (Fifth assignment of error.)

The Court charged, inter alia, as follows:

"The threats made by Meyers against Keller are relied upon by the defence to show the condition of Keller's mind when he met Meyers upon the railroad, and to show what he had reason to expect from Meyers on account of Meyers' attitude towards him on account of his threats to do him violence, and to injure him during the day. Of course you must understand that a threat made by one man against another, unless it is communicated to him, cannot have any effect upon the mind of the man that is threatened." (Second assignment of error.)

The verdict was not guilty on the first count and guilty on the second count of the indictment. Judgment and sentence accordingly.

The defendant took this appeal and assigned error, inter alia, as above indicated, and also that the Court failed to instruct the jury as to the effect, weight and relevancy of the uncommunicated threats. (First and third assignments of error.)

J. F. Scragg, (*J. M. Harris* with him), for appellant.

Uncommunicated threats are admissible to show who began the affray.

Wharton's Criminal Law, 9th ed., 642.

They are evidence to corroborate evidence of communicated threats.

Rice on Evidence, Vol. 3, 580.
Kerr on Homicide, 431.
Wharton's Criminal Evidence, 8th ed., 614, sec. 757.
Hart *v.* Com'th, 85 Kentucky, 77.

They are evidence to show the attitude of the deceased toward the defendant.

Wiggins *v.* Utah, 93 U. S. 467.
Stokes *v.* The People, 53 N. Y. 174.
Rice on Criminal Evidence, Vol. 3, 580, 581, 582, 594, sec. 370, and cases cited.

The Commonwealth should have called all the eye-witnesses to the transaction and the omission to call Lown was improper.

Roscoe's Criminal Evidence, Vol. 1, (8th ed.) 210, citing Reg. *v.* Chapman, 8 C. & P. 558, and other cases.
Russell on Crimes, Vol. 3, (9th ed.) 527 and note.
Abbott's Direct Proof of Criminal Cases, 187 and cases cited.
Herr *v.* People, 25 Mich. 309.
Donaldson *v.* Com'th, 95 Pa. 21.
Rice *v.* Com'th, 102 Id. 408.

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Photographs in careless or inexpert, or interested hands are capable of very serious misrepresentation of the original. Before they are permitted to be used in the trial, therefore, there should always be preliminary proof of care and accuracy in the taking of them, and of their relevancy to the issue before the jury.

Udderzook *v.* Com'th, 76 Pa. 340.
Beardslee *v.* Columbia Township, 188 Id. 502.

John R. Jones, district attorney, for appellee.

Threats made by the deceased against the accused a short time before the murder and not communicated to the defendant are not admissible in evidence.

Com'th *v.* Nevling, 98 Pa. 322.

Where it is clearly and unequivocally shown that the defendant was the aggressor, and there is no pretense that deceased was about to carry the threats into execution, or that defendant had reasonable grounds to believe and did believe that such was the case, evidence of such threats by deceased, although they were communicated to defendant, is inadmissible.

Payne *v.* State, 60 Ala. 80.
People *v.* Taing, 53 Cal. 602.
Bond *v.* State, 21 Fla. 738.
People *v.* Garbutt, 17 Mich. 9.
State *v.* Downs, 91 Mo. 19.
State *v.* Clum, 90 Id. 482.
Gouzales *v.* State, 31 Tex. 495.
State *v.* Birdwell, 36 La., An. 859.
Thomas *v.* State, 11 Tex., App. 315.

The reason advanced in the cases which decide that uncommunicated threats made by the deceased against the defendant are admissible, is that they tend to show the attitude and animus of the deceased toward the defendant at the time of the fatal encounter.

Kerr on Homicide, 431, sec. 402.
Davidson *v.* People, 4 Colo. 145.
State *v.* Turpin, 77 N. C. 473.
People *v.* Alivtre, 55 Cal. 263.
State *v.* Evans, 33 W. Va. 417.
Keener *v.* State, 18 Ga. 194.
White *v.* Territory, 3 Wash. Ter. 397.
Hart *v.* Com'th, 85 Ky. 77.

The cases where the prosecution have been compelled to call all of the eye-witnesses in the case are those in which there have been very few witnesses.

Regina *v.* Stroner, 1 C. & K. 650.
Kent *v.* People, 8 Col. 563.
Rice on Crim. Ev., p. 124.
Hurd *v.* People, 25 Mich. 406.

The fact that the name of a witness is endorsed on the indictment does not of itself involve any necessary obligation to do any more than to have the witness in Court ready to be examined.

Rex *v.* Simmonds, 1 Carrington & Payne, 84.
Rex *v.* Beezley, 4 Id. 218.
Reg. *v.* Bodle, 6 Id. 186.
Rex *v.* Harris, 7 Id. 581.
Reg. *v.* Bull, 9 Id. 22.
Reg. *v.* Vincent, 9 Id. 91.

April 24, 1899. FELL, J. The defendant, in support of the allegation that he had acted in self-defence, was allowed at the trial without objection to offer proof of threats made by the deceased. Some of these threats had been made in the presence of the defendant, and heard by him; others had been made in his absence and had not been communicated to him. In three of the assignments it is alleged as error that the Court failed to call the attention of the jury to the effect that should be given to uncommunicated threats, and that in this respect the charge was inadequate and misleading. In connection with these assignments only that part of the charge is given which refers to the effect on the defendant's mind of threats made by the deceased. Earlier in the charge the attention of the jury had been called to the threats which the deceased and the accused had made against each other, and it was then clearly stated that the purpose of this testimony was to throw light on the relation in which they stood to each other and the condition of their minds when they met. It was said: "But in considering the evidence, you will begin with that which throws light upon the relation of the two men one to the other; and these threats on one side or the other, if you believe they were made, will show you the condition of mind of these two men when they came near or when they approached each other—at least it will have a tendency to do that." It was for the purpose thus stated that the testimony as to threats made by either was admissible. Proof of uncommunicated threats made by the deceased was received as tending to show his motive and intention and thus giving rise to an inference that in the fatal encounter he was the aggressor. The effect to be given to such testimony might have been more fully explained, but what was said in the charge in relation to it was not misleading, and in the absence of a request for more specific instructions on the subject it cannot be said that the charge was inadequate.

The photograph of the deceased was offered by the Commonwealth to rebut testimony that the defendant was a smaller man than the deceased. This is a kind of testimony which should be received with caution. In a recent case: Beardslee *v.* Columbia Township, 188 Pa. 502, it was said by our brother MITCHELL: "Photographs are competent evidence, and when properly taken are judicially recognized as of a high order of accuracy. See Udderzook *v.* Com'th, 76 Pa. 340. But in careless or inexpert, or interested hands they are capable of very serious misrepresentations of

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the original. Before they are permitted to be used in the trial, therefore, there should always be preliminary proof of care and accuracy in the taking of them, and of their relevancy to the issue before the jury." On a question of size a photograph would probably be less reliable than on one of identity. But where other objects, whose size is known, are shown in the picture, and appear therein to have been at the same distance from the camera as the object whose size is sought to be established, a reasonably safe means of comparison is furnished. This was a full-length photograph, and the witness who identified it and testified to its accuracy was represented in it, standing by the side of the deceased. This gave the jury a sufficiently safe guide.

The only remaining assignment which need be noticed relates to the refusal of the Court to direct the district attorney to call a witness, Charles Lown, whose name was on the bill of indictment. To the request of the defendant's counsel, the district attorney replied that he had called all the eye-witnesses to the occurrence, and the Court sustained this refusal to call the witness on the ground that his testimony would be cumulative merely. It appears that this witness saw the shooting, and that the fact that he was present had been disclosed by witnesses before examined. The offer should, however, be judged in the light in which it was presented to the Court at the time. The statement of the district attorney that he had called all the eye-witnesses was not controverted and the fact that other witnesses had testified to the presence of this one was not called to the attention of the Court. It then appeared to the Court that the witness could have testified only to the threats which had been made some hours before the encounter, as to which there was no dispute.

The refusal to require the Commonwealth to call this witness would not be ground for reversal even if it had appeared that he was present when the deceased was shot. Sixteen eye-witnesses had already been examined. While it is the duty of the district attorney in such a case as this to present all the testimony on the material facts, whether adverse to the defendant or favorable to him, the Court in its discretion may limit the number of witnesses to be called. There was not a withholding of testimony favorable to the defendant or a failure on the part of the district attorney to present to the jury all the material facts. It was the right of the defendant to have all of the facts connected with the shooting fully and fairly disclosed by the prosecution, but it was not his right to have them repeated over and over indefinitely by all the persons who saw the occurrence.

The case seems to have been tried with great care and ability by the learned Judge, and the record discloses no error calling for a reversal.

The judgment is affirmed.

W. D. N.

Jan. '98, 142. Supreme Court. May 9, 1898.

Rodgers's Appeal.

Mines — Lateral railroad — Act July 5, 1883, P. L. 176 — Constitutional law — Title to Act.

The proviso to the Act of July 5, 1883, P. L. 176, providing for the construction of lateral railroads from mines, viz., that said road "shall not . . . pass through nor disturb or endanger the safety of any other mine," is not unconstitutional as not being embraced within the title of the Act, viz.: "A supplement to an Act entitled 'An Act regulating lateral railroads,' approved the fifth day of May, A. D. 1832, authorizing the owners or lessees of iron ore, or coal mines, to construct lateral railroads from said mines to any railroad, public road or navigable stream within the county in which such mines are situated."

Where an Act is a supplement of a former Act, if the subject of the original Act is sufficiently expressed in its own title, and the provisions of the supplement are germane to that subject, the subject of the supplement is sufficiently covered by a title containing a specific reference to the original by its title, with the date of its approval.

Where the size of the plant is in proportion to the area of coal to be mined, and "a plan of the mining operations to be pursued in the mining of the coal" has been formulated and followed, the plant, the plan of operation, and the area of coal with which they are connected, may be designated as a coal mine.

Appeal of William B. Rodgers, trading as the Tide Coal Company, from the decree of the Common Pleas of Fayette County, refusing the appointment of viewers and dismissing his petition.

W. B. Rodgers presented a petition under the Act of July 5, 1883, P. L. 176, the contents whereof and proceedings whereunder sufficiently appear in the following opinion of the Court of Common Pleas, delivered by REPPERT, J.:

"This is an application by William B. Rodgers, doing business as the Tide Coal Company, for appointment of viewers for a lateral railroad under the Act of 1832, and its supplements, including the Act of 1883. The petition was filed March 21, 1898, and notice of the intended application was given to the parties interested March 1 and 5, 1898.

"The petitioner is the owner of the Pittsburgh or Monongahela seam of coal underlying 264 acres of land in Jefferson township, Fayette county. This tract of coal is distant a little over 4000

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feet from the Monongahela river, which has been made navigable by slackwater. The tract was originally composed of two contiguous parcels, owned respectively by Harvey J. Steele and Joseph S. Elliott, the Steele parcel containing 114.92 acres, being purchased February 1, 1898, and the Elliott parcel, including a reservation of two acres, containing 151.42 acres, having been purchased a few months prior to, or about the same time. The petitioner is also the lessee of the Chamouni coal mine and coal land abutting on the said Monongahela river. Between the Chamouni property and the petitioner's 264-acre tract of coal, a wedge-shaped portion of a tract of coal containing about 450 acres intervenes. This intervening coal is owned by Mrs. C. L. Snowden, Mrs. E. S. Hackney and Miss Mary Hogg, and is under lease to Snowden, Gould & Co., for a period of ten years from 1894. The property is known as the Albany mine, and has been operated since about 1884, and a considerable portion of the coal mined. In addition to the coal the property consists of tipple, haulage, draining and ventilating system and plant, electric plant, boilers, engines, blacksmith shop, boiler houses, thirty or forty tenement houses, 225 cars, etc. . . .

"The route of the proposed lateral railroad begins on the line of the Monongahela river at the tipple house of the Chamouni mines, thence westward and underground through the excavated portion of the Chamouni property to the line of the coal of Mrs. C. L. Snowden and others through the same for a distance of 1714 feet to the coal tract of the petitioner containing 264 acres. The eastern terminus of the road is at the western line of that portion of petitioner's tract purchased of Steele.

"In 1895 the lessees of the Albany property, with a view to the systematic mining of the coal leased, laid out their coal and made a working plan whereby the unmined coal could be operated to the best advantage. In the development of the coal this plan has been followed since that time. The entrance to the Albany mine is near the southwest corner of the property. The main entry is planned to run from the entrance of the mine in a straight line to the northern boundary line, substantially parallel with the western boundary line and a short distance therefrom. The exhaust air course runs parallel with the main entry and distant about seventy feet west. The main entry and air course have been driven about 5800 feet from the mouth of the mine, and at the time notice of this application was given to the owners and lessees, March 1 and 5, 1898, said entry and air course had been driven a considerable distance beyond the location of the proposed lateral railroad. No other excavation has been made in the coal on the route of the proposed railroad.

"In the petition for the appointment of viewers it is set forth that said railroad does not 'pass through and disturb the operating or endanger the safety of any other mine—passing over and above any intervening slope, entry, heading, drift, room or opening in existence at the time of the marking out and surveying of said lateral railroad, or at the time of the filing hereof.'

"The petitioner proposes to construct the railroad through the Monongahela seam of coal from the Chamouni pit mouth to its eastern terminus except where the road crosses the main entry and air course of the Albany mine. He designs to avoid interference with these by an overcast in the overlying strata, leaving ten feet of overlying strata between the entry and air course and the road, and to reinforce the strength of the intervening strata by brick and stone arches in the entry and air course and by steal beams and girders and concrete above, and in any other way that the engineers of the petitioner and parties interested and the mine inspector of the district, or a majority of them, might regard as necessary.

"To the petition the owners and the lessees and others interested in said intervening coal, filed seven exceptions, and March 29, 1898, was fixed for the hearing thereon. On the day of the hearing an answer of this petition was also filed.

"The matters of defence chiefly relied on by the respondents are embodied in their answer, and in the fifth and sixth exceptions filed to the petition, to wit: The proposed railroad would intersect and cross the main entry and haulage way of the mines of Snowden, Gould & Co., already opened beyond the proposed railroad; and that said railroad would not only 'pass through, disturb the operating and endanger the safety' of said mines, but would practically destroy said mines in the vicinity of said railroad, would seriously endanger the safety of the mine, obstruct its ventilation, prevent its haulage system, and affect its drainage.

"The rights of the petitioner are such as have been conferred upon him by legislative enactment. Is this proposed lateral railroad within the intent and meaning of the Act of 1832 and its supplements? If it is, the viewers asked for should be appointed. Otherwise the appointment of viewers should be refused and the petition dismissed: Hays *v.* Risher, 32 Pa. 169; Coal Co. *v.* Robertson et al., 12 C. C. R. 1.

"The Act of 1832, and its supplements of 1840 and 1848, undoubtedly authorize the appointment of the viewers asked for, unless, under the Act of 1883, the proposed railroad passes through,

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disturbs the operating or endangers the safety of another mine.

"The Act of 1883 reads as follows:

"'It shall be lawful for the owners or lessees of iron ore or coal mines to construct lateral railroads from said mines to any railroad, public road, or navigable stream, over or under, or partly over and partly under, the surface of intervening lands: Provided, said lateral railroad shall not extend beyond the limits of the county in which said mines may be situated, nor pass through, disturb the operating, or endanger the safety of any other mine; and the proceedings to obtain said lateral roads shall be according to the provisions of the Act of May 5, 1832, and the supplements thereto.'

"Is the tract of 264 acres of undeveloped coal to be reached by the proposed road a coal mine within the meaning of the Act of 1832? If it is not, the Act has no application to this cause and the proposed road could be located and constructed notwithstanding the proviso of the Act of 1883. The Act of 1832, applies to the owners of 'lands' and 'coal mines.'

"Coal in place is land. Conceding that the property in question is not a 'coal mine,' and that therefore under the Acts of 1832, 1840 and 1848, the petitioner has the right to construct a lateral railroad thereto, under the surface, notwithstanding the proviso of the Act of 1883. After the construction of the road, should it be operated, the coal would necessarily be developed and the property, or a part of it at least, would be a 'coal mine.' If the contention of the respondents is true, the immediate result would be a lateral railroad from a coal mine passing through another coal mine the very thing the Act was intended to prevent if it has any meaning and force. The object of the Act was the protection of the owners of intervening mines; and while it was the purpose of lateral railroad legislation to bring coal and other minerals into market, it is just as apparent that the intention of the Act of 1883, founded upon experience and justice, was that this should not be done in such a manner as would interfere with a prior enterprise to the same end.

"Nor are we satisfied that it is necessary to regard undeveloped coal as 'land' in order to bring it within the spirit and intent of the original Act of 1832. We therefore conclude that the Act of 1883 is applicable to the present case, and that the tract of 264 acres of undeveloped coal belonging to the petitioner, to which he desires a lateral railroad, may be classed within the meaning of the term 'coal mine' as used in the Act of 1832, and its supplements.

"Upon the argument it was urged by counsel for petitioner that the proviso of the Act of 1883 is unconstitutional. We will not so declare. The Act has stood unchallenged for fifteen years. Its provisions are just and reasonable and we will follow them until the appellate court directs otherwise.

"The next inquiry is as to the meaning of the word 'mine' as used in the proviso of the Act of 1883. 'Said lateral railroad shall not—pass through, disturb the operation, or endanger the safety of any other mine,' etc.

"It is strenuously urged in behalf of the petitioner that the meaning of the word 'mine' in this connection relates only to the actual workings or openings in the seam of coal, and many authorities and definitions of the term are cited in support of this contention.

"The respondents on the other hand allege that a mine is 'such territory, whether worked through one or more drifts, as lies compactly adjacent and in its working constitutes but a simple operation'; that it 'includes the bed or vein of ore into which the pit enters, so far as may be necessary to the working of the mine, and the whole series of shafts and subterranean passages and chambers connected with it.' A number of decisions were quoted arising out of claims of tenants for life to work mines supporting their contention. The first definition above noted is taken from the case of Commonwealth *v.* Wigton, 12 C. C. R., page 55, in which the meaning of the words 'every coal mine' in the fifth section of the Act of 1885, in reference to bituminous coal mines were construed by Judge KREBS. The controversy arose in that case, in part, out of the fact that five drifts had been driven into one solid body of coal and the Commonwealth contended that therefore there were five separate mines requiring the services of five mine bosses. On that branch of the case the Court took the view above stated, and against the position of the Commonwealth. While the question in that case was not whether a mine includes not only the actual openings in the seam of coal but also the adjacent body of solid coal, yet the definition given is important for the reason that the word 'mine' seems to be used in the same sense in both Acts.

"If the meaning of the word 'mine' contended for by respondents is correct, under the evidence submitted, the Snowden coal mine embraces the entire body of their coal as necessary for the proper working of the mine. The size of the plant is in proportion to the area of coal to be mined and the working of the coal in accordance with the mine plan would constitute but a simple operation.

"The meaning of the word 'mine' contended for by the petitioner would limit its application to the excavations made at the time of the location

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of the lateral railroad. If interference with these excavations could be avoided by over casts or in any other way the road could be constructed without reference to its effect upon the mining of the coal remaining in place. Such a construction of the Act of 1883, would deprive intervening mine owners to a great extent of the protection the Act was designated to afford. Modern coal mining requires the application of scientific principles, and direction by high intelligence. A modern coal mine is something more than an opening or series of openings in the earth. The openings must be driven with a view to the safe and economical removal of the entire body of coal to be mined, and in that sense every foot of excavation is related to and connected with the coal yet in place. In the present case, in 1895, a plan of the mining operations to be pursued in the mining of this coal was made which has been followed. It had in view the removal of the entire body of coal in this tract, including its drainage, ventilation and haulage. It embraces a manway, used also as an air inlet, projected along the line of the Steele coal and not yet completed beyond the location of the proposed railroad. The man-way would have to cross the proposed railroad either at grade or by an overcast, or its projected route would have to be changed to cross under the proposed road near the main entry. It is also admitted that a block of coal from 50 to 150 feet in width would have to be left on each side of the railroad for its protection from the weight of the overlying strata and from the mining operations of the respondents.

"That an independent passage-way, by avoiding the excavations already made, can be driven into and through the coal in place, without passing through, disturbing the operations or endangering the safety of this mine, as we understand the meaning of the word, is not possible under the evidence in the case.

"It is very true that practically only 43 acres of the coal in question would be affected. But if the right be conceded there can be no limit to the area that might be affected in the same manner, and as there is no way of satisfactorily estimating the damages that might ensue from such an interference it is prohibited by law.

"For the reasons above given we are compelled to refuse the prayer of the petitioner and dismiss the petition."

The petitioner took this appeal.

C. G. McIlvain and *G. D. Howell*, (*A. D. Boyd* and *R. E. Umbel* with them), for appellant.

Coal and minerals in place are land, and thus within the very terms of the Act of 1840.

Brown *v.* Corey et al., 43 Pa. 503.
Caldwell *v.* Fulton, 31 Id. 475.

A proviso inconsistent with the title is inoperative.

Sewickley Borough *v.* Sholes, 118 Pa. 165.
Road in Otto Township, 2 Pa. Super. Ct. 20; affirmed in 181 Pa. 390.

The validity of a statute must depend upon the sufficiency of the title, and where the latter is defective, the statute will be sustained only in so far as the title indicates the subject matter of the law.

Road in Phoenixville, 109 Pa. 44, 48.

The title of an Act is a part of it; it limits its scope, and is properly used in interpreting its words.

Perkins *v.* Philadelphia, 156 Pa. 554.
Com'th *v.* Samuels, 163 Id. 283.

A mine properly speaking, is the pit or excavation in the earth, from which the ore is taken. The term is certainly used to include the bed or vein of ore into which the pit enters, so far as may be necessary to the working of the mine, and the whole series of shafts and subterranean passages and chambers connected with it. But neither in ordinary parliance nor in strict technical language, is a mine understood to indicate the entire ore bed with which the shaft is connected.

Shaw *v.* Wallace, 1 Dutch, 453.
Haddock *v.* Com'th, 103 Pa. 243.

At the time the civil engineer for both petitioner and respondents made a location of a proposed road, the respondents had no opening, entry, head-way, room, drift or slope within several hundred feet of the proposed lateral railroad.

This location of a railroad by survey is a taking, and appropriation of the land, although the actual construction is not begun for years afterwards.

Railroad Co. *v.* Com'th, 101 Pa. 196.
Johnston *v.* Callery, 184 Id. 146.

Even if the Act of 1883 should be declared to be in force, the interference or danger spoken of in the Act is not mere inconvenience or incidental and temporary interferences, but such dangers and interferences as would be of a permanent, substantial character, something that would effect the physical condition or existence of the mine, dangers and interferences that would result from the construction of the road, not those which are predicated or might result from a remote contingency that does not happen once in one thousand instances. They should be real, not imaginary or speculative. Every taking, under the right of eminent domain, is to a greater or less extent, an interference with the right of enjoyment of one's property; but where that interference can be fully compensated for in damages for the injury sustained, the decisions of the Court have been universally in favor of the taking

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of private property for public use, notwithstanding such inconvenience.

Pa. Coal Co. *v.* Sanderson, 113 Pa. 149.
Chartiers B. C. Co. *v.* Mellon, 152 Id. 294.

N. Ewing, (*R. H. Lindsey* and *Johnson* with him), for appellees.

The ground upon which the constitutionality of the Act of 1883 is assailed is, in reality, that the title does not enumerate all its provisions. The Act is not an original enactment, but a brief supplement to the Act of 1832. Consequently, according to all the decisions, if the subject of the original Act be sufficiently expressed in its title, and the provisions of the supplement are germane to the subject of the original, the "rule is that the subject of the supplement is covered by a title which contains a specific reference to the original by its title, giving the date of its approval, and declaring it to be a supplement thereto": Phila. *v.* Ry. Co., 142 Pa. 491. This is precisely what the title of the Act of 1883 does, and, in addition thereto, it also states the specific purpose of the supplement by following the recital of the date and title of the original Act with the words "authorizing the owners or lessees of iron ore or coal mines to construct lateral railroads from coal mines to any railroad, public road or navigable stream within the county in which said mines are situated."

Phila. to use *v.* Market Co., 161 Pa. 527.
Craig *v.* First Presbyterian Church, 88 Pa. 45.
Allegheny County Home's Appeal, 77 Id. 78.

If this provision upon which the respondents rely can possibly be declared unconstitutional, then that for locations "partly over and partly under" intervening lands must fall also, and for the same reason, and this proceeding must, therefore, fail. But, it is submitted, the law is constitutional and effective. It consequently works an amendment to all prior Acts upon the same subject.

Com'th ex rel. *v.* Taylor, 159 Pa. 457.

The opinions of experts as to what constitutes a mine in this locality should have great weight, for the legal rule is that terms of art, or technical terms must be taken according to the acceptation of the learned in each art, trade, and science.

Dwarris on Statutes, pp. 188-9 and 274.

Many cases have arisen in Pennsylvania involving the right of a tenant for life to work the coal underlying the land in which his estate exists, and the rule adopted in those cases is, that if the seam of coal has been opened in the lifetime of testator, or decedent, the mine may be worked to exhaustion, that is, to the extreme boundaries of the tract, but if the seam has not been opened or worked, then it is not a mine, and cannot be worked. Clearly showing that the coal alone is not a mine, and that the excavations alone are not a mine; but that the workings and the coal together constitute a mine.

Westmoreland Coal Co.'s Appeal, 85 Pa. 344.
Neel *v.* Neel, 7 Harris, 323.
Shoemaker's Appeal, 106 Pa. 394.

The language of the proviso of the Act of 1883 is clear and unambiguous: "Said lateral railroad shall not extend beyond the limits of the county in which said mines may be situated, nor pass through, disturb the operating, or endanger the safety of any other mine."

It needs no "construction."

Haddock *v.* Com'th, 103 Pa. 249.
Damon's Appeal, 119 Id. 295.
Yough. River Coal Co. *v.* Robertson, 12 C. C. R. 1,

May 31, 1899. McCollum, J. The appellant is the lessee and operator of a coal mine abutting on the Monongahela river, and he is also the owner of the Pittsburgh or Monongahela seam of bituminous coal underlying two hundred and sixty-four acres of land situate some distance from the coal mine above mentioned and from the river on which said mine abuts. Between the two hundred and sixty-four acres and the coal mine of which the appellant is lessee a portion of a tract of land containing about four hundred and fifty acres intervenes. It is known as the Albany mine and is owned by Mrs. C. L. Snowden, Mrs. E. S. Hackney and Miss Mary Hogg, who have leased it to Snowden, Gould & Co. for a term of years. The mine has been operated since 1884 and has all the requisites for a reasonably safe and successful operation of it, including, inter alia, "draining and ventilating system and plant, electric plant, boilers, engines, blacksmith shop, boiler houses, thirty or forty tenement houses, 225 carts," etc. The lessees having regard to the term of their lease are prosecuting, with due diligence, the work of mining and removing the coal underlying said tract. The Albany mine includes all the coal underlying the intervening land and is clearly a coal mine within the meaning of the Act of July 5, 1883, P. L. 176. This sufficiently appears in the testimony which fully sustains the finding of the learned Court below on this branch of the case.

The appellant acquired title to the coal underlying the two hundred and sixty-four acres by two deeds, one of which was dated January 31, 1898, and the other was dated February 1, 1898. Previous to the execution of the deeds the appellant had no interest in the coal enforceable against his grantors or the owners or lessees of the coal land intervening. On February 14, 1898, he filed a petition in the Court of Common Pleas of Fayette county, alleging, inter alia, that he labored under great inconvenience for want of "a

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private roadway or heading under the surface of the ground from a point at or near the eastern terminus of the main heading" of the coal mine leased to him, and from thence to a point in the western boundary underlying the two hundred and sixty-four acres, which "private roadway or heading," he claimed would necessarily pass under and through the intervening land and coal underlying it, for a distance of about 1743 feet. The prayer of the petition was for the appointment of "properly qualified persons to view the place proposed for said road, and to lay out the same, if they deemed it necessary, and to assess the damages sustained therefrom" by the owners of the intervening land and the lessees of the coal thereunder. On February 28, 1898, exceptions to this petition were filed by the owners and lessees of the intervening land and coal. On March 21, 1898, the appellant filed another petition in which he alleged that he had surveyed and marked a route through the aforesaid intervening land and coal for a lateral railroad of the width of twenty feet, which route, he claimed, was particularly set forth and described in the plan annexed thereto. The petition concluded with a prayer for the appointment of "six disinterested and judicious men, resident in said county of Fayette to view the said marked and proposed route for a railroad and examine the same, and to make report in writing according to the provisions of the statutes in such cases made and provided, whether the railroad petitioned for is necessary for public or private purposes, as well as the damages which shall be sustained by the owners of the intervening land." The proceeding under the first petition was discontinued on March 30, 1898, and the second petition was disposed of by the learned Court below upon due consideration of the petition, the exceptions and answer thereto, and the testimony submitted by the parties. The result of the hearing had was a refusal to appoint viewers and a dismissal of the petition.

The principal contention of the appellant, as shown by the printed argument in his paperbook, is that the proviso to the Act of 1883 is unconstitutional, and that the property through which he proposes to locate and construct a lateral railroad of the width of twenty feet is not a coal mine. It must be conceded, however, that a railroad located as shown on the plan annexed to the petition would pass through the intervening land and coal a distance of at least 1714 feet, and intersect and cross the main entry and haulage way of the mine of Snowden, Gould & Co., whose lease includes all the coal underlying the four hundred and fifty acres, and whose plan for mining and removing the coal was definitely formed in 1895 and has been consistently maintained and adhered to since that time. The suggestion that the lessees in the formation and prosecution of their mining plan had in view the prevention of the appellant's purpose to locate and construct a lateral railroad, through the invening land and coal in which they were interested, does not appear to be supported by the testimony in the case. As the appellant did not acquire title to any portion of the coal under the two hundred and sixty-four acres until January 31, 1898, and the main entry and haulage way was extended beyond the route of the proposed railroad before the lessees had notice of his intention to petition for a view, there is but little room or basis for the suggestion. Where the size of the plant is in proportion to the area of coal to be mined and "a plan of the mining operations to be pursued in the mining of the coal" has been formulated and followed, the plant, the plan of operation, and the area of coal with which they are connected, may be designated as a coal mine. The learned Judge of the Court below, in his opinion dismissing the appellant's petition, has forcibly stated the reasons for his conclusion that the property to which this contention relates constitutes a coal mine within the meaning of the Act aforesaid. We approve his conclusion and the reasoning which supports it.

We cannot assent to the appellant's contention that the Act of 1883 is invalidated, in whole or in part, by a defective title. It is now well settled that "when an Act is declared to be a supplement to a former Act, if the subject of the original Act is sufficiently expressed in its own title and the provisions of the supplement are germane to that subject, the subject of the supplement is sufficiently covered by a title containing a specific reference to the original by its title with the date of its approval." The Act of 1883 is in our opinion clearly within this rule and applicable to the case at bar. The specifications of error are dismissed and the decree of the Court below is affirmed.

W. C. S.

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WEEKLY NOTES OF CASES.

VOL. XLIV.] *FRIDAY, AUG. 4, 1899.* [No. 18.

Supreme Court.

Jan. '98, 150. Supreme Court. February 22, 1898.

Scranton Gas and Water Co. v. Northern Coal and Iron Co.

Equity—Railroads— Gas companies—Eminent domain—Franchise—Act March 17, 1869, P. L. 12.

A railroad corporation cannot appropriate land previously appropriated by a gas and water corporation, and essential to its present or future needs, unless the necessity is so absolute that without it the railroad company's franchise will be defeated. No considerations of expense or inconvenience, in the absence of such necessity, will warrant such taking, under the claim of eminent domain.

Appeal of the Scranton Gas and Water Company, from the decree of the Common Pleas of Lackawanna County, in a proceeding in equity to restrain the Northern Coal and Iron Company, defendant, from entering upon land of the plaintiff.

The plaintiff had been the owner for thirty years of a lot of ground in the city of Scranton, upon which a building had been erected for the purpose of carrying on the business of the company.

The defendant instituted proceedings on the law side of the Court for the purpose of taking possession of a portion of the lot. The bill asked that the defendant be restrained from taking possession and for general relief.

The answer set forth: That the power of eminent domain, conferred upon the plaintiff, is restricted to the right, "by themselves, their agents, engineers and workmen, to take water from any stream, and with their tools, carts, wagons and horses to enter upon lands and enclosures, streets, lanes and alleys, roads, highways and bridges, as may be necessary to occupy or to obtain necessary materials for the construction of the said works, and to occupy, ditch and lay pipes, and from time to time to repair the same," and that such right of eminent domain does not extend to the taking of land upon which to erect works or buildings for the manufacture of gas.

That, by reason of the vast increase of its business, the single track originally built has become inadequate to the requirements of the defendant company, and it has become necessary for the discharge of its duties to the public and for the safety of the traveling public that it should build a second track.

That the defendant company has located its second track and has completed the same, "and that it is absolutely necessary that the defendant company should take and occupy the said lot for the performance and discharge of its duties to the public."

The bill and answer were referred to L. H. Bennet, Esq., as master.

The master found as a fact that the plaintiff had sufficient property irrespective of the lot in question to exercise its franchise and discharge its duties to the public, and that there were three possible routes by which the defendant could obtain its object without disturbing the plaintiff, but that they were impracticable and that the cost of establishing a route was too great for the defendant to be compelled to assume.

The Court, GUNSTER, J., dissolved the injunction in part. The plaintiff thereupon appealed.

E. Warren and *D. T. Watson*, (with them *A. Hand* and *W. J. Hand*), for appellant.

The defendant's charter only permitted it "to construct and erect lateral railroads from its mines, either of coal or iron, not exceeding twenty miles in length, to connect with any railroad now constructed or to be hereafter constructed in the county of Luzerne."

Act April 27, 1864, P. L. 627.

It subsequently, by a supplement to this Act, was invested "with all and singular the rights, powers and privileges conferred by and made subject to all the conditions contained in an Act entitled 'An Act regulating railroads,' approved February 19, 1849."

It is doubtful whether the general corporation Act of March 17, 1869, applies to companies chartered under the general Act of February 19, 1849.

Marlor *v.* Railroad Co., 166 Pa. 524.

In order to take a franchise of a corporation under the right of eminent domain there must be no implication. The necessity which compels it must be so absolute that without it the grant itself would be defeated.

Pittsburgh Junction R. R. Co.'s Appeal, 122 Pa. 511.
Sharon R. R. Co.'s Appeal, 122 Id. 533.
Pennsylvania Railroad Company's Appeal, 93 Id. 150.

To take such property the authority must be expressed in clear terms or by necessary implication.

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Groff's Appeal, 128 Pa. 632.

J. H. Torrey and *G. R. Bedford*, for appellee.

Lands of a railroad company not actually in use by them or absolutely necessary for its business are subject to be taken under the exercise of the right of eminent domain.

Railroad Co. *v.* Railroad Co., 66 Ill. 174.

The master has found that the occupation of the lot of ground was not essential to the exercise of the plaintiff's corporate right.

"In determining whether a power generally given, is meant to have operation upon lands already devoted by legislative authority to a public purpose, it is proper to consider the nature of the prior public work, the public use to which it is applied, the extent to which that use would be impaired or diminished by the taking of such part of the land as may be demanded for the subsequent public use."

City of Buffalo, 68 N. Y. 175.

Northern Central R. R. Co.'s Appeal, 103 Pa. 628-9.

The development of the country and the promotion of its prosperity, for which all corporate powers are conferred, are weightier considerations than private interests or the convenience of corporations.

Pittsburgh Junction R. R. Co. *v.* Allegheny Valley R. R. Co., 146 Pa. 297.

The plaintiff has a right to lay a second track at this time.

Comm. *v.* Erie & N. E. R. R. Co., 27 Pa. 354.

"In measuring the extent of a railroad company's rights, there must be liberal construction for the future as well as the existing necessities of the company, the use of existing tracks, the construction of additional ones . . . and the unembarrassed transaction of all its business."

L. S. & M. S. R. R. Co. *v.* N. Y. C. & St. Louis R. R. Co., 8 Fed Rep. 858.

May 31, 1899. STERRETT, C. J. In its decree, the learned Court below continued the injunction, theretofore awarded, as to the greater part of the lot described in the bill, and dissolved the same as to the residue of said lot. This appeal is from so much of the decree as releases said residue from the operation of the injunction.

Among other things, the bill in substance avers that under its right of eminent domain, the plaintiff company took possession of the lot 40 feet front on Mechanics street by 150 feet in depth, being lot No. 2 in block 19 on the town plot of the city of Scranton, on which it erected for the purposes of its business a building, 60 feet front by 120 feet in depth, which it has continuously used for the purposes of its business; that the use of said lot is absolutely necessary to the business in which plaintiff is engaged, viz.: furnishing the city of Scranton and the inhabitants thereof with a supply of pure gas; that its plant for the manufacture of gas, erected at an expense of over $200,000, is located on adjoining lots and is separated therefrom only by the present right of way of the defendant company, and that said property, including the lot above described, is absolutely necessary for the supplying of gas to the public and has been so used without let or hindrance thirty years and upwards last past; that the defendant company has instituted proceedings on the law side of the Court for the purpose of taking possession of said lot No. 2, etc.; and this is followed by a denial of the defendant's right to take said property, and a prayer for an injunction, etc.

On the coming in of the answer, etc., the case was referred to a master, who found substantially the following facts: Defendant's railroad extends from the city of Wilkes-Barre, through the city of Scranton, to Green Ridge in Lackawanna county, a distance of over twenty miles, and is a connecting link between the Wyoming region of the anthracite coal field and the railroad system of the Delaware and Hudson Canal Company in the State of New York. An average of twenty-four passenger and seventy freight and coal trains pass over defendant's road daily, and by reason of its constantly increasing traffic, its whole line has been double tracked, except for a distance of about five hundred feet extending through lot No. 2 of plaintiff's gas plant. This line of single track runs for some distance in a measure parallel with the Lackawanna river, on the low lands lying southeasterly along said river and at the foot of a steep bluff, rising from the interior curved line of the right of way of the railroad from twenty to thirty feet and bounding, on the northwest, a plateau on which a built-up portion of the city of Scranton is located. The line of defendant's railroad, including the single track, may be said to describe a half circle with a base of about fifteen hundred feet. Lying between this track and the river is the main plant of plaintiff's gas works.

On the hearing, plaintiff introduced evidence to show the practicability of completing defendant's double-track system without appropriating lot No. 2 aforesaid, or any part of it. Three methods were proposed: (*a*) The construction of a tunnel underneath the plateau, and in the neighborhood of the base line of the half circle described by the present track; (*b*) by the construction of an additional track for a distance of sixteen or seventeen hundred feet, diverging from the present track in such manner as to avoid lot No. 2, leaving it between the tracks; and (*c*) by the construction of two tracks, substantially

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on the same line as that last indicated, by abandonment of the present track and right of way through plaintiff's land, and the taking of a sufficient strip from lot No. 2 on the side furthest from the gas works proper, and thus running lot No. 2, so to speak, up against plaintiff's present land, and leaving lot No. 2, as thus moved, untouched.

The master reported that "the tunnel route (*a*) is impracticable by reason of its expensiveness as well as engineering difficulties." After considering the methods of the other two routes proposed by plaintiff and the attendant difficulties, he concludes thus: "While the defendant might operate its railroad after the completion of either the (*b*) or (*c*) method of accomplishing its double-track system, yet the occupancy of lot No. 2, for that purpose, by placing thereon an additional track immediately adjoining its present single one, as propsed by it at the time of filing this bill, is, from an engineering standpoint, both as regards construction, and subsequent use by defendant, the most practicable and feasible method; and, in addition to this consideration, the defendant would be thereby saved in the item of construction alone, an expenditure of $62,000, as already indicated, and the use of Bridge and Scranton streets, as public highways at their present grades, would better subserve the needs of public travel."

The master does not find that a double track, at the point in question, is imperatively necessary to the defendant company's business, and, while he might possibly have so found from the evidence, it is quite apparent from his conclusions above quoted that there exists no necessity that impels defendant to take plaintff's land for its additional track. It is simply a question of economy or convenience, or both combined. This is not sufficient to justify the taking of property which has heretofore been acquired under the right of eminent domain and for many years devoted to public use by another corporation. As was said by Mr. Justice GORDON in Pennsylvania Railroad's Appeal, 93 Pa. 159: "It is true that a franchise is property, and, as such, may be taken by a corporation having the right of eminent domain, but, in favor of such right, there can be no implication unless it arises from a necessity so absolute that without it, the grant itself will be defeated. It must also be a necessity that arises from the very nature of things, over which the corporation has no control. It may not be a necessity created by the company itself for its own convenience or for the sake of economy. To permit a necessity such as this to be used as an excuse for the interference with, or extinction of previously granted franchises, would be to subject these important legislative grants to destruction on a mere pretence, in fact at the will of the holder of the latest franchise."

After reciting the above quotation, Mr. Justice PAXSON, in Pittsburgh Junction Railroad's Appeal, 122 Pa. 532, employed language especially applicable to the case at bar: "The location claimed for the defendant is a matter of economy, not of necessity. It can construct its road and reach its terminus by another route. It is true, it would be expensive, but it is a mere question of money and engineering skill. It is not entitled to run through plaintiffs yard and cripple its facilities for handling its business, merely to save money."

In Sharon Railroad Company's Appeal, 122 Pa. 533, the same learned Justice, reiterating the same principle, says: "It is settled law and rests upon sound principles." The same principle is reaffirmed in Groff's Appeal, 126 Pa. 633, and again in Perry County Railroad Extension Co. *v.* Newport & Sherman's Valley Railroad Co., 150 Pa. 200.

It may not be amiss to say that there is nothing new or exceptional in the rule that the test of the power to take by implication is "a necessity so absolute that without it the grant itself would be defeated." Implied powers in all cases rest on this basis. Any other rule would be subversive of the law of corporate authority. The rule relating to the appropriation by one corporation of land already dedicated to public use by another corporation and necessary for the proper exercise of its corporate functions, is too firmly established on both principle and authority to be seriously questioned.

Before this bill was filed, the defendant company had instituted proceedings at law to condemn the whole of said lot No. 2. This was an assertion of the necessity of the whole for its corporate purposes; and the answer filed in this case reiterated that claim. At the close of the hearing before the master, the defendant, in the language of the master, admitted, "that it was sufficient for the construction and operation of the additional track that it should take no more than a strip of said land (lot No. 2) twelve feet wide and parallel with its existing right of way," and "specified as the quantity of plaintiff's land which it was necessary and essential for the purposes of the defendant, a strip east of defendant's present track, whose centre line shall be parallel with and twelve feet to the east of the centre line of its present track, leaving an open space to the east of the centre line of such additional track equal to the space between the centre line of its present track and the land or building of the plaintiff company." While it may be con-

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ceded, as before stated that this amount of land finally claimed may be reasonably necessary to the defendant for its corporate purposes, it is certainly plain that there is no such necessity as would justify it in taking it from the plaintiff.

These considerations are sufficient to dispose of the controlling questions in this case; but, a few words on another branch of the case may not be amiss, viz., the necessity of the whole of lot No. 2 for plaintiff's corporate uses. The master found that said lot was devoted by plaintiff to public uses, and "that the use was not merely incidental or casual or as a matter of accommodation in the operation of its plant"; but he further found that it was not an essential part of plaintiff's plant. On exceptions to his report, the learned Judge of the Court below disagreed with the master's conclusions, except as to the strip twelve feet wide, and he accordingly dissolved the injunction as to that strip and made it perpetual as to the residue of lot No. 2.

The findings of facts and his reasonings thereon should have led him to the logical conclusion that the injunction should be made perpetual as to the whole of the said lot No. 2.

It appears to us that the learned Court below attached too much importance to the immediately present needs of the parties and not enough to their future needs. Our consideration of the evidence, has led us to the conclusion that it presents a much stronger case, in plaintiff's favor, than appears in the opinions of the master and the Court below. Defendant's expert witness, Byrne, in his examination in chief speaking of the value of lot No. 2, said: "Restricted as they are for ground there, it might be of more than ordinary value to the gas company." He also admitted that on account of the conformation of the ground of lot No. 2, the expense of a retaining wall would be enough to prevent the use of the lot for building purposes after the strip twelve feet wide was taken off. The witnesses substantially agree that the cost to the plaintiff in re-arranging the gas plant in accordance with the defendant company's suggestion, would equal, if not exceed the additional cost to the defendant of adopting one of the alternative routes that would not injure the plaintiff company. There are also grave doubts whether the plans suggested on behalf of the defendant are either feasible or safe. But, it is not our purpose to discuss the evidence. Enough has been said to show that the learned Court below erred in not making the injunction perpetual as to the whole of said lot No. 2.

The decree of the Court below is accordingly reversed and set aside; and it is now adjudged and decreed that the defendant company, its agents, workmen, servants and employés be, and they are hereby severally enjoined forever from entering upon or taking possession of plaintiff's lot No. 2, described in the bill, or any part thereof, and also from laying railroad tracks thereon, or in any manner obstructing the plaintiff company in the free use and enjoyment thereof; and it is further ordered that the defendant company pay all the costs, including the costs of appeal.

W. D. N.

Jan. '98, 401. Supreme Court. February 15, 1899.

Boone v. East Norwegian Township.

Negligence— Road without guard rail— Proximate cause.

Whether the township authorities are guilty of negligence in leaving a declivity on the side of a road on which an accident occurs without a guard rail, and whether that negligence is the proximate cause of the accident, are for the jury to determine.

Appeal of the Township of East Norwegian, defendant, from the judgment of the Common Pleas of Schuylkill County, in an action for damages for the death of Ransloe Boone, at the suit of Anna E. Boone, his widow.

On May 4, 1896, Ransloe Boone and his wife were driving, about dusk, along the public road in East Norwegian township, in a phaeton, drawn by a horse five or six years old, that had been owned and used by Mr. Boone about two years. The road was one of the most frequented in the locality and connects the boroughs of Port Carbon and Saint Clair, toward the latter of which, where he resided, Mr. Boone was going. Along the western side of this road had been built an electric railway, operated by the Schuylkill Electric Railway Company. When they had reached a point some feet north of a curve in the road, where it is practically level, they met a team, driven in the opposite direction, and his horse made an abrupt turn to the left, dragging the wagon over the electric railway and down the bank, which, at a pitch of from 34 degrees to 27 degrees, fell a vertical distance of about 11 feet in a horizontal distance of 17.8 feet; the carriage was upset, both of its inmates thrown out, and Ransloe Boone suffered a fracture of the skull, from which he died almost immediately. The public road for a distance north and south of the place where the accident occurred had been cut out of the hill side and had a high bank on its eastern side and on its western side the declivity mentioned. Near the point of the accident the eastern bank compresses the road into a width of 12.7 feet exclusive of the water channel on the east and the line of the electric railway on the

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west. The road widens in both directions from this point, and opposite the place where Mr. Boone's body was found there was a clear traveling way for vehicles of 18.8 feet or including the water channel on the east and electric railway on the west the road has a width of nearly 30 feet. The electric railway, laid with T rails on ties, practically renders from six to eight feet on the western side of the road unavailable for teams. There was no rail or other protection along the top of the bank. Mrs. Boone brought two suits against East Norwegian township, one to recover damages for the loss of her husband and the other to recover for her own injuries; the cases were tried together, before SAVIDGE, J., specially presiding, and resulted in verdicts for the plaintiff of $2000 and $325 respectively, from which appeals were taken to this and the Superior Court, respectively. At the trial the defendant requested the Court to charge the jury as follows:

"1. The uncontroverted evidence in the case shows, that the approximate cause of the injury, complained of in the above cases, was the accident of the horse driven by Ransloe Boone jumping and kicking in such an extraordinary manner, as to get his right hind leg over the shaft and becoming unmanageable, and the verdict must be for the defendant."—"Refused."

"5. That under all the evidence in the cases the verdict of the jury must be for the defendant." —"Refused."

Fergus G. Farquhar, (*James B. Reilly* with him), for appellant, cited—

Horstick *v.* Dunkle, 145 Pa. 220.
Titus *v.* Inhabitants of Northbridge, 97 Mass. 258.
Yoders *v.* Amwell Twp., 172 Pa. 448.
Bitting *v.* Maxatawny Twp., 177 Id. 215.
Hey *v.* City of Phila., 81 Id. 44.
Potter *v.* The Gas Co., 183 Id. 589.
Jackson Twp. *v.* Wagner, 127 Id. 184.
Schaeffer *v.* Jackson Twp., 150 Id. 145.
Kieffer *v.* Hummelstown Borough, 151 Id. 304.
Worrilow *v.* Township, 149 Id. 40.
Herr *v.* Lebanon, 149 Id. 222.
Willis *v.* Armstrong Co., 183 Id. 184.
Howard Ex. Co. *v.* Wile, 64 Id. 201.
Koons *v.* Steele, 19 Id. 204.
Whitehill *v.* Wilson, 3 P. & W. 405.
Sartwell *v.* Wilcox, 8 Harris, 117.
Evans *v.* Mengel, 1 Barr, 69.
P. & R. R. R. *v.* Yerger, 73 Pa. 121.

E. D. Smith, (*S. H. Kaercher* with him), for appellee, cited—

Wray *v.* Spence, 145 Pa. 399.
Scranton *v.* Barnes, 147 Pa. 461.
Medary *v.* Cathers, 161 Id. 87.
Vannatta *v.* Central R. R., 154 Id. 262.
Hoag *v.* Lake Shore R. R. Co., 85 Id. 293.
Yoders *v.* Amwell Twp., 172 Id. 447.

July 19, 1899. GREEN, J. The learned trial Judge submitted carefully and with entire correctness two questions of fact to the jury. The first of them was, whether the township had been guilty of negligence in leaving the declivity on the side of the road where the accident occurred without a guard rail, and the second was, whether that negligence was the proximate cause of the accident. On the first question there was an abundance of testimony to the effect that there was necessity for a guard rail at the place in question, and the jury by their verdict for the plaintiff, has established the fact of negligence in this respect. It is not now contended on behalf of the defendant that this is an open question or that there is any thing for discussion in this Court on that subject.

On the second question as to proximate cause, the appellant contends that it was the duty of the Court to instruct the jury to find that the absence of the protecting rail was not the proximate cause of the accident, and that they should therefore return a verdict for the defendant. The Court declined to give such instruction but left to the jury the determination of the question upon a consideration of all the testimony affecting the subject. Was this erroneous? It must be confessed that there is some embarrassment in the disposition of cases of this character growing mainly out of the fact that the injury suffered results from the act of an unruly horse owned and controlled by the party injured at the moment of the accident. It is clear that in some cases there should be no liability for such results on the part of other persons, and we have so held in several instances cited in the appellant's brief. These decisions were based upon the special and peculiar circumstances of each case and do not necessarily determine the contention now before us. In the two cases which approach quite nearly to this, in regard of the fact that the absence of a rail at the summit of a declivity permitted the fall of a vehicle down the declivity, there was a fault of the party injured which contributed to the injury, and that circumstances affected materially the ultimate decision. In one of them: Herr *v.* Lebanon, 149 Pa. 222, the wagon was overloaded and the horse fell down in its attempts to regain its feet, and in making these attempts dragged the wagon over an unprotected bank. In Willis *v.* Armstrong, 183 Pa. 184, it was the breaking of insufficient traces that caused the wagon to run backwards over an unguarded declivity. In both of these instances there was a concurring fault of the party injured which contributed to the injury and prevented a recovery.

But in the case which was most analogous to this: Yoders *v.* Amwell Township, 172 Pa. 448, and which was followed by the Court below, we held that the question of proximate cause was properly submitted to the jury. In that case a

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horse drawing a wagon had safely passed, in the night time, over a bridge without guard rails and being stopped for a temporary purpose at a point about fourteen feet from the bridge, suddenly took fright and backed the wagon on the bridge and over the side of it, thereby injuring the plaintiff. We there held that the absence of the guard rail was the proximate cause of the injury. The Court below had instructed the jury that the absence of the rail was not the proximate cause of the injury and the defendant was not liable. We reversed the judgment. In an elaborate and most carefully considered opinion, our brother DEAN fully reviewed the evidence and the authorities and showed with conclusive force, that the question of proximate cause was for the jury in the circumstances which were there developed, and further held that in those circumstances the absence of the guard rail was the proximate cause of the injury. He thus summed up the whole matter in controversy and formulated a rule which should have been applied to that case and which applies also to this. "The township authorities were bound to foresee and reasonably provide against a common danger to ordinary travel, on that highway; it is well known that one of such dangers arises from the habit of fright in the horse, and it is just as well known that when affrighted no one can foretell his conduct; the presence of guard rails would have been a protection from the danger of going over the bridge no matter what the movement of the horse; therefore the habit of the horse being known, they ought to have put up the guard rails, and their neglect of duty in this particular was the proximate cause of the injury. Or to express it in another form. The fright of the horse was ordinary and to be expected; that his conduct when in fright would be unreasoning, insane and unlooked for, was also to be expected; if it were otherwise, it would have been extraordinary, because, contrary to common observation, the township authorities should have guarded against that which was to be expected, and it will not excuse the negligence of the supervisors, or make that negligence the remote cause to assert they could not foresee the particular freak of conduct in a terrified horse."

This ruling was followed in the case of Bitting *v.* Maxatawny Twp., 177 Pa. 215, and must be considered as the settled law in all cases in which it is applicable to the facts. We are quite clear that the learned Court below was correct in holding that it ruled the present controversy. The fright of the horse was the occasion of the accident unmixed with any element of contributory fault on the part of the plaintiff. The immediate and producing cause of the accident was the absence of a guard rail on the edge of the declivity. It was the duty of the supervisors to anticipate that accidents arising from the fright of horses might result in the ordinary use of the highway for purposes of travel and the neglect of that duty was the proximate cause of the accident. The question of proximate cause, having reference to the special circumstances of this case, was committed to the jury with very careful and precise instructions, and the jury found as a fact that the absence of a guard rail was the proximate cause of the accident. This finding was in accord with the testimony. The kicking of the horse was only an incident of his fright which might readily happen in any case of fright and is not to be regarded as the producing cause of the falling of the wagon over the declivity. The assignments of error are not sustained.

Judgment affirmed. W. C. S.

Jan. '99, 48. Supreme Court. April 11, 1899.

Barnes v. Fidelity Mutual Life Association.

Life insurance — Policy — Contract — "Good health."

The term "good health" when used in a policy of life insurance, means that the applicant has no grave, important or serious disease and is free from any ailment that seriously affects the general soundness and healthfulness of the system. Therefore, when the application for insurance contains a statement "that I am in good health and free from any and all diseases, sickness, ailments or complaints, trivial or otherwise," the death of the insured a month later is not of itself sufficient to deprive the jury from passing on the question whether the insured was ill two days before his death of the disease which proved fatal, at which time the premium on the policy was paid, which, according to its provision, was essential to the validity of the policy.

Appeal of the Fidelity Mutual Life Association, defendant, from the judgment of the Common Pleas of Luzerne County, in an action of assumpsit wherein Mary A. Barnes was plaintiff.

The facts of the case appear in the opinion of the Supreme Court.

Upon the trial, before LYNCH, J., the defendant submitted points for charge as follows:

"1. That the application for insurance contains the following representation which is material to the risk: 'That I am now in good health, and am free from any and all diseases, sicknesses, ailments, or complaints, trivial or otherwise,' and that the plaintiff's testimony shows that deceased was sick and confined to his bed at the time the first premium was paid and the contract delivered; the contract is therefore void and the plaintiff cannot recover in this action.

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"2. That one of the conditions upon which the contract of insurance was to be binding, was that a receipt for the payment, in cash or its equivalent, of the first premium, signed by the president and treasurer of the company, and countersigned by the agent or person to whom payment is made, as evidence of such payment, be delivered with and accompany the policy within sixty days from the date hereof, and during the lifetime and good health of the person on whose life it is issued. That the plaintiff's testimony shows that claimant was sick on November 28, when the premium was paid and the policy delivered, had been sick since November 25, and that he died on November 30. That the policy is therefor void, and the plaintiff cannot recover in this action."

Both points were refused. Verdict for plaintiff. Defendant thereupon appealed.

H. W. Palmer, for appellant.

The plaintiff's obtaining possession of the policy, concealing from the company the fact that the insured was sick, she was guilty of a fraud and was also guilty of a violation of the law.

Act of June 10, 1881, P. L. 109, sec. 1.

A right of action cannot arise out of a fraudulent contract or out of the fraudulent performance of a condition of the contract.

Fisher *v.* Saylor, 78 Pa. 84.
Lansdale *v.* Richardson, 1 WEEKLY NOTES, 413.
Seidenbender *v.* Charles, 4 S. & R. 151.

A contract of insurance never becomes complete until the last act necessary to be done by either party has in fact been done.

Bacon's Benefit Societies and Life Ins., sec. 272.
Kohen *v.* Mut. Reserve Fund Ass'n, 28 Fed. Rep. 705.
Misselhorn *v.* Same, 30 Id. 545.

If the point be made that the question whether Barnes was in good health when the policy was delivered was one of fact for the jury, the answer is that it is error to submit an issue to the jury where there is not sufficient evidence to sustain it.

Ashbridge *v.* Kenyon, 15 Leg. Int. 158.
Canal Co. *v.* Torrey, 33 Pa. 143.
Elkins *v.* McKean, 79 Id. 493.
Railroad *v.* Alvord, 128 Id. 42.
Horn *v.* Hutchinson, 163 Id. 435.

J. T. Lanahan, (*E. A. Lynch* with him), for appellee.

The condition of the health of the insured, when the policy was issued, was essentially and entirely a question of fact, to be decided upon the evidence, involving the credibility of witnesses.

Keatley *v.* Ins. Co., 187 Pa. 198.

To violate a warranty of good health it must appear that the sickness was one having a tendency to shorten life or permanently impair health; in fact, that it amounted to a vice in the constitution.

Richards on Ins., sec. 173.

A man may be in sound health according to the common meaning and acceptation of those words, if he is in sound health so as not to be in danger, or not to be seriously sick—not to be affected in any way that would endanger his life or create any reasonable probability that his life was in danger.

Dietz *v.* Ins. Co., 168 Pa. 504.

Where a life insurance company defends a suit on a policy on the ground that the insured made untrue statements as to the condition of his health at the time he applied for the insurance, the case is for the jury, where there is a positive conflict in the evidence respecting the health of the insured at the time the policy was issued.

Smith *v.* Ins. Co., 183 Pa. 504.

The law in anticipation of fraud on the part of a company does not impose an absolute duty on the insured to read his policy, although it is certainly an act of prudence on his part to do so.

Kister *v.* Ins. Co., 128 Pa. 565.
Meyers *v.* Lebanon Ins. Co., 156 Id. 420.

May 23, 1899. STERRETT, C. J. This appeal, from the judgment entered in an action on a life insurance policy issued by the defendant association and dated November 14, 1893, presents the single question, whether there was sufficient evidence of "good health" of the insured, at the time the policy was delivered, to go to the jury.

On October 30, 1893, plaintiff's husband made application to defendant association for insurance on his life in the sum of $5000, payable upon his death to his wife, the plaintiff in this suit. Among other representations, the application contains the following: "That I am in good health and free from any and all diseases, sickness, ailments or complaints, trivial or otherwise." It is conceded that plaintiff's husband was in good health at the time his application was presented to and acted on by the defendant association. The policy was issued and sent to the local agent, Lewis L. Evans, for delivery upon payment of the premium. The latter was not paid until November 28, 1893, at which time the policy was delivered to plaintiff. At the foot of the policy is printed the following provision: "The policy issued hereon shall not become binding until the first payment due thereon has been actually received by the association or its authorized agent during my lifetime and good health." It was admitted that the insured contracted an ordinary cold on November 25, 1893, and that he died of pneumonia six days thereafter, but it was claimed by the plaintiff and the evidence tended to prove

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that pneumonia, the disease of which Mr. Barnes died—did not "set in" until the day after the premium was paid and policy delivered.

As stated in the learned trial Judge's charge, the questions in dispute were: "The real contention here, on the part of the plaintiff is, that while Mr. Barnes was sick and in bed from Saturday, November 25, until the night of Thursday, November 30, when he died, still the sickness up to and including the time when the policy was issued and the money paid by Mrs. Barnes, was simply trivial or temporary, as they believed, and that the serious illness which took Mr. Barnes's life set in the next day, or Wednesday evening, when he had a severe chill. The contention of the defendant is that Mr. Barnes was taken down on Saturday with a severe cold which steadily grew worse, and that at the time the premium was paid to Mr. Evans, Mrs. Barnes either knew, or ought to have known, her husband was a very sick man, and it was a fraud upon the company to have him insured."

In a fair and impartial charge these and subordinate questions were submitted to the jury by the learned trial Judge, who among other things said: "A temporary or slight cold in a man of usual good health . . . . . would not constitute unsound health." In view of the instructions, under which the case was submitted to the jury, on all the evidence, their verdict in plaintiff's favor necessarily implies that they found as a fact that when the premium was paid and the policy delivered, on November 28, 1893, Mr. Barnes was, according to the true intent and meaning of the policy, in "good health." That finding of fact definitely settled the controlling question in the case.

The jury were correctly instructed as to the meaning of the words, "good health." As stated by a learned text writer, the term "*good health*," does not mean absolute perfection, but is comparative. The insured need not be entirely free from infirmity or from all the ills to which flesh is heir. If he enjoys such health and strength as to justify the reasonable belief that he is free from derangement of organic functions, or free from symptoms calculated to cause a reasonable apprehension of such derangement, and to ordinary observation and outward appearance his health is reasonably such that he may with ordinary safety be insured, and upon ordinary terms, the requirement of "good health" is satisfied. Slight troubles, temporary and light illness, infrequent and light attacks of sickness, not of such a character as to produce bodily infirmity or serious impairment or derangement of vital organs, do not disprove the warranty of "good health." In other words, the term "good health," when used in a policy of life insurance, means that the applicant has no grave, important or serious disease, and is free from any ailment that seriously affects the general soundness and healthfulness of the system. A mere temporary indisposition which does not tend to weaken or undermine the constitution at the time of taking membership does not render the policy void: 3 Joyce on Ins., sec. 2004. "Colds are generally accompanied with more or less congestion of the lungs, and yet in such a case there is no disease of the lungs which an applicant for insurance would be bound to state": Cushman *v.* Insurance Co., 70 N. Y. 77.

It is unnecessary to refer in detail to the evidence. It was clearly sufficient to warrant the submission of the case to the jury on the question of the "good health" of the insured at the time the premium was paid and policy delivered to plaintiff, and other subordinate questions of fact in dispute. This is especially so, in view of the fact that the evidence was more or less conflicting on all material questions of fact. The case was clearly for the jury: Smith *v.* Metropolitan Life Ins. Co., 183 Pa. 504; Keatley *v.* Traveller's Ins. Co., 187 Pa. 197.

There is nothing in either of the specifications of error that requires discussion. Neither of them is sustained.

Judgment affirmed.

W. D. N.

Jan. '99, 74. Supreme Court. May 16, 1899.

City of Lancaster to Use etc. v. Frescoln et al.

Bond of contractor—Surety—Res adjudicata.

In an action against a surety, the obligation of a bond cannot be extended beyond the plain import of the words used.

The rule that what has once been judicially determined shall not again be made the subject of litigation, extends to every question in the proceeding which was legally cognizable.

A municipality entered into a contract with defendant for the construction by the latter of a reservoir, which provided that defendant should pay the wages of labor and the price of material used, and gave bond to do so. He failed to pay for certain material and action was brought upon the bond in the name of the municipality to the use of those who furnished the material. The defendant had, in a prior action against the municipality, recovered a balance found to be due him on the contract.

***Held,* that the prior action by the contractor to recover the balance claimed to be due him under the contract necessarily included every matter touching the present right; that the claims for labor and materials were unpaid was a proper ground of defence in that action, and all of these matters must be considered as conclusively adjudicated; that the**

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municipality could not maintain this action, and as the use plaintiffs have no standing here except upon its rights, it follows that they cannot recover.

Appeal of the American Surety Company, one of the defendants, from the judgment of the Common Pleas of Lancaster County, in an action by the City of Lancaster to the use of the Penn Iron Company, Limited, et al., upon a bond for the faithful performance by Samuel W. Frescoln of his contract in the building of a reservoir.

The facts are stated in the opinion of the Supreme Court.

William U. Hensel, (with him *Coyle & Keller* and *J. Hay Brown*), for appellant.

All liability on this bond was res adjudicata.

Bell *v.* Allegheny County, 184 Pa. 300.
Haun *v.* Trainer, 190 Id. 4.
Bank *v.* Miller, 179 Id. 412.

The city of Lancaster has no power to enter into a contract to protect those who deal with its contractors. Such arrangements are wholly in excess of its municipal functions and are against public policy; for, if the municipality can assume such power, it may be held responsible for the neglect or misuse of it. The same principle that forbids the attachment of municipal obligations rules this situation. What a municipal corporation is not expressly authorized to do is ultra vires; a doubtful power does not exist.

A person who is neither a party to a contract nor to its consideration cannot sue thereon, either in his own name or in the name of one of the parties to his use.

Mississippi Central R. R. *v.* Southern R. R. Assn., 8 Phila. 107.
Freeman *v.* Penna. R. R., 3 Dist. 733, affirmed in 173 Pa. 274.
Blymire *v.* Boistle, 6 Watts, 182.

The city of Lancaster is the legal plaintiff here. Its right alone is in question, and may be recovered upon or defended against, and the defendant is not permitted to dispute the form of the suit—

Guaranty Co. *v.* Powell, 150 Pa. 18.
Montgomery *v.* Cook, 6 Watts, 238.

and the equitable use is surplusage, even when traced in the pleadings.

McKinney *v.* Mehaffey, 7 W. & S. 278.
R. R. *v.* Wilcox, 48 Pa. 161.

E. D. Reilly, (with him *Appel & Appel* and *William Leaman*), for appellees.

Bonds similar to that in suit are common, and, in many States, are required by law.

A provision in a bond given to a township trustee for the payment by the principal for all material and labor employed in the construction of a school house inures to the benefit of the laborers and materialmen.

Williams *v.* Markland, 15 Ind. 669.
R. R. Co. *v.* Cuthbert, 14 Kan. 212.
Merriman *v.* Moore, 90 Pa. 78.

When a former judgment is shown by way of bar, whether by pleading, or in evidence, it is competent for the plaintiff to reply, that it did not relate to the same property or transaction in controversy in the action, to which it is set up in bar . . . . . where from the nature of the two actions, the cause of action cannot be the same in both, no averment will be received to the contrary.

1 Greenleaf on Evidence, § 532.

Both the litigants must be alike concluded, or the proceedings can not be set up as conclusive upon either.

1 Greenleaf on Evidence, § 524.

To make a matter res judicata, there must be a concurrence of the four conditions following, namely, first, identity of the subject matter; second, identity of cause of action; third, identity of persons and parties; fourth, identity in the quality of the persons for or against whom claim is made.

21 Am. and Eng. Enc. Law, 227.

"Parties" includes all directly interested in the subject matter, who have a right to defend or control the proceedings and appeal. Those not having these rights are strangers. The privity of the surety with his principal is in the contract, not in the action.

Giltinan *v.* Strong, 64 Pa. 242.

July 19, 1899. FELL, J. This action is upon a bond given to secure the compliance by S. W. Frescoln with the provisions of a contract into which he entered with the city of Lancaster for the construction of a reservoir. The contract provides among other things that Frescoln shall pay or secure the wages for labor and the price of materials used. The conditions of the bond are that he shall complete the work in a satisfactory manner, that he shall pay or secure the wages of laborers and the price of materials, and that he shall not employ alien labor. The action is brought in the name of the city of Lancaster to the use of three parties who furnished materials. The principal in the bond was not served, and the defence is made by the American Surety Company in its own interest only.

The main grounds of defence set up in the affidavit filed by the surety company are: first, that the bond imposes upon it no liability to the use plaintiffs; secondly, that all matters between it and the legal plaintiff arising out of the contract were adjudicated in an action brought on the contract by S. W. Frescoln against the city of Lancaster in which he recovered $13,750, the balance found to be due him for constructing the reservoir.

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A general ordinance of the city of Lancaster provides that contractors for city work shall be required to give additional bonds to the city for the use of any persons who may be aggrieved by their failure to pay for work done or materials furnished. The special ordinance authorizing the construction of the reservoir and awarding the contract required the contractor to enter security for the faithful performance of the contract. In an action on the bond given under the general ordinance an entirely different question would be presented, but this bond was not given under that ordinance. It is not an additional bond, and is not for the use of third parties. It was given under the special ordinance, and its conditions correspond with the stipulations of the contract. In an action against a surety the obligation of a bond cannot be extended beyond the plain import of the words used. This bond is given to the city of Lancaster, and primarily for its benefit; it is the only party entitled to sue, and no recovery can be had except in its right. That the use plaintiffs might incidentally be benefited by the city's withholding payment until their claims had been satisfied gave them no right of action. The bond is not like one given to secure the performance of official duties or one whose primary object is the protection of third parties, on which suit may be brought by the parties injured in the name of the nominal obligee.

The action brought by S. W. Frescoln against the city to recover the balance claimed to be due him under the contract necessarily included every matter touching this right. The rule that what has once been judicially determined shall not again be made the subject of litigation extends to every question in the proceeding which was legally cognizable. That the claims for labor and materials were unpaid by the plaintiff was a proper ground of defence in that action, and all of these matters must now be considered as conclusively adjudicated. The city could not maintain this action, and as the use plaintiffs here have no standing except upon the city's rights it follows that they cannot recover.

The judgment is reversed.

W. C. S.

Superior Court.

Oct. '98, 95. Superior Court. November 22, 1898.

Dutton v. Lansdowne Borough.

Negligence — Sidewalks — Action against landowner and municipality jointly.

The duty to keep the sidewalks in a municipality in order is imposed by law on the land owner and municipality equally, and when neither performs this duty there is a concurrent negligence for which they are equally liable to third persons, and for which they may be sued in one action.

While liable equally to third persons for the same cause, the land owner and municipality may not be equally liable one to the other. Liability grows out of neglect of duty and duty may be subordinate to power.

Klauder *v.* McGrath, 35 Pa. 128, and Durkin *v.* Coal Co., 171 Pa. 193, followed.

Whether or not notice of the defect in the sidewalk was brought home to the authorities of the borough is a question of fact for the jury.

Appeal of the Borough of Lansdowne, from the judgment of the Common Pleas of Delaware County, in an action of trespass, wherein Thomas Dutton and Phenettie Alice Dutton, his wife, were plaintiffs, and the appellant and one George W. Statzell, defendants.

On the trial of the case, before CLAYTON, P. J., the facts appeared as follows: On the morning of December 19, 1895, one of the plaintiffs, Mrs. Dutton, was walking on a wooden sidewalk in the borough of Lansdowne, in front of the property of the defendant, Statzell, when the sidewalk gave way and the plaintiff was thrown to the ground and severely injured. There was some evidence that the chairman of the highway committee of the borough of Lansdowne had received notice from the predecessor in title to the defendant, in October prior to the accident, that the wooden footway, at the point where the accident occurred was in bad condition and that it had already caused an accident to a pedestrian. The defendant, Statzell, took title to the property on December 10, 1895, nine days before the accident occurred. There was no evidence that the condition of the boardwalk was easily visible, but the accident seemed to have been caused by its rotting on the lower surface.

The defendants asked the Court to charge:

"If a sidewalk appears to be reasonably safe to passersby, although it may actually be unsound, and such unsoundness causes an injury, no recovery can be had against a borough for such injury. A borough is not bound to seek for defects in sidewalks, and is only liable for such as it has express notice of, and such as are notorious to passersby in general. If, therefore, a boardwalk is apparently sound on top, but decayed beneath, and an injury occurs from the breaking of a board from decay, no recovery can be had against the borough therefor." Answer—"I affirm that point, unless you find that from a previous repairing the borough knew of this rotten condition; and it is my duty to say to you that if the person that is employed to repair it knew it, then the borough knew it. They selected him

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to do the work, and his knowledge was theirs." (Second assignment of error.)

The Court declined to charge that if the accident occurred on the property of Statzell, the borough was not liable. (Fourth assignment of error.)

The Court refused to affirm defendants' fifth and sixth points, as follows:

"5. Inasmuch as it is the duty of property owners to keep the sidewalks in repair, even if the boardwalk were in the highway no recovery could be had against the borough where the property owner and the borough are joined in one action, because as between these two the liability of the borough is only secondary. Your verdict so far as the borough is concerned must be in its favor.

"6. The plaintiffs have not given any evidence of any injury caused by the joint action or negligence of the defendants. The failure to keep the sidewalk in repair was not a joint neglect and no recovery can be had in this action therefor. Your verdict must be for the defendants." (Fifth and sixth assignments of error.)

The Court charged the jury, as follows:

"You have two defendants here; one is the owner of the land fronting on the street, the soil belonging to him, but the public having the right to walk over it, and the borough requires him to keep that sidewalk over which the people of the borough travel in good repair at his own expense. While it seems to be unreasonable it is lawful; the law permits the borough to cast that part of the burden upon the owner of the land facing upon a street. But in order to fix liability upon him, it is necessary that he should have neglected some duty. I charge you that it was his duty to have an ordinary oversight, not an extraordinary, but a usual one, to see that the boardwalk was in a safe condition. He was not bound to inspect it every day, he was not bound to give it any more than the ordinary inspection that any gentleman would give to his own property, as a boardwalk on his own place leading from his house to his barn or any other improvement around such place; that is the kind of duty that is cast upon him." (Tenth assignment of error.)

The thirteenth and fourteenth assignments of error were to the Court's stating to plaintiffs' counsel in the presence of the jury:

"You understand, Mr. Robinson, I am only permitting you to go on against the borough; I don't think there is sufficient evidence against the landlord.

"There is not sufficient evidence here to hold your client without notice. I shall hold that there is not sufficient evidence against the landowner. The purpose of that ordinance is only compelling him to do it with notice."

The jury found for the defendant Statzell and for the plaintiffs against the borough of Lansdowne. The borough of Lansdowne thereupon appealed, assigning error as above stated.

L. L. Smith, for appellant.

The joinder in one action of both the borough and the property owner is improper. The ordinance requiring the property owners to keep the sidewalks abutting their property in good order would make the property owner failing to comply with the obligations of the ordinance liable to the borough for any damages the borough might sustain by reason of his failure in his obligation.

One of two joint wrongdoers cannot have contribution from the other.

Brookville Borough *v.* Arthurs, 130 Pa. 515.
Lohr *v.* Philipsburg Borough, 156 Id. 246.

It is the duty of a municipality to exercise a reasonable supervision over its sidewalks; but as the first duty in relation to them rests upon the property owner, and that of the city is secondary only, it is not liable for defects without notice, actual or implied, of their existence.

Duncan *v.* Phila., 173 Pa. 550.

A joint judgment against the borough and property owner would not be good, and the lower Court was in error in charging that the jury might find against both defendants. If there has been no concert, no common intent, there is no joint liability.

Klauder *v.* McGrath, 35 Pa. 128.
Bard et al. *v.* Yohn, 26 Id. 482.
Laverty *v.* Vanarsdale, 65 Id. 507.
Collins *v.* Cronin, 117 Id. 35.
Gallagher *v.* Kemmerer, 144 Id. 509.

A municipal corporation is not an insurer against all defects in its highways, but it is answerable for negligence in the performance of its duties in the construction and care of them. For a defect arising in them without its fault or neglect it is not liable unless it has express notice, or the defect be so notorious as to be evident to all passers.

Burns *v.* Bradford City, 137 Pa. 361.

The defendant, Statzell, may be presumed to have examined the property when he bought it and he became the owner of the property just nine days before the accident.

Palmore *v.* Morris, Tasker & Co., 182 Pa. 82.

In order to charge the owner of premises with notice the defect need not be so notorious as to be evident to all pedestrians passing in the immediate neighborhood.

Dickson *v.* Hollister, 123 Pa. 421.

V. G. Robinson, for appellee.

A joint action may be brought where the in-

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jury is the result of a neglect to perform a common duty resting on two or more persons, although there may be no concert of action between them.

Klauder *v.* McGrath, 35 Pa. 128.
Colegrove *v.* Railroad Co., 6 Duer, 382.
Colegrove *v.* Railroad Co., 6 Smith (N. Y.) 492.

It is enough that it appears both defendants may have been guilty of negligence in regard to that which caused the injury to plaintiff, to enable him to maintain his action against them jointly.

City of Peoria et al. *v.* Simpson, 110 Illinois, 300.
Weakly *v.* Royer, 3 Watts, 460.

In an action for tort against two or more, separate acts not committed with a common purpose or design, and without concert, will not authorize a joint recovery. If it be proved that only one was concerned the plaintiff may recover against him as if he only had been sued.

Leidig *v.* Bucher et al., 74 Pa. 65.
Chambers *v.* Lapsley, 7 Id. 24.
Laverty *v.* Vanarsdale et al., 65 Pa. 507.
Collins *v.* Cronin, 117 Id. 35.

In an action brought against the Insurance Patrol of Philadelphia and two employés jointly, for damages resulting from the negligent throwing of heavy tarpaulins into the street, it was held that a non-suit might properly be entered against one of the employés, and that a joint recovery might be had against the other employé and the Insurance Patrol of Philadelphia, the employer.

Boyd *v.* Insurance Patrol of Phila., 113 Pa. 269.

Knowledge of the street commissioner of a borough of the dangerous condition of the sidewalk is notice to the borough.

Nanticoke *v.* Warne, 106 Pa. 373.
Rosevere *v.* Osceola Mills Borough, 169 Id. 555.
Crumlich *v.* Harrisburg, 162 Pa. 624.
Fee *v.* Columbus Borough, 168 Id. 382.

It is undoubtedly the duty of a municipal corporation, having the exclusive care and control of its streets, to see that they are kept in a condition that is safe for the passage of persons and property, and if that plain duty is neglected, and thereby injury results to any one, the corporation is primarily liable to the injured party.

Brookville Borough *v.* Arthurs, 130 Pa. 515.

The municipality is liable under its general duty to keep its highways in good repair without express notice.

Wyman *v.* Phila., 175 Pa. 117.
Miller *v.* Bradford, 186 Id. 164.

April 17, 1899. SMITH, J. The leading objection of the appellant is to the joinder of the abutting landowner and the borough as defendants in the action. It is very ably argued that they are not joint wrongdoers; that in law their relation to the duty arising in the premises is dissimilar and unequal—that of the land owner being primary and absolute, while that of the borough is secondary and supplemental. It is contended, therefore, that the breach of duty is materially different, that of the land owner being a failure to maintain the sidewalk in safe condition, while that of the borough is the failure to compel the owner to do this. Considered in their relation to each other, this distinction is well taken, and in an action by one against the other would be of controlling importance. But so far as third persons are concerned, it is not to be doubted that either is primarily liable for neglecting to keep the public sidewalk in good condition.

This duty is imposed by law on the landowner and the municipality alike, and it has often been held that either may be sued in the first instance, for failure to perform it, without reference to the primary and secondary liability existing between them. When neither performs this duty, there is concurrent negligence, for which they are equally liable to third persons. Their relative rights and duties concern only themselves and can be enforced only in an action by one against the other. While equally liable to third persons for the same cause, they may not be equally liable one to the other. Liability grows out of neglect of duty, and duty may be subordinate to power. The power of the municipality over the public streets and walks is paramount to that of the abutting property owner. In any conflict between them the latter must yield, and liability may vary accordingly. But this relative power and relative liability concern only the municipality and the property owner, and neither is material in an action for neglect of the common duty to the public. Neglect of this duty is the ground of liability on the part of both the municipality and the land owner, and no good reason appears why they may not be joined in an action for this tort. Such joinder does not affect their relative rights, which may be enforced without reference to their common duty and liability to others.

While the precise question here raised does not seem to have been discussed by our Supreme Court, our conclusion is in harmony with the principle of decision in many of the cases. Here the maintenance of the walk in safe condition was a common duty, and a failure to perform it was a common default. The cause of action is single and based on the negligence of both municipality and land owner. Both participated in the non-feasance and they are equally and jointly liable for the consequences: Klauder *v.* McGrath, 35 Pa. 128. The essential feature of the latter case, and upon which it turned, was the neglect of both parties to maintain a party wall. In the

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case before us, the essential feature is the neglect to maintain a sidewalk. In both the controlling principle is necessarily the same.

Further analogy is found in the case of Durkin *v.* Coal Co., 171 Pa. 193. In that case the corporation, a mine foreman, and an assistant superintendent, were joined as defendants, and charged with dissimilar acts of negligence. The plaintiff sued for damages for his son's death, caused by the falling in of the mine, and a recovery was had in the Court below against the corporation and the mine foreman. It was argued in the appellate Court that there was a misjoinder for the reason that parties liable only at common law shall not be joined with parties liable under a statute. But this was ignored by the Supreme Court, and judgment was reversed as to one defendant and affirmed as to the other. A similar result was reached by the jury in the present case. The view here adopted is entirely consistent with the doctrine of many cases: Schuylkill Co. *v.* Richards, 57 Pa. 143; Leidig *v.* Bucher, 74 Pa. 65; Laverty *v.* Vanarsdale, 65 Pa. 507; Huddleston *v.* Borough, 111 Pa. 110; Brookville *v.* Arthurs, 130 Pa. 501; Gates *v.* Railroad Co., 150 Pa. 50; and seems to have been affirmatively announced in Borough of Carlisle *v.* Brisbane, 113 Pa. 544; Koelsch *v.* Railroad Co., 152 Pa. 355. The Court refused to give binding instruction in favor of the land owner, but left it to the jury to pass upon his liability under the established rules of evidence. We cannot hold that the jury should, as a matter of fact, have found a verdict against him and relieve the borough. That was for the jury under the evidence. The fifth, sixth, twelfth and seventeenth specifications are overruled.

The second, third, seventh, eighth, eleventh, and thirteenth specifications deal with the questions of negligence and of notice to the borough. The testimony on these points was abundant to call for their submission to the jury. Notice of defects in the sidewalk at and about the place where the plaintiff was injured was both direct and inferential. Testimony was introduced showing that written notices of this were given to the highway commissioners, whose duty it was to report the condition of the streets to the chairman of the highway committee, and that in pursuance of this he made a written report to the highway committee of the bad condition of the walk, about two months before the plaintiff's injury. The testimony also shows that the borough acted on these notices and undertook to repair the walk, but as it was intended soon to replace the pave with asphaltum the work of repair was of a temporary nature. The abutting lot owner was not called upon to make the repairs, but the borough, without notifying him, undertook the performance of this duty. Having thus taken charge of the work the borough was in duty bound to make such examinations and repairs as the safety of the public required and whether it did so or not was for the jury to decide. In view of the evidence, and of the admitted fact that the borough engaged in repairing this walk, it would seem idle to argue that the borough had no notice of the defects or other knowledge of their existence. The principles governing this branch of the case are stated and applied in Township *v.* Moore, 68 Pa. 404; Nanticoke *v.* Warne, 106 Pa. 373; Fee *v.* Borough, 168 Pa. 382. The specifications relating to the relative liability of the borough and the lot owner have been sufficiently noticed. The subject is not directly involved in this issue and must be left for future determination if it is raised by an issue, between the proper parties. The remaining matters presented for our consideration are without merit. Looking at them in the light of the whole evidence, it does not appear that they did the appellant any harm, and, therefore, they are not ground for reversal.

The assignment of errors is overruled and the judgment is affirmed.

W. D. N.

Oct. '98, 136. Superior Court. October 13, 1898.

Fletcher v. Gawanese Tribe.

Unincorporated beneficial societies—Act April 28, 1876, P. L. 53—Act June 16, 1836.

The proper method of enforcing payment of benefits by an unincorporated beneficial society is by bill in equity.

An action at law cannot be maintained by a member of an unincorporated beneficial association to recover from the association, benefits alleged to be due, the relation arising out of membership in the association being a quasi partnership.

Appeal of William J. Dippel and others, members of the Gawanese Tribe, No. 281, Improved Order of Red Men, from a judgment of the Common Pleas No. 3, for the County of Philadelphia, in an action of assumpsit brought by F. B. Fletcher against said tribe.

This was an action of assumpsit by F. B. Fletcher against "Gawanese Tribe, No. 281, Improved Order of Red Men." The summons was served on W. J. Dippel, chief of records of said tribe.

The statement set forth that Gawanese Tribe, No. 281, Improved Order of Red Men, was an unincorporated beneficial society, and that under the provisions of the by-laws thereof the plaintiff, as a member of said society, having been

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sick and "unable to follow the hunt" for a long time, was entitled to benefits therefrom from February 26, 1896, to May 12, 1897, (when he was suspended from said society), at the rate of three dollars per week; that he was paid his weekly benefits until February 26, 1896, when the society refused to pay him at the rate of three dollars per week because of a change in the by-laws reducing the benefits to one dollar per week; that plaintiff appealed from this action to the Great Council of Pennsylvania, Improved Order of Red Men, which decided that under the law in force the plaintiff was only entitled to one dollar per week; that plaintiff then appealed to the Great Council of the United States, Improved Order of Red Men, and that the Great Incohonee thereof sustained the plaintiff and directed the tribe to pay the benefits claimed, yet the tribe refused and continued to refuse to pay.

A demurrer was filed by William J. Dippel, on behalf of himself and other members of the society, averring that the tribe being admitted to be an unincorporated body, an action at law would not lie against it, but that the proper remedy was a bill in equitv filed against all the members thereof or a representative number of the members, naming ten such members.

The Court overruled the demurrer. An affidavit of defence was then filed which, in view of the action of the Superior Court, becomes of no interest. The Court entered judgment for want of sufficient affidavit of defence.

This appeal was then taken, and the overruling of the demurrer and the entry of judgment were assigned as error.

David H. Stone, for appellants.

The action is a nullity for want of a defendant of legal capacity and responsibility. Apart from a statute a member cannot sue an unincorporated society.

Beach on Corporations, sec. 900.
Story's Eq. Pleadings, secs. 107, 479.

The common law rule prevails in this State.

McConnell *v.* Apollo Savings Bank, 146 Pa. 79.
Paul *v.* Keystone Lodge, 3 WEEKLY NOTES, 408.

The Act of April 28, 1876, exempts members of unincorporated beneficial societies from individual liability for benefits, but does not provide a way of reaching the money in the society's treasury.

McDowell *v.* Smith, 21 WEEKLY NOTES, 558.

The case of Liederkranz Singing Society *v.* Turn Verein, 163 Pa. 265, does not decide that an unincorporated society may be sued eo nomine. The plaintiff should have sued in equity.

W. H. R. Lukens, for appellee.

An action at law is the proper remedy.

Smith *v.* Society, 12 Phila. 380.
Kurz *v.* Eggert, 9 WEEKLY NOTES, 126.
Sparks *v.* Husted, 5 Dist. Rep. 189.

Assumpsit has been maintained without objection in—

Hamill *v.* Supreme Council, 152 Pa. 537.
Dickinson *v.* A. O. U. W., 159 Id. 258.

The action was properly brought against the appellants by their collective title.

Liederkranz Singing Soc'y *v.* Germania Turn Verein, 163 Pa. 269.
Kline *v.* Allen Council, 6 North. Co. Rep. 17.

January 18, 1899. W. W. PORTER, J. This suit is brought at common law by a member of an unincorporated beneficial society against the society eo nomine, for sick benefits alleged to be due and unpaid.

It is objected, both by demurrer and affidavit of defence, that the suit is improperly brought. The Court below overruled the demurrer and entered judgment for want of a sufficient affidavit.

If the defendant were an unincorporated association other than a so-called beneficial society, this proceeding would be bad for want of parties defendant. The suit should have been against all or some (representing themselves and others interested) of the members associated under the joint title. Such bodies, while not partnerships, are in the nature thereof, and should sue, or be sued, in the form usual in such cases. Thus, in McConnell *v.* The Bank, 146 Pa. 79, it is said: "The suit stands against the Appollo Savings Bank without anything upon the record to show the character of the institution or the names of the persons comprising it, if it be a partnership or a private banking association. If the latter, there is no defendant on the record. A suit against a firm must set out the names of the individuals composing the firm. A judgment against the Apollo Savings Bank would do the plaintiff no good if he had one."

Again, in the Singing Society *v.* Turn Verein, 163 Pa. 268, where the right of possession to certain chattels was in dispute, suit was permitted to be brought by "The Liederkranz Singing Society, of Lancaster, Pa., by F. C. Ostermayer," et al. Mr. Justice MITCHELL there says: "It is necessary that the suit should be brought on behalf of all the parties interested, but this may as well be done in substance by using the general name which describes them all, as by the phrase, 'in behalf of themselves and all others interested.' The latter is the usual form, and it is always better to adhere to established practice; but there being no plea in abatement here, the common interest of the parties being substantially expressed on the record and there being individual plain-

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tiffs responsible for costs, the case was not in a position to be non-suited for want of parties."

But an unincorporated beneficial association is in a somewhat different position from other unincorporated societies by reason of the Act of April 28, 1876, which provides, "That members of lodges of the order of Odd Fellows, Knights of Pythias and other organizations paying periodical or funeral benefits, shall not be individually liable for the payment of periodical or funeral benefits or other liabilities of the lodge or other organization, but the same shall be payable only out of the treasury of such lodges or organizations. Provided, that the provisions of this Act shall only apply to unincorporated associations."

This Act places the organizations described in a middle ground between quasi-partnerships and corporations. While it takes from the members a personal liability, it makes no provision for a direct means of reaching the treasury. Corporations have franchises and presumably assets, upon which judgments may be executed. But what process known to the common law can reach "the treasury" of a quasi-corporation? The position of such an organization as the defendant is anomalous. If sued at common law (even if individual members are joined as defendants), no process can issue either against the defendant or its members for the recovery of a debt judicially found to be due and payable. Again, upon whom shall original process be served? Not upon the association, but only upon some of its members, through and by whom it alone has a legal entity. Yet it is contended that such members cannot properly be made parties to the suit.

By the Act of June 16, 1836, the several Courts of Common Pleas are given the supervision and control of unincorporated societies or associations and partnerships. This jurisdiction clearly comprehends matters relating to such organizations as the present one. Equity will reach not only a settlement of controversies, but has power and process to enforce its decrees. But the original process must be served upon members and officers of the association, who must be made parties defendant to the end, not that personal liability may be imposed or enforced, but that some *person* known to the law, may be within the grasp of the Court through whom its decrees may be carried into effect. Thus, though the treasury alone shall respond for a debt found to be due, those in control of the treasury may be compelled to see that the treasury meets its liabilities by payment. Again, the organization has still some of the features of a partnership. Claims for benefits arise under the articles of association. The right sought to be enforced is created by the contract relation, and the dispute is between quasi partners. Such disputes are properly cognizable only by a Court of equity.

It cannot be urged (as it has been in some of the lower Courts) that the common law action is the more speedy and economical course of procedure. The converse of such a statement is the more accurate, under recent changes in the conduct of the equity business of the Courts.

The plaintiff's remedy, if he has a right of action, is by bill in equity, and the demurrer should have been sustained. As this disposes of the plaintiff's present action, it is neither necessary nor proper to discuss the other matters of defence set up in the affidavit. The judgment on the demurrer is reversed, and judgment thereon is now entered for the defendant, the costs of this appeal to be paid by the appellee.

H. B.

Oct. '97, 78. Superior Court. December 12, 1898.

In re Narrowing of Cresson Street.

Road law—Narrowing of street.

The mere revision of street lines on the plans of the city streets whereby "on paper" the street is narrowed, does not give rise to a cause of action.

The plotting of a street upon the city plan is not a guaranty of future performance, and is nothing more than a notice of a present intention.

Where a street is plotted of a width of seventy-eight feet, forty-eight feet of which is the right of way of a railroad, a property owner whose property abuts on the street has such notice that the forty-eight feet is already subjected to a public servitude, which would probably conflict with any attempted physical opening beyond the thirty feet, as to prevent his recovering damages for the narrowing of the street by the width of the occupation of the railroad.

Appeal of John Kane, from the judgment of the Quarter Sessions of Philadelphia County, entered in sustaining exceptions to the report of a jury of view in the matter of the narrowing of Cresson street between Cedar street and Shur's Lane, in the City of Philadelphia.

The facts of the case are set forth in the opinion of the Superior Court.

T. R. Elcock, (*M. Z. Paul* with him), for appellant.

James Alcorn, assistant city solicitor, (with him *J. L. Patton* and *J. L. Kinsey*), for appellee.

The jury having found that the railroad was the owner and occupied as their right of way all but thirty feet of the bed of Cresson street as originally plotted, it was impossible for Cresson street to have been physically opened on those lines at a greater width than thirty feet. It is well settled that a town or municipal corporation

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may not without express authority take the location of the railroad for their streets or highways. There was no express authority here to take the location of the railroad for a street.

Great Bend Road, 2 Pa. C. C. 335.
In re City of Buffalo, 68 N. Y. 167.
Bridgeport *v.* Railroad Co., 36 Conn. 255.
Atlanta *v.* Railroad Co., 53 Ga. 120.
Wood on Railroads, Minor's Ed., vol. 2, p. 876.
Paul *v.* Carver, 24 Pa. 207.
McGee's Appeal, 114 Id. 470.
Vacation of Centre Street, 115, Id. 247.
Howard Street, 142 Id. 601.

The Supreme Court has said that exceptions and an appeal might be taken at the same time, if the appeal is taken within thirty days of the filing of the report.

In re Private Road in Nescopeck Twp., 14 WEEKLY NOTES, 559.
Fifty-fifth Street, 55 Leg. Int. 327.
Bowers *v.* Braddock, 172 Pa. 596.
Howard Street, 142 Pa. 601.

May 18, 1899. W. W. PORTER, J. That which is now called Cresson street, between Shur's Lane and Cedar street was put on the plan of the city of Philadelphia by the approval of the board of surveyors and confirmation of the Court of Quarter Sessions, in 1859. The street was marked 78 feet wide and called "railroad," on the plan. Prior to that time the Philadelphia, Germantown & Norristown R. R. had occupied about 48 feet of the bed of the street plotted as above stated. On April 19, 1879, the width of the street was reduced on the plan of the city to 36 feet and on June 3, 1895, to 30 feet. The report of the viewers finds, inter alia, that: "The said Cresson street, between Shur's Lane and Cedar street was opened by user and not by ordinance of councils or by the Court of Quarter Sessions, and was never so used of a greater width than thirty feet southwestward from the building line on the northeast side of Cresson street between Cedar street and Shur's Lane. The property on the southwest side of Cresson street between Cedar street and Shur's Lane for a width of 48 feet is, and has been occupied for many years" by the railroad; that the building line on the northeast side of Cresson street was established by the plan of 1859; that no alteration was made in that line by either the revision of April 19, 1879, or June 3, 1895, but that the reductions in width were both made on the railroad side.

The appellant being an owner of property on the northeast side of Cresson street claims that he has been damaged by the reduction in the plotted width of the street, and the jury of view have given him damages. The Court below has set the verdict aside and has sustained certain specified exceptions. In this there was no error. By the findings of the jury of view it appears that there never has been a physical narrowing of Cresson street. The opening by user was only to a width of thirty feet. The last reduction of plotted width leaves the opening by user undiminished. That which the city did was to revise the street line on the public plans. For this no action lies. The placing of a street upon the city plan is so far an interference with the rights of property that any buildings thereafter erected within the lines of the proposed street must be removed by the owner and without the payment of damages, when the street is opened, but no right of action accrues to the owner of the property until the actual opening of the street: Plan 166, 143 Pa. 423. In the present case the appellant claims to have improved his property on the faith of the opened street. If it was upon the faith of the visible physical opening, this was only to the extent of thirty feeth in width, as the report of the jury finds. If it was upon the faith of the plotted street, the public records which furnished the information respecting the width of seventy-eight feet, furnished also knowledge of the fact that forty-eight feet of the width was land of the railroad company or covered by its right of way. This was notice to the appellant that forty-eight feet of the original plotted width of the street was already subjected to a public servitude which would or might conflict with any attempted physical opening beyond the thirty feet. Furthermore, the public records if examined by the claimant before he bought or commenced to improve, would have apprised him of the fact that the street had never been opened by legal procedure. He who improves his property with reference to a street plotted but unopened, does so at the risk of a change being made of the location or width of the street as plotted or of even a removal of it from the plan. The plotting of the street is notice of a present intention; not a guaranty of future performance; such plotting does not acquire for the public any right of use for travel: Com'th *v.* The Railroad, 135 Pa. 271.

The city of Philadelphia has taken an appeal to the Court of Common Pleas from the award of the jury of view. It is argued that thereby the city lost her right to file exceptions. The matter is ruled by Bowers *v.* Braddock, 172 Pa. 596: "The filing of exceptions to the report of viewers has nothing to do with the right of appeal . . . . the hearing of the exceptions can go on and be completed before the case is actually tried, and if the exceptions are decided favorably to the appellant so as to defeat the proceeding, no trial will be necessary. If otherwise, the trial can then proceed."

The judgment of the Court below is affirmed.

W. D. N.

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WEEKLY NOTES OF CASES.

VOL. XLIV.] *FRIDAY, AUG. 11, 1899.* [NO. 19.

Supreme Court.

Jan. '98, 418. Supreme Court. March 21, 1899.

Estate of Louisa Nevins.

Devise—Act of April 8, 1833—When fee does not pass.

The Act of April 8, 1833, providing "That all devises of real estate shall pass the whole estate of the testator in the premises devised although there be no words of inheritance or perpetuity, etc.," was intended to carry out, not to defeat, the testator's actual intention, and when it appears from the whole will that it was not the intention to grant an estate in fee, this Act is not to be invoked to defeat such intention.

The fact that a devise is in trust is some evidence that it was not testator's intention to grant a fee, and when this is followed by the words "it is my wish and desire that she shall live in this house free of rent," and there is a blending of the devise with a gift of personalty which latter is manifestly for life only, and further, a direction that the trustee shall pay taxes and insurance, a clear intent to grant a life estate only is established.

Appeal by the Fidelity Insurance, Trust and Safe Deposit Company, executor of the will of Louisa Nevins, deceased, from a decree of the Orphans' Court of Philadelphia County, surcharging the accountants.

The facts as they appeared at the audit, before HANNA, P. J., are as follows:

Elizabeth Lathrop, a widow, died a resident of Philadelphia, on October 2, 1892. She was the owner of No. 122 South Eighteenth street, and thus disposed of it by her will, dated January 3, 1889:

"I give to the Fidelity Insurance and Safe Deposit Company of this City my house 122 S. 18th St. and eight 8 Thousand dollars, Philadelphia & Reading Railroad Consolidated mortgage seven per cent. Bonds due in 1911, to hold the same in trust for the benefit of my only surviving Sister, Louisa Nevins. It is my wish & desire she shall live in said House free of rent. I also request my said Trustees to pay to her the her (sic), the Interest on said Phila. & Reading Consolidated Bonds as long as she lives, after paying Taxes & Insurance on said House. At her death I make the following bequests which I request my said Trustees to pay free & clear of the Collateral inheritance Tax or other Taxes which I desire to be paid out of my residuary estate.' (Here follow numerous pecuniary legacies, but no disposition of the residue or remainder, and the will concludes): 'If the money I leave is not sufficient to pay Funeral & other expenses, then I direct my said Trustees to sell One thousand dollars of the above described Phila. & Reading bonds."

Letters of administration cum testamento annexo were granted to the Fidelity Insurance, Trust and Safe Deposit Company on October 8, 1892.

Mrs. Lathrop wrote this will in her own hand, and evidently inops consilii. After her death, Mrs. Nevins took possession of the house, and lived there until she died, on May 16, 1897, the trustee under Mrs. Lathrop's will in the meantime collecting the interest, insurance, and paying over the net income to Mrs. Nevins.

Mrs. Nevins left a will, dated September 7, 1893, appointing the Fidelity Insurance, Trust and Safe Deposit Company, executors, with power of sale, etc., to whom letters testamentary were issued. She made sundry specific and pecuniary bequests, and gave and devised her residuary estate two-thirds to her son, Richard Nevins, and one-third to her grandson, Charles M. Campbell (the appellee in this case).

The heirs at law of Mrs. Elizabeth Lathrop at the time of her death numbered four stirpes, viz.: Louisa Nevins (sister), children of Margaretta Bacon (a deceased sister), children of Emily Hopkins (a deceased sister), and children of Charles Macalester, 2d (a deceased brother).

The Fidelity Insurance, Trust and Safe Deposit Company being constituted by these heirs their attorney in fact to make sale of these premises, made title to the purchaser at a public sale by virtue of this authority, and also as executors of Mrs. Nevins (whose estate was entitled, in any event, to one-fourth of the proceeds). The net proceeds of the sale amounted to $19,167.17, and the executor of Mrs. Nevins, in filing its account, charged itself with $4791.79, being one-fourth thereof, upon the theory that Mrs. Lathrop had died intestate as to the fee of the property which descended to her heirs-at-law, subject to the occupancy of the premises by Mrs. Nevins during her life. At the audit of the executor's account Charles M. Campbell claimed that the entire fee passed by Mrs. Lathrop's will to Mrs. Nevins, and that consequently her executor should have charged itself in its account with the entire proceeds. The auditing Judge, HANNA, P. J., overruled the motion to surcharge the accountant, but exceptions to his adjudication were sustained by the Orphans' Court in banc (ASHMAN, J., be-

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ing absent), by Judges PENROSE and FERGUSON, the latter delivering the opinion of the Court, and HANNA, P. J., dissenting. A decree was thereupon entered surcharging the accountants with the sum of $14,375.38, representing three-fourths of the net proceeds of sale of premises in question. This appeal was then taken, assigning for error this action of the Court.

John Marshall Gest, for appellant.

The will created a trust, the testatrix's intention being to provide a residence for Mrs. Nevins. The legal estate was in the trustee and there were active duties to perform.

Barnett's Appeal, 46 Pa. 392.
Ogden's Appeal, 70 Id. 501.
Gregory *v.* Henderson, 4 Taunt. 772.
Hapland *v.* Smith, 1 Bro. C. Rep. 75.

The provision that the grantee should live in the house "free of rent" is totally inconsistent with the grant of an absolute estate in the property. This reference and the direction to pay interest on certain bonds to Mrs. Nevins "as long as she lives" show clearly that the intention to benefit her did not go beyond her lifetime.

The further reference in the will to a "residuary estate" shows that testatrix knew there would be some estate undisposed and she probably intended by this expression, the remainder in this house.

The Act of April 8, 1833, sec. 9, P. L. 249, does not apply.

To appreciate the intent and meaning of this section of the wills Act, it is only necessary to recall the technical rules of the common law and the decisions of the Courts that led to its passage. If the testator prior to that Act gave an estate without words of inheritance and without any expressions of a kind showing an intention to give more, the devisee took but a life estate.

Clayton *v.* Clayton, 3 Binn. 476.
Steele *v.* Thompson, 14 S. & R. 84.

The latter case was decided in 1826, and perhaps occasioned the amendment in the law. The testator's language was, "As touching all my worldly substance with which it has pleased God in this life to bless me I give bequeath and dispose of the same as follows: I make over and bequeath to my son George the plantation I now live on." Yet the majority of the Supreme Court felt constrained to hold that this gave a life estate only to George. It was to meet such cases where the plain meaning of the will was overcome by technical rules that the Act was framed. As the commissioners to revise the civil code said in their explanatory remarks concerning this section, "The ninth section coincides with the improvement made in this respect by many of our sister States and has been introduced from a belief that the intention of a testator has often been defeated by omission of words of inheritance in a devise of real estate."

2 Parke & Johnson's Digest, 875.

The Act, therefore, we submit, was only intended to apply to those cases where the intent was to give a fee, and a harsh rule of law prevented that intention from going into effect by reason of the omission of words of perpetuity. It was not meant, we think, to establish another though contrary rule of construction, or any means of ascertaining the testamentary intent.

Urich *v.* Merkel, 81 Pa. 332.
Urich's Appeal, 86 Id. 386.
Jarman on Wills, 1155.
Beach on Trusts, § 406.
Fox's Appeal, 99 Pa. 382.

Joseph F. Lamorelle and *Hampton L. Carson*, (with them *J. Levering Jones*), for appellee.

That Louisa Nevins took an absolute estate in fee simple, under the first clause of said will, cannot be seriously questioned.

The property is left to the Fidelity Company to hold in trust for her.

All title and interest that she had in the property was thus vested in the trust company, absolutely and in fee.

Such construction of the language of the will is in accord with both the letter and the spirit of sec. 9 of the Act of April 8, 1833, P. L. 250.

Coles *v.* Ayres, 156 Pa. 200.

The trust was a mere "dry trust."

Snyder *v.* Baer, 144 Pa. 278.

The devise being without qualification, it cannot be defeated by subsequent precatory words.

Bowlby *v.* Thunder, 105 Pa. 179.
Schuldt *v.* Herbine, 39 WEEKLY NOTES, 290.
Keller's Estate, 11 Lanc. Law Rev. 185.
Martin's Est. 30 WEEKLY NOTES, 461.

In cases of doubtful construction the law leans in favor of an absolute estate rather than a defeasible estate.

Silknitter's Appeal, 45 Pa. 365.
Smith's Appeal, 23 Id. 9.
Weber's Appeal, 17 Id. 479.

In Kiefel *v.* Keppler, 173 Pa. 181, where the husband was given the income as long as he lived, and further was authorized to sell any and all of his wife's property, it was held that, under the Act of 1833, he took a fee.

The right of alienation was equivalent to a gift, and limiting the income to the husband as long as he lived, was not sufficient to bar the statutory presumption, that where there is no devise or limitation over, the whole estate of the testatrix passed.

Moreover, it has been frequently decided that a will must be so construed as to avoid partial intestacy, unless the contrary is unavoidable.

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Board of Missions' Appeal, 91 Pa. 513.
Roland v. Miller, 100 Id. 47.
Miller's Appeal, 113 Id. 459.

July 19, 1899. MITCHELL, J. The title of Mrs. Nevins to the house in question depends on the construction of the following clause of the will of Mrs. Lathrop: "I give to the Fidelity Insurance and Safe Deposit Company my house 122 South Eighteenth street and eight thousand dollars, Philadelphia & Reading Railroad bonds, to hold the same in trust for the benefit of my only surviving sister, Louisa Nevins. It is my wish and desire she shall live in said house free of rent. I also request my said trustees to pay to her the interest on said Philadelphia & Reading consolidated bonds as long as she lives, after paying taxes and insurance on said house. At her death I make the following bequests which I request my said trustee to pay free and clear of the collateral inheritance tax or other taxes which I desire to be paid out of my residuary estate."

The first notable observation on this clause is that there is no direct gift at all to the devisee, but only a devise in trust for her. While not in itself conclusive, this suggests at once an intent not to give the fee, else why interpose a trust? The most ignorant property owner knows the difference between owning a house himself and having the use of it under a trust, and if this testatrix meant to give the full ownership in fee there is no purpose disclosed in her will which would have prevented the easiest and most natural way of doing it by direct gift.

Next there is expressed a "wish and desire she shall live in the house free of rent." These are not precatory words addressed to her sister as to the use she shall make of a house given to her, but words addressed to the trustee, and therefore though expressed as wish and desire, they are a mandatory direction that her sister shall not be chargeable with rent. The testatrix, though not learned in the law and apparently inops consilii, yet was a householder and must be presumed to have had the common knowledge that the owner does not pay rent while ordinarily every other occupant does. She appears to have known also that in devising the house in trust she made the trustee the legal owner, and thus apparently clothed him with authority to exact rent, even though he should be accountable for it afterwards as part of the gross income, the net proceeds of which were ultimately payable to the occupant. From the possibility of this trouble and charge the testatrix appears to have intended that her sister should be free, while at the same time the latter's title and estate in the property should be limited by the trust.

Again, in creating the trust, the whole estate is thrown together with no distinction between this house and the personal property. And the latter is manifestly not given absolutely, for the trustee is to pay the interest to Mrs. Nevins "as long as she lives" and to use the principal "at her death" in paying certain specified bequests, the collateral inheritance and other taxes on which are to be paid out of the residuary estate. There is nothing in the will on which we can safely base a distinction which the testatrix herself avoided making, between the extent of the beneficiary's interest in the real and personal property included in the same words of disposition.

We are therefore of opinion that, though there is no devise over, the will shows a clear general intent to give only a life estate. The Act of 1833 was meant to effectuate not to defeat the actual intent. A testator giving by will, usually intends to give the whole of the subject named, as he legally does when he names personal property. The necessity for words of inheritance to pass a fee in land is an invention of the law, a technicality in the way of the testator's usual purpose, which the statute meant to remove. But when the intent appears by the whole will to be otherwise, the statute is not to be invoked to defeat it.

The decree surcharging the accountant with three-fourths of the proceeds of the sale of the house is reversed, and the adjudication of the auditing Judge reinstated. Costs to be paid by the appellee, Charles M. Campbell.

W. M. S., Jr.

Jan. '99, 128. Supreme Court. May 9, 1899.

Woolsey v. Axton & Son.

Contracts—Sales—Delivery—When and how completed—Vendee's title.

Upon a contract for the sale of any article upon terms therein set forth, vendee's title to the article only vests upon his performance of his part of the contract.

M. contracted on February 2, to sell to W. a raft described in the agreement, upon the terms of one hundred dollars paid in cash, balance of half the amount on April 1, and a ninety days' note for the remainder. One hundred and fifty dollars was paid by W., but when the raft was ready the parties had a dispute, W. claiming that M. was indebted to him, and that this should be credited on the purchase money. M. denied the claim, alleging that he had paid it. W. having taken possession of the raft, M. recovered it by force, and finally sold and delivered it to A. In an action of assumpsit brought by W. against A. to recover the value of the raft:

Held, that there had been no delivery by M. to W.,

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and that title thereto was in M. when he sold the raft to A.

The Court below instructed the jury to find for the defendant.

Held, not to be error.

Appeal of Orville I. Woolsey, plaintiff, from the judgment of the Common Pleas of Fayette County, in an action of assumpsit, brought by Orville I. Woolsey against Andrew Axton and Thomas Axton, trading as Axton & Son, to recover the sum of $1500 claimed by said plaintiff to be due to him by said defendant.

The facts of this case are sufficiently set forth in the opinion of the Supreme Court.

The plaintiff submitted, inter alia, the following point:

"The plaintiff asks the Court to charge the jury that if Josephus Minor supplied the place of the small timber in the raft to which the plaintiff objected as too small under the contract, with larger lumber according to Josephus Minor's testimony and if after the said three sticks of timber were supplied by the said Minor, nothing more remained to be done to the raft to fit it for delivery according to the contract, and if the said raft was so prepared by Minor, at New Geneva according to the contract; and if the plaintiff paid the said Minor $150 on the said raft, before the said raft was removed from New Geneva aforesaid; then the title to the said raft was vested in the plaintiff before the said raft left New Geneva, and the verdict should be for the plaintiff for the value thereof." "Refused." (Second assignment of error.)

The Court, MESTREZAT, P. J., after stating the facts of the case, charged the jury, inter alia, as follows:

"Now, such, briefly, are the facts in this case; and as we understand it, there are no disputed facts in the case. It is, therefore, our duty to pass upon the law of the case arising upon these disputed facts. [We are of opinion that, under the contract submitted here and under which the plaintiff, Woolsey, claims to recover and claims title to this raft, it was his duty to pay, or to secure the payment of, the balance of the purchase money according to the contract before he could legally recover or compel Minor to deliver him the raft. It is not disputed, as we have already said, that he didn't pay the balance of the one-half on the first of April, 1897, of the purchase money due on this raft or give a note for the remainder for ninety days as required by this contract. It is our opinion that, not having done that, he is not in a position and was not in a position, to require the delivery of that raft to him. As we understand the evidence here—and it is not disputed—there was no delivery of this raft to Woolsey. It is claimed, however, on the part of Mr. Woolsey that under this agreement when these sticks of timber were taken by Minor to the Monongahela river and placed in the river and put together or rafted, as it is called here, that it immediately became the property of Woolsey and was a delivery under this contract. That is not our construction of this contract; on the contrary, we are of opinion that, in addition to placing the sticks of timber in the river and rafting them, putting them together, that there was yet to be a delivery by Minor to Woolsey.] It is not denied that Minor placed his ropes upon this raft and moored it there at the mouth of Georges creek; and it is not denied, further, that Woolsey didn't take possession of this raft until that Sunday when he did it in the absence of Minor and without his permission. That was not a delivery by Minor to Woolsey. There was no intention on the part of Minor to deliver that raft so far as the evidence discloses and the admitted facts show. The taking possession of this raft by Woolsey before he had complied with his contract—and this possession was not taken, it will be remembered, until August, long after the balance of the purchase money was to be paid—the taking possession of this raft by Woolsey in the manner he did was tortious; was contrary to Minor's rights in the raft, and, therefore, was not a legal delivery of the raft to Woolsey by Minor. Such being the facts of the case, we are of opinion that the plaintiff here is not entitled to recover, and we instruct you to return a verdict for the defendant."

Verdict for defendant and judgment thereon. Whereupon the plaintiff took this appeal, assigning for error, inter alia, the answer to his point as above, the portion of the charge given above in brackets, and the instruction to the jury to find a verdict for the defendant.

Edward Campbell, for appellant.

The rule of law is that where there is an immediate sale and nothing remains to be done by the vendor as between him and the vendee, the property in the thing sold vests in the vendee.

1 Parsons on Contracts, 7th ed., 562.
Benjamin on Sales, 4th Am. Ed., page 311.
Lockhart *v.* Connell, 22 U. C. C. P. 597.
Ballentine *v.* Robinson, 46 Pa. 177.
Com'th *v.* Fleming, 25 WEEKLY NOTES, 122.
Bement *v.* Smith, 15 Wendell, 493.
Riddle *v.* Varnum, 20 Pick. 280.

George D. Howell, for appellee.

The plaintiff was to get the raft in question, when he paid for it, according to the terms of the agreement, and this he never did.

The authorities cited by the appellant do not sustain his contention. They refer to completed

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sales where the minds of both parties meet and agree.

To constitute a delivery, these must be not only an actual delivery at the place appointed, but made with an intent to deliver; which intent is to be manifested by the acts and declarations of the vendor.

Nat. State Bank *v.* Korting Gas Engine Co., 3 Dist. Rep. 604.
Lester *v.* McDowell, 18 Pa. 91.
Bush *v.* Bender, 113 Id. 94.

July 19, 1899. DEAN, J. On February 20, 1897, Woolsey, this appellant, made an agreement in writing with Josephus Minor, as follows:

"1897—2—20, New Geneva,
Fayette Co., Pa.

I, Jos. Minor of the first part agree to deliver at New Geneva, Pa.

One raft averaging 120 cu. ft. to stick if weather is reasonable.

One raft averaging 100 cu. ft. to stick and the tie poles for the first raft.

I, Orville Woolsey of the second part agree to pay him one hundred dollars now on first raft; balance of half the amount on April 1, 1897; and note for balance, for ninety days.

Second raft: half down, and ninety day note; timber to be in against May 10th, 1897.

Witness: ORVILLE WOOLSEY.
Witness: JOE MINOR.
TODD DREW.

Endorsed: First raft settled for 6420 cu. ft. at 10 cts., $642, settled April 10—'97."

It will be noticed, two rafts were contracted for to be delivered at Geneva. The second one mentioned was delivered and paid for; there is no dispute as to that one. The first one which was to average 120 cubic feet per stick is the one in dispute. The price per foot is not specified in the written agreement, but that it was ten cents per cubic foot is not disputed. One hundred dollars of the purchase money for this one, it will be noticed, was to be paid on signing the agreement; half the balance on April 1, 1897, and note for remaining half at ninety days to be then given. The $100 was paid on signing agreement, and afterwards an additional fifty dollars. About August 10, 1897, the raft was moored at Geneva by Minor, and Woolsey notified, who examined it, and finding fault with several of the sticks, Minor replaced them by others, and Woolsey announced himself satisfied, and then notified Minor to come to his house and they would make a settlement on the contract. They accordingly met at Woolsey's house for that purpose. Woolsey claimed there was due him from Minor an old debt of $500, which should be credited on the purchase money. Minor denied the justice of this claim, alleging, he had paid it; and demanded the half cash and ninety day note as stipulated in the contract, which Woolsey refused, and they separated without a settlement. Woolsey, then, in the absence of Minor, took actual possession of the raft early on Sunday morning; Minor, by force, retook and retained possession; then followed criminal prosecutions and an action for trespass. On October 1, 1897, Minor sold and delivered the raft to Axton & Son, these appellees, who manufactured and sold the timber for their own account; Woolsey brought this suit in assumpsit against them for its value. At the trial in the Court below, the learned Judge, being of opinion, there had been no delivery of the raft by Minor to Woolsey, instructed the jury to find for defendant, and we have this appeal by plaintiff. The error complained of, is the refusal of the Court to affirm plaintiff's second point, thus:

"The plaintiff asks the Court to charge the jury that if Josephus Minor supplied the place of the small timber in the raft to which the plaintiff objected as too small under the contract, with larger lumber, according to Josephus Minor's testimony, and if after the said three sticks of lumber were supplied by the said Minor, nothing more remained to be done to the raft to fit it for delivery according to the contract, and if the said raft was so prepared by Minor at New Geneva, according to the contract; and if the plaintiff paid the said Minor $150 on the said raft, before the said raft was removed from New Geneva aforesaid; then the title to the said raft was vested in the plaintiff before the said raft left New Geneva, and the verdict should be for the plaintiff for the value thereof." Answer—"Refused."

The conclusion of the learned counsel for appellant does not follow from the facts set out in the point. Woolsey, without Minor's assent, could have no lawful possession of the raft until he complied with the terms of his agreement, which expressly stipulated for payment of half the balance in cash and a ninety day note for the remaining half. Admit, that on inspection, Woolsey objected to the quality of some of the sticks, and Minor replaced them, then Woolsey signified his acceptance of the raft, that only proves that Minor had complied fully with his part of the contract, and the delivery of the raft would be complete on Woolsey performing his part, the payment of the cash and delivery of the note; but until this was done, or Minor waived performance, both title and possession remained in him. The payment, by a plain implication from the contract, was a condition precedent to actual delivery to Woolsey, not alleged payment by an old and disputed indebtedness, which formed no part of the contract, but actual payment by cash and note. If Woolsey intended by that means to collect the old indebtedness, he should not have expressly stipulated for another method of payment for the timber. We have no quarrel

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with the many authorities cited by the able counsel for appellant. They undoubtedly hold, that a contract for the sale of a chattel, may be fully executed while the actual possession remains in the vendor; but in all such cases, the intention of the contracting parties, that a constructive delivery shall immediately take place, is either expressed or implied. The implication from this contract and the circumstances, is directly the reverse. Even Woolsey's interpretation, by his admitted conduct, was, that he owed to Minor immediate settlement and payment of balance due, to complete the delivery. Bush *v.* Bender, 113 Pa. 94, is very much like the case before us on its facts. Bender, a farmer, sold to Bush a lot of horses to be delivered at a tavern, there to be paid for in cash. He took them to the tavern, and Bush offered to pay with some old notes drawn by Bender years before and apparently still unpaid, instead of with cash. Bender refused to accept such payment, and when he attempted to retake possession of his horses, Bush refused to give them up; Bender replevied them, this Court holding, there was no delivery within the contemplation of the parties to the contract; that Bush was not entitled to possession until he paid the cash, and that his attempt to extort payment of an old debt by such methods was a fraud upon Bender. To the same effect are Lester *v.* McDowell, 18 Pa. 91, and McCullough *v.* McCollough, 14 Pa. 295.

We are of opinion, the Court below committed no error in holding there was no delivery of the raft to Woolsey under the contract. The assignments of error are overruled, and the judgment is affirmed.

S. H. T.

Jan. '99, 246. Supreme Court. March 13, 1899.

Betts v. Lehigh Valley R. R. Co.

Railroad crossing—Negligence—"Stop, look and listen."

When a railroad company has adopted a rule for the government of its servants in charge of passenger trains that "Any train approaching a station where a passenger train is receiving or discharging passengers must be stopped before reaching the station, and must not proceed until the passenger train moves away or a signal has been given to come on," a passenger intending to get on a train standing at a station is relieved from the application of "stop, look and listen," even though to take the train he must needs cross intervening tracks. But the question whether his actions preceding the accident were negligent or not must be submitted under proper instruction to the jury.

Where a given state of facts is such that reasonable men may fairly differ upon the question whether there was negligence or not, the determination of the matter is for the jury.

Appeal of the Lehigh Valley Railroad Company, from the judgment of the Common Pleas of Bradford County, in an action of trespass wherein William Kirk Betts was plaintiff.

The facts of the case are set forth in the opinion of the Supreme Court.

Defendant presented the following points for charge:

"1. The plaintiff having admitted that he did not stop, look and listen, and also if he had looked he could have saved himself, was guilty of contributory negligence and cannot recover." Refused.

"3. If the jury believe Washington street was a public highway crossed by the railroad, neither the fact that the plaintiff was using the crossing to take a train, nor the rule of the company as to the approach of trains to a station when another train was receiving or discharging passengers, relieved the plaintiff from the obligation to stop, look and listen." Refused.

The Court in its charge said, inter alia:

"Now, if that train was standing still at that station, under the rule of this company which I have read to you, the plaintiff in this case had a right to rely upon that rule and cross the track without stopping, looking and listening, as required by the rule of law which I have stated to you, and he would not be guilty of contributory negligence in crossing the track under those circumstances. His presence there that morning was for the purpose of taking that train. Wherever it was standing for the purpose of receiving passengers, the company by its rule had said should be free from disturbance from approaching trains. He has a right to rely upon that rule and not take the ordinary precaution." (Fourth assignment of error.)

Verdict and judgment for plaintiff. Defendant appealed and assigned as error the refusal of its points and the part of the charge quoted above.

Henry Streeter and *W. T. Davies*, for appellant.

Even at a station the plaintiff is not relieved from the duty to stop, look and listen, much less at a public highway crossing.

Irey *v.* R. R., 132 Pa. 563.
Carroll *v.* R. R., 12 WEEKLY NOTES, 348.
R. R. *v.* Bell, 122 Pa. 58.

No presumptions arise in the case at bar, and under the plaintiff's own evidence our third point should have been affirmed.

Hovenden *v.* R. R., 180 Pa. 244.

Due and ordinary care is to be used in crossing public streets, as in all other transactions in life. Even upon the sidewalks a man is bound to look where he is going.

Barnes *v.* Sowden, 119 Pa. 53.
Schmidt *v.* McGill, 120 Id. 412.

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Buzby *v.* Traction Co., 126 Id. 559.
Baker *v.* R. R., 182 Id. 336-339.

It was negligence to attempt to board a moving train.

Bacon *v.* R. R., 143 Pa. 14.

We submit that there is nothing in the evidence that relieved the plaintiff from taking the ordinary precautions before attempting to cross the public highway, and that even if the facts proved in the case warranted the supposition stated to the jury, complained of in the fourth assignment of error, it was too broad. and clearly erroneous as matter of law.

R. R. *v.* Greiner, 113 Pa. 600.
Buzby *v.* Traction Co., 126 Id. 559.

The cases of R. R. *v.* White, 88 Pa. 327, and Kohler *v.* R. R., 135 Pa. 346, especially relied on by the plaintiff's counsel, are not at all in accord with the plaintiff's own testimony, and the actual facts of the case at bar.

In the White case he was misled by the announcement of the brakeman, and White was struck by another train just as he alighted for the purpose of crossing the track to reach the platform and not at or upon a public highway crossing.

In the Kohler case the plaintiff testified that he stopped, looked and listened before attempting to cross the track, at the station, and the Court said there was no presumption of negligence.

E. Overton, (*W. Maxwell* with him), for appellee.

Where the measure of duty is not unvarying, where a higher degree of care is demanded under some circumstances than under others, both the duty and the extent of performance are to be ascertained as facts, the jury alone can determine what is negligence, and whether it has been proved.

McCully *v.* Clarke & Thaw, 40 Pa. 406.

The law is well settled that what is and what is not negligence in a particular case is generally a question for the jury and not for the Court. It is always a question for the jury when the measure of duty is ordinary and reasonable care.

West Chester & Phila. R. R. Co. *v.* McElwee, 67 Pa. 315.

No presumption of negligence arises from the crossing of a track at a railway station, in order to get to and take passage upon a train on another track, when that is the only way by which such train can be reached; nor is it necessarily negligent to start across before the train which the passenger intends to take has come to a full stop.

Kohler *v.* Railroad Co., 135 Pa. 346.

Plaintiff had a right to rely on the observance of the company's rule forbidding another train while his train remained there.

Penna. R. R. Co. *v.* White, 88 Pa. 327.

The duty of the company to provide for safety in receiving and setting down of passengers, which in this case was recognized by the company and the adoption of the rule gave the plaintiff a right to rely on the observance of the company's rule forbidding another train passing while his train is at the station.

White *v.* R. R. Co., 88 Pa. 329.
Flanagan *v.* P. W. & B. R. R. Co., 181 Id. 242.
Shutt *v.* R. R. Co., 149 Id. 266.

A passenger who is obliged to pass over an intervening track to reach his train need neither look nor listen, but may assume the way to be safe.

Baltimore, etc., R. Co. *v.* State, 60 Md. 449.
Gaynor *v.* Old Colony R. Co., 100 Mass. 208.
Warren *v.* Fitchburg R. Co., 8 Allen, 227.
Klein *v.* Jewett, 26 N. J. Eq., 474.
Weeks *v.* New Orleans, etc., R. Co., 40 La. 800.
P. W. & B. R. Co. *v.* Anderson, 8 L. R. A. 673.

To run a train at a high rate of speed past another discharging passengers likely to step right into its path, would be not only neglect of common care but reckless and gross negligence.

Bobostelli *v.* R. R. Co., 33 Fed. Rep. 799.

The rule requiring a traveler on a highway to use his eyes and ears to ascertain whether a train is approaching, does not apply to passengers who are crossing a track at a station to get on a train.

Terry *v.* Jewett, 78 N. Y. 338.

May 23, 1899. STERRETT, C. J. In 1894, the plaintiff, whose home was in the borough of Towanda, was regularly employed at Ulster, about eight miles north on the Lehigh Valley Railroad. In reaching his place of business, he daily took a local train starting at 6.25 A. M. from Washington street station on the Bernice branch in said borough, about a quarter of a mile from his home. He usually left home about 6.15 o'clock A. M., and walked south down Main street to Washington street, and then turned east at Washington street, and went about one hundred and seventy feet down this street to the station. Washington street station is the freight station of the Lehigh Valley Railroad Company at Towanda, and is located on the Bernice branch at the eastern end of Washington street, in close proximity to the Susquehanna river. There were no buildings beyond the station on Washington street, and no bridge across the river, so that the street crossing was practically limited in its use to a means of access to and from the station for teams and foot passengers. The sidewalk, which was of stone from Main street to the railroad tracks at Washington street crossing, was continued across the railroad by means of planks laid between the

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rails. This walk led to the platform steps at the north end of the station, where the ticket office was located. South of this walk, for the distance of about one hundred feet, the tracks were filled in with earth and red shale, forming a level strip of ground where passengers were received and discharged by passing trains. Passengers on the main line necessarily used this earth platform, as it extended on both sides of this track. Plaintiff's train, popularly known as the "Geneva train," was made up at and started from this station. It occupied the side track, next to and in front of the station, for the reception of passengers, and the engine stood facing, or upon, the Washington street crossing. In order to go aboard this train, passengers were required to enter from the earth platform, or to pass around in front of the engine, ascend the platform steps and walk south along the platform until the cars could be conveniently entered.

The following rule, given in evidence, was shown to be in force at the time of the accident: "Any train approaching a station where a passenger train is receiving or discharging passengers must be stopped before reaching the station, and must not proceed until the passenger train moves away or a signal has been given to come on, except where proper safeguards are provided between the tracks." It is admitted that there were no safeguards in this case.

The morning before the accident, the Williamsport and North Branch Railroad Company commenced running a train to Towanda station, about a mile and a half north of the Washington street station and the junction of the Bernice branch with the main line, to Williamsport, leaving Towanda at 6.15 o'clock A. M. and scheduled to arrive at Washington street at 6.20 A. M., where it was to meet and pass the Geneva train, and leaving there at 6.30 A. M. On the morning of the accident, it was several minutes late. It was at this point, and from the time of starting, in charge of employés of the Lehigh Valley Railroad Company. According to plaintiff's testimony, he came down Washington street, on the morning of the accident, to take his train as usual. His attention was attracted to it by the ringing of the bell. He passed a two-seated top carriage or hack standing on the edge of the street and sidewalk, near the railroad track, and between him and the street to the north, and crossed over the first rail of the main track, when he was struck and injured by the train coming rapidly down on the main track from the north.

He also testified that, knowing the rule of the company above quoted, and seeing his train still standing at the station, he did not stop, look or listen for an approaching train; that a car was standing on a siding just south of the southern sidewalk of Washington street. This siding crossed Washington street to a coal shed which extended for some distance along the main track and partially obstructed the view to the north. His witnesses testified positively that plaintiff's train was not in motion at the time of the accident, and defendant's witnesses testified just as positively that it was.

The learned trial Judge refused defendant company's requests for binding instructions, and submitted the case to the jury in a full, fair and adequate charge in which the propositions of law involved were amply discussed. The care with which the case was submitted is shown in the following brief summary of the questions submitted to the jury in his charge: "You are to apply the principles which I have laid down to you, as governing the case, to the facts as you shall find them from the evidence, determine first, whether the company was negligent in running the train, called the Williamsport train, over the track at the time they did. If they obeyed the rule as they claim they did, then they would not be guilty of such negligence as would make them chargeable with this accident under the testimony of the plaintiff. Next, inquire whether the plaintiff was guilty of any contributory negligence. If when he approached the track upon which this train was coming from the north, the train which he intended to take was standing there, it would excuse him from stopping to look and listen; but it would not excuse him from exercising the care which an ordinarily prudent man would exercise under like circumstances. It is for you to determine, as I said, first, whether the train was standing still, and he was excused from stopping and looking and listening. If you should find he was, then, secondly, did he otherwise exercise the care in going across that track that an ordinarily prudent man would? If he did, and was struck by the train, then he would not be guilty of any negligence which would excuse the company from the negligence which they had committed in crossing that street while the Geneva train, as it is called, was standing upon the track at its station."

The real contention in the case is whether the failure to stop, look and listen was contributory negligence to be declared by the Court, as matter of law. Our cases recognize an exception to the general rule. In the recent case of Flanagan *v.* Philadelphia & Reading R. Co., 181 Pa. 242, our brother FELL said: "It is true that the duty of a person, about to cross a railroad track, to stop, look and listen for an approaching train is not always applicable to a passenger at a station going to and from his train; the obligation upon

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him may be totally different from that of a person at a public crossing: Railroad Co. *v.* White, 88 Pa. 327; Kohler *v.* Railroad Co., 135 Pa. 346. If the way provided is across a track, he may rely upon the performance by the company of its duty to keep its track clear while passengers are in the act of passing between the train and the station. But, this is when a way is provided and the passenger is impliedly invited to take it." That case was ruled against the passenger on the ground that "he was not invited to get off where he did, and the invitation was to alight on the other side, and, in disregarding it, he violated a reasonable rule which it was his duty to observe." The same considerations controlled the decision in Morgan *v.* Camden & Atlantic Railroad Co., 1 Monaghan, 122, under somewhat different facts.

Pennsylvania Railroad *v.* White, supra, is more nearly like the case at bar. There the train came to a stop at a point opposite to a station, and the order of the company was very similar to the order here. It was there said: "This rule (to stop, look and listen) is not always applicable to passengers leaving a train and crossing the track to reach the depot at the point of destination. There are duties which spring from the relations existing between the carrier and its passengers. It is the duty of the company to provide for the safe receiving and discharge of passengers. It is bound to exercise the strictest vigilance not only in carrying them to their destination, but also in setting them down safely, if human care and foresight can do so: Railroad Co. *v.* Aspell, 23 Pa. 147. Ordinary prudence and due regard for the safety of passengers alike require that special care should be exercised at public crossings and depots by passing trains." It was further said, in discussing the plaintiff's case: "He had a right to rely on the observance of the company's rule forbidding another train while his train remained there."

In Warner *v.* Balt. & Ohio Railroad Co., 168 U. S. 339, the facts and the rule of the company closely resembled this case, and also Railroad Co. *v.* White, supra. In the former, the principles enunciated in the latter were adopted on the authority of that and similar cases from other States. Indeed, the doctrine of these cases may be considered as firmly established by a uniform line of decisions.

In the case under consideration, the rule adopted by the defendant company was notice to the public that the tracks on Washington street would be kept clear while the train was at the station receiving or discharging passengers. As was said by the learned trial Judge in his charge: "Whether that is a public street or not, they had used the ground there for the purposes of a platform, not only where the platform was, adjoining the station, but also the ground east of the main track of defendant company. If it had been their custom to so use that ground, then as far as the purpose of this suit is concerned, or as far as the people of that community are concerned, who had knowledge of that custom, they had made the street their platform for the purpose of receiving and discharging passengers." The jury has found that plaintiff knew of the rule prohibiting other trains from passing, and that he relied upon it, as he had a right to do. The object of stopping, looking and listening was to avoid the dangers incident to a railroad. But the rule of the company gave notice that as long as the train remained at the station, the tracks would be free from passing trains. This was equivalent to saying to approaching passengers: You need not stop, look and listen, as there will be nothing for you to see. It was, in effect, an invitation to passengers to cross the tracks. Under such circumstances, the mere failure to stop, look and listen, without more, cannot be pronounced contributory negligence by the Court.

It will be observed that the learned trial Judge did not undertake to pronounce on the question of contributory negligence otherwise than as to the rule, stop, look and listen. He was careful to say that the rule of the company did not relieve the plaintiff from the exercise of ordinary care under the circumstances. It is not pretended that if he saw the approaching train and deliberately went in front of it, he could recover. But, in view of all the facts and the evidence as to location of the trains, the obstructions on the sidings and the street, and the very material question as to whether plaintiff's train was standing still or in motion,—as to which the evidence was conflicting,—the case was necessarily for the jury. It was submitted with instructions in which the rights of both parties were carefully guarded.

We find no substantial error in the record. Neither of the specifications of error is sustained.

Judgment affirmed.

W. D. N.

Jan. '98, 296. Supreme Court. January 30, 1899.

Mellor v. Bridgeport.

Municipality—Negligence—Avoidance of known danger.

A person who uses a street or highway that is thrown open for public travel, knowing at the time that there is a safer route which he may take to reach his destination, is not necessarily guilty of negligence because he does not take the safer route. If the alternative route has dangers of its own and the dangers of the route actually taken are not too great and obvious as to deter the general public and

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ordinarily prudent and careful people from using it, the question of the contributory negligence of a person using it is for the jury.

Haven v. Bridge Co., 151 Pa. 620, distinguished.

Appeal of Samuel S. Mellor from the decree of the Common Pleas of Montgomery County, in an action of trespass wherein the Burgess and Town Council of Bridgeport was defendant.

The facts of the case, appearing upon the trial, before WEAND, P. J., were as follows: The plaintiff, on the evening of November 14, 1896, was driving along Vine street, in the borough of Bridgeport, near its intersection with Front street. At the eastern margin of the intersection of these two streets there is an abrupt descent to the tracks of the railroad, some fifteen or twenty feet. As the plaintiff reached this point the horse became frightened at the light of a locomotive on the tracks below and backed over the embankment, injuring the plaintiff and incurring such injuries to the horse that he had to be killed. The wagon and harness were totally destroyed. It was in evidence that another route could have been taken by the plaintiff which would have brought him to the same terminus, but on this other route the street was occupied by electric motor cars and in addition to that in traversing this route two railroad lines would have to be crossed.

At the trial the plaintiff testified: "I think it is a very dangerous place on Fourth street. . . . The trolley cars run on Fourth street. On coming down Vine street and up Front street you avoid the trolley."

The Court granted a non-suit on the ground that a person having the choice of two streets, one of which he knows to be safe and the other he knows to be dangerous, was guilty of contributory negligence.

On motion the Court refused to take off the non-suit. Plaintiff appealed and assigned as error the refusal to do so.

N. H. Larzelere, (*M. M. Gibson* with him), for appellant.

The evidence in the case being inferential in its character, tending to show contributory negligence, the case was for the jury.

Easton v. Neff, 102 Pa. 474.
Chilton v. Carbondale, 160 Id. 463.
Gates v. P. R. R. Co., 154 Id. 566.

But, even if the defendant knew another safe way around, it does not follow that he was necessarily obliged to take it. It would depend upon whether the danger in traveling over the road he did take and upon which this accident befell him, was so manifest and apparent that, as a prudent man, he ought not to have undertaken its passage.

Stokes v. Ralpho Twp., 187 Pa. 333.
Altoona v. Lotz, 114 Id. 238.

Had the defect been in the roadbed itself and the plaintiff been shown to have had knowledge of this defect, the action of the Court in entering a non-suit would not have been error.

James Boyd, (*E. F. Kane* with him), for appellee.

If a person, having a choice of two ways, one of which is perfectly safe, and the other of which is subject to risks or dangers, voluntarily chooses the latter and is injured, he is guilty of contributory negligence and cannot recover.

Haven v. Bridge Co., 151 Pa. 627.
Lynch v. Erie City, 151 Pa. 381.
Brendlinger v. Township, 148 Id. 95.

In an accident case, where the evidence is uncontradicted that the cause is remote and not proximate, it is the duty of the Court to determine that point as a matter of law and instruct the jury accordingly.

Pass. Ry. Co. v. Trich, 10 Cent. 367.
Ry. Co. v. Taylor, 104 Pa. 316.

May 23, 1899. STERRETT, C. J. This appeal is from the refusal of the learned Court below to take off the non-suit which was ordered at the trial on the ground that the plaintiff was guilty of contributory negligence.

The only question presented here is, whether the evidence was such as required submission to the jury of the questions of negligence and contributory negligence. As to the former, there is no room for any doubt. If the testimony on that subject is true no jury could hesitate to find that the defendant borough was guilty of negligence in leaving the steep embankment down to the railroad tracks unguarded, etc. As to the alleged contributory negligence of the plaintiff, while there is perhaps sufficient testimony to justify submission of the question to a jury, there are no fact or facts either admitted or established by undisputed evidence, that would justify a trial Judge in declaring, as matter of law, that he was guilty of contributory negligence, and therefore could not recover.

Without unnecessarily consuming time, by reviewing or summarizing the evidence and presenting it here, the foregoing are the conclusions we have reached after a careful consideration of the record. This case was clearly for the jury, and it should have been submitted to them with proper instructions as to the law applicable to the facts which the evidence tended to prove. As to the law of the case, there cannot be any trouble. A person who uses a street or highway that is thrown open for public travel, knowing at the time that there is a safer route which he may take to reach his destination, is not necessarily

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guilty of negligence because he does not take the safer route. It is only when the danger is so great and apparent that an ordinarily prudent person would regard it as dangerous and therefore avoid it, that a trial Court can say, as matter of law, that the person using the more dangerous route is guilty of contributory negligence: Stokes *v.* Ralpho Township, 187 Pa. 333. If the alternative route has dangers of its own, as was the fact in this case, and the dangers of the route actually taken are not so great and obvious as to deter the general public and ordinarily prudent and careful people from using it, the question of the contributory negligence of a person injured in using it, is a question for the jury. The rule laid down in Haven *v.* Bridge Company, 151 Pa. 620, and recognized in other cases, that "where a person having a choice of two ways, one of which is perfectly safe and the other . . . is subject to risks and danger, voluntarily chooses the latter and is injured, he is guilty of contributory negligence and cannot recover," is not applicable to the facts which the testimony in this case tends strongly to prove.

Without further elaboration of the subject we are satisfied that the judgment of non-suit should have ben taken off, so that the case may be tried by jury and the facts determined by them.

Judgment reversed and procedendo awarded.

W. D. N.

Jan. '98, 156. Supreme Court. April 10, 1899.

O'Malley v. Borough of Parsons.

Negligence — Borough — Highway — Barrier — Personal view by jury.

Whenever, owing to the existence of embankments or excavations alongside a public street or highway, it would be reasonably prudent and necessary to erect and maintain railings or other suitable barriers to prevent accidents to passengers traveling along, coming into or leaving the public street or highway at customary and proper points, it becomes the duty of the municipality to provide such guards or barriers; and its neglect to do so will render it liable to those who, in the exercise of ordinary and reasonable care themselves, sustain injury in consequence of such neglect.

It is for the jury to determine what was the condition of the street at the point where and when the accident took place, and, as a personal view is valuable in aiding the jury to form an intelligible conclusion, it was proper in this case to permit the jury to visit the premises as a part of the trial.

Appeal of the Borough of Parsons, defendant, from the judgment of the Common Pleas of Luzerne County, in an action of trespass wherein A. P. O'Malley was plaintiff and the Lehigh Valley Coal Company was co-defendant.

The facts of the case are set forth in the opinion of the Supreme Court, infra.

In his charge to the jury the Court, LYNCH, J., said:

"The contention of the plaintiff is that in 1892, by the authority of the borough, Main street at its intersection with the middle row, was cut down from one foot to four feet. I leave this large latitude because witnesses have differed so much. The dirt was taken from the embankment and a precipitous cut was made at this point; the dirt was taken from that place and thrown farther down the road or thrown into the middle of the road, for the purpose of grading or making the main way better. This the borough authorities had the right to do; not only had the right, but perhaps it was their duty to do so. In grading Main street, if you find they cut in to the line of the street in 1892, and it was left in such condition from then up to 1894, when the accident occurred, Dr. O'Malley can not recover, because it was not the duty of the borough to guard the street from a private way. The borough would have no right to cut down the street and leave it unguarded so that a person might fall over it in the way shortly thereafter; but where a place had been left open so long as this was, it was not the duty of the borough to fence the approach to its highway upon private land. Therefore the question narrows itself down to close limits. What did the borough do? That is the question for you to decide first. I have stated their duty was to exercise reasonable diligence in keeping a safe public highway. Did they violate this duty?" (First assignment of error.)

The appellant asked for a binding instruction in its favor, which was refused. (Seventh assignment of error.)

Verdict and judgment for plaintiff. The borough of Parsons thereupon appealed.

P. J. Sherwood, for appellant.

The authorities of a municipality are bound to do what is practicable and reasonable under all the circumstances to render highways safe. But having done this, they have fulfilled their duty and can be called upon to do no more. When one alleges that they have failed in so doing, the burden is upon him to show it.

Worrilow *v.* Upper Chichester Twp., 149 Pa. 40.
Kieffer *v.* Hummelstown Borough, 151 Id. 304.
Jackson Twp. *v.* Wagner, 127 Id. 184.

A municipality is not bound to provide a safe way, or any way, by which its streets may be entered from private ways or private property.

Goodin *v.* City of Des Moines, 55 Ia. 67.
Haines *v.* Barclay Twp., 181 Pa. 521.

A traveler's right to use a highway is always

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subordinate to the right of the authorities to repair it.

Crescent Twp. *v.* Anderson, 114 Pa. 643.

A municipality need not keep its public ways open and in repair the full width, unless the demands of public travel require it.

Monongahela City *v.* Fischer, 111 Pa. 9.
Pittsburgh R. R. Co. *v.* Taylor, 104 Id. 306.
Dillon on Mun. Corp., 4th ed., vol. 2, sec. 1003, note 2.

The plaintiff, having admitted that he had driven along by the cut on Main street on different occasions after the time of the cut and before the accident, although he says he does not remember seeing the change, was bound to know that the bank was there because it was in plain sight of all.

Forks Twp. *v.* King, 84 Pa. 230.
Haven *v.* Pittsburgh, etc., Bridge Co., 151 Id. 620.

Courts must be careful not to relax the principles of law applicable to cases of negligence, otherwise we shall have a principle which, if once established, will be found difficult to confine within reasonable limits.

Pittsburgh Ry. Co. *v.* Taylor, 104 Pa. 306.

John McGahren, (with him *E. K. Little* and *P. A. O'Boyle*), for appellee.

It is no ground for reversal that the trial Judge in instructing the jury used facts assumed, but not purporting to have been shown in the testimony, merely by way of illustration as to legal negligence, although the facts assumed may have conformed to a theory of the case urged by one of the parties.

Platz *v.* McKean Twp., 178 Pa. 601.
Long *v.* Milford Twp., 137 Id. 122.

Wherever owing to the existence of embankments or excavations alongside of a public street or highway, it would be reasonably wise and necessary to erect and maintain railings or barriers to prevent accidents to passengers; it is the duty of a municipality to furnish them and it will be held liable for a failure to do so.

Pittston *v.* Hart, 89 Pa. 389.
Lower Macungie Twp. *v.* Merkhoffer, 71 Id. 276.
Newlin *v.* Davis, 77 Id. 317.
Hey *v.* Philadelphia, 81 Id. 44.

That it is the duty of a municipality to fence off a private way leading into a public street where a cut or excavation exists at the point of intersection which renders the same dangerous to public travel is expressly ruled and decided in—

Burnham *v.* City of Boston, 10 Allen, 290.

If the opening of such ways were not to be regarded as a license to the public to use them, they would be traps to innocent passengers.

Washburn on Easements, p. 133.

Whenever a highway is from any cause rendered so unsafe as to put the traveler upon it in peril, it is the duty of the township to do whatever is practicable and reasonable, under all circumstances, to render it safe, and the facts in each case are to be submitted to the judgment and experience of the jury.

Plymouth Twp. *v.* Graver, 125 Pa. 25.
Bauerle *v.* Philadelphia, 184 Id. 545.

May 23, 1899. STERRETT, C. J. This action of trespass was brought by the plaintiff, a practicing physician, to recover damages for injuries resulting from his being thrown from his carriage over an unguarded embankment into a highway, formerly called "Main Road," but now known as "Main street" in the borough of Parsons. Main street was originally laid out in 1818, and its width fixed by the Court at fifty feet. After the incorporation of the borough defendant in 1876, Main street within its limits was accepted and since recognized as one of its streets.

A large tract of land in the neighborhood—including a settlement on the south side of Main street, known as "Scranton Patch" was held by the Lehigh Valley Coal Company, as lessees, for mining purposes. In 1866 or 1867, three rows of houses were built on this tract a short distance back from Main street for the use of employés of the mines. The houses were built at an angle to Main street, the middle row extending, in the direction of the street, several houses beyond the first row. The third row was located back of the middle row and not contiguous to the street. The open spaces in front of the houses were used as a means of ingress and egress to and from the houses and Main street. Although evidence was introduced to prove acceptance by the borough defendant of these passage ways as streets, the learned trial Judge instructed the jury that the evidence was insufficient and that said passage ways must be treated as private ways. The houses in the middle row, at the end next to Main street were on a slight embankment which narrowed as it approached Main street, and ended in the same, at the end house. In its original condition, the terrace in front of these houses next to Main street was a gradual slope and the houses were approached from any point on Main street. Sometime prior to the accident, the borough authorities in improving Main street, cut down the driveway thereof in front of the terrace, thus making the bank more abrupt. Immediately opposite the second house from the end next Main street—the house professionally visited by the plaintiff on the night of the accident—there was a depression in the embankment, which, after Main street was improved, was used as a means of approach to the houses from said

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street. The evidence was conflicting as to the width of Main street after the grading was completed. Mr. Stahl, a surveyor, called by the plaintiff, testified that it was forty-eight or forty-nine feet wide, but that it narrowed down to thirty-five feet at the point where the accident happened only a short distance beyond. No fence or guard was placed along the embankment.

There is no controversy as to the way in which the accident happened. On the night of January 29, 1894, a cold, rainy night, plaintiff, with a pair of horses, a driver and covered phaeton, on his return from the borough of Parsons to Wilkes-Barre, turned off Main street by a private wagon-way and stopped at the first house, thirty or forty feet from the street. After visiting his patient in that house, he resumed his seat and undertook to drive directly out to Main street. The accident is briefly described by plaintiff thus:

"There was no difficulty in getting in there any time, night or day, and, of course, intending to go down where I had previously gone, not knowing there was any break in the road, or any precipice or bank, first thing I knew horse went over, and, secondly, the carriage, and out we went. It was all done in an instant, and it was all over."

Plaintiff's leg was broken and he was otherwise severely injured.

Under all the evidence, the case was necessarily for the jury. If Main street was opened to its full width, the borough would have no right to go upon private land to erect guards or barriers. If on the other hand, a considerable portion of ground dedicated to uses of a public way or street projected out into Main street as opened, and if in consequence of the cutting down that was done by the borough authorities it was made dangerous to the traveling public, even approaching on private ways, the borough was negligent in not properly guarding the abrupt embankment or cut: Burnham *v.* City of Boston, 92 Mass. 290; Orme *v.* City of Richmond, 5 Am. & Eng. Corp. Cases, 605, and authorities there cited. In the former it was held:

"If a traveled way, either public or private, over lots adjoining a public street in a city and leading into that street, for a long time before and after the existence of an excavation in the street has been so much used by persons, having occasion to pass, as to become known as a common way for travel, and to make it reasonably necessary for the city in the exercise of due and proper care, to provide a barrier, for the purpose of preventing travelers, who pass over such way from the adjacent lots into the street and use due care, from falling into the excavation, and the city has unreasonably omitted to erect such barrier, it is guilty of negligence and liable for any injury happening to a traveler in the street by reason thereof."

In Orme *v.* City of Richmond, supra, the municipal authorities lowered the grade of two streets, making a precipice of several feet at their intersection, at which point, there was an old and much used pathway over an adjoining lot into those streets. The city had placed barriers at the ends of the streets, but nothing to warn passengers along the pathway. A traveler ignorant of the precipice and without negligence on her part, at night, walked along the pathway down into the precipice, causing her great damage. In an action against the city, it was held that she had a right of action against the city and that the trial Court erred in sustaining a demurrer to her claim.

In this class of cases, the underlying principle, —recognized by approved text writers and many of our own cases as well—is that whenever, owing to the existence of embankments or excavations along side of a public street or highway, it would be reasonably prudent and necessary to erect and maintain railings or other suitable barriers to prevent accidents to passengers traveling along, coming into or leaving the public street or highway at customary and proper points, it becomes the duty of the proper municipality to provide such guards or barriers; and its neglect to do so will render it liable in damages to those, who, in the exercise of ordinary and reasonable care themselves, sustain injury in consequence of such neglect.

The evidence shows that between the top of the cut or steep bank, over which plaintiff was thrown, and the southerly line of the street, there was plenty of public ground (from ten to fifteen feet wide) on which to put up railing or other suitable barriers. If the embankment projected in the manner described by plaintiff's witnesses, the borough had exclusive control over this ground, either to fence it off or to guard it in such manner as to make it reasonably safe. It was for the jury to determine what the condition of Main street, at the point in question, was, and what the borough could and should have done under the circumstances. In addition to the evidence presented on the trial, the jury were permitted to view the premises. In view of the testimony given in Court, such personal view was worth more, in aiding them to form an intelligent conclusion in the premises, than all the witnesses that could be called. On the question of contributory negligence, it would have been error for the learned trial Judge to have taken the case from the jury. Plaintiff testified posi-

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tively that he did not know of the alterations and grading done on the street, and the witnesses generally agree that before the grading, etc., was done, it was entirely safe to drive over that part of the street—going in or leaving it at any point.

The case was submitted to the jury with well guarded instructions, which were quite as favorable to the borough as it had any right to expect. We find nothing in any of the assignments of error that requires special notice. They are all overruled, and the judgment is affirmed.

W. D. N.

Jan. '99, 220. Supreme Court. April 24, 1899.

Commonwealth v. Heidler.

Criminal law—Murder—Jurors—Assignments of error—Practice—Insanity.

Where error is assigned to the charge of the Court, the part of the charge referred to must be quoted totidem verbis, and when the error assigned is to the admission or rejection of evidence, the specification must quote the full substance of the bill of exceptions or copy the bill in immediate connection with the specification.

To convict of murder in the first degree the Commonwealth must prove beyond a reasonable doubt the unlawful killing and the fully formed purpose to kill; no evidence of the sanity of the defendant need be adduced; the law presumes that, and the presumption is conclusive in the absence of evidence to rebut it. If insanity is the defence it must be established like any other fact, by fairly preponderating evidence.

Com'th *v.* Wireback, 190 Pa. 138, followed.

Unless a very clear abuse of discretion appear in the selection or rejection of jurors, the appellate Court will not pass upon the exercise of this discretion by the trial Court, and the acceptance as a juror of one who was shown to have expressed an opinion of defendant's guilt, is not an abuse of this discretion, if he at the time of his examination declare he has formed no opinion in the case.

Appeal of Edwin D. Heidler, from the sentence of the Court of Oyer and Terminer for Erie County, on the trial of an indictment for murder.

The facts of the case were as follows: Defendant and Levi H. Kreider had married sisters, the daughters of Maria Weidler. Mrs. Weidler left a will in which she gave to these two daughters and a son equal third shares of her estate and in her will made the following provision:

"I appoint Levi H. Kreider as committee over their (Sarah F. Heidler's and John Weidler's) portions, and he is only to give them the interest on the same during their lives, but in case in after years the committee thinks it expedient he can give them their share or shares, but the committee is to use his own judgment in so doing and in case Sarah F. Heidler dies without issue then her share is to be equally divided between my daughter, Sarena Kreider and my son, John Weidler, share and share alike."

The defendant and his wife were anxious to secure the latter's share of her mother's estate, and frequently importuned Kreider to pay it to them. On the last day of May, 1896, a final effort was made when, accompanied by his wife, Heidler drove to Kreider's place and demanded a settlement or the execution of a note upon which he could raise the money. Kreider declined to comply with either request and the defendant shot and killed him.

At the trial, before WALLING, P. J., John Swailes was examined as to his capacity to serve as a juror. In the cross-examination by defendant he was asked: "Have you any prejudice against a defence based on a question of insanity, where the charge against the defendant is murder?" Objected to by the Commonwealth. Objection sustained.

Another talesman, upon cross-examination by defendant's counsel, was unable to say whether his friendship and acquaintance with the deceased would have any weight in determining his verdict. Objection by defendant was overruled by the Court.

And another who had admitted having expressed an opinion to police officers at the station house as to the guilt of the defendant, was objected to in behalf of the defendant, even though he said he did not believe the opinion so formed would effect his verdict. Objection overruled by the Court. (First, second, third and fourth assignments of error.)

Thomas Newsham, a talesman, was stood aside by the district-attorney. Objected to that the Commonwealth had no right to stand aside a talesman. The Court overruled the objection. (Fifth assignment of error.)

The defendant asked the Court to charge:

"The burden of proof never shifts from the Commonwealth to the defendant, but the burden to establish every element of the offence beyond a reasonable doubt remains upon the Commonwealth throughout the trial, even where the defence is the insanity of the defendant." Answer—"But where it is shown beyond all reasonable doubt that the defendant did the act in question and the only defence set up is his insanity at the time, then to justify his acquittal upon that ground the existence of said insanity should be shown by fairly preponderating evidence so explained in the general charge. And if upon the whole case the jury have a reasonable doubt as to defendant's guilt from whatever cause arising, the defendant is entitled to the benefit of that

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doubt and should be acquitted." (Sixteenth assignment of error.)

The defendant also asked the Court to charge: "If, after fully considering all of the evidence in this case, any juror pauses or hesitates in arriving at a conclusion as to the guilt or innocence of the defendant, this would constitute a reasonable doubt and such juror would have no right to find the defendant guilty." Answer—"If, after fully considering all the evidence in the case, and after a full consideration and discussion of the case with his fellow jurors any juror has a reasonable doubt as to defendant's guilt, of course he should not agree to a verdict of guilty, for the verdict, whatever it be, when found, must be the united act of twelve jurors. I have already given you instructions as to what constitutes a reasonable doubt." (Seventeenth assignment of error.)

The Court charged:

"That is, so that he might have done different from what he did, then he is responsible before the law and should be punished even though he may not have had, at the time, an entirely sound mind: and while a slight departure from a well-balanced mind may be pronounced insanity in medical science, yet such a rule cannot be recognized in the administration of the law when a person is on trial for the commission of a high crime. The just and necessary protection of society requires the recognition of a rule which demands a greater degree of insanity to exempt from punishment." (Nineteenth assignment of error.)

Verdict of guilty and sentence thereon. Defendant appealed.

The seventh assignment was:

The learned Court erred in rejecting the several items of evidence offered on behalf of the defendant, which were objected to by the attorneys for the Commonwealth. (Seventh assignment of error.)

J. Ross Thompson, (*U. P. Rossiter* with him), for appellant.

It is a good cause for challenge that a juror states he would not convict a person charged with murder upon circumstantial evidence alone.

Kerr on Homicide, 399, sec. 364.

On the trial of an indictment for murder, a juryman may be properly challenged for cause by the Commonwealth, who testifies on his voir dire that he does not think that a man who would commit such an offence, was of sound mind and that it would require evidence to change that opinion.

Com'th *v.* Buccieri, 153 Pa. 535.

When the challenge is for bias or opinion, a wide range of questions is permissible to show the state of the juror's mind toward either party.

12 Am. & Eng. Ency. of Law, 359.

In the United States the weight of authority seems to be that the holding by a juror, of any opinion, which may disqualify him from rendering a verdict in accordance with the laws of the land is a disqualification.

Archibald Cri. Pl. & Pr., p. 515.

Evidence tending to show the relation between the deceased and the defendant before the killing, particularly when they indicate a lack of ill-feeling on defendant's part, should be fully commented on by the Court to the jury.

Com'th *v.* Silcox, 161 Pa. 495.
Goersen *v.* Com'th, 99 Id. 401.

If the evidence as to the insanity of the defendant be sufficient to cast a doubt on the same the defendant is entitled to the benefit of this doubt. "Fairly preponderating evidence" is not essential.

Instructions which tend to mislead the jury as to force and effect of testimony are erroneous.

Connelly *v.* Walker, 45 Pa. 449.
Com'th *v.* Cleary, 135 Id. 64.

C. L. Baker, (*Paul A. Benson*, district-attorney, with him), for appellee.

An isolated answer of a juror that he has a fixed opinion, is not decisive of the question under investigation; to disqualify, the character of the opinion must be determined upon the whole evidence affecting it, to be deduced from his answers taken together.

Clark *v.* Com'th, 123 Pa. 556.

There was no error in overruling defendant's challenges for cause.

Clark *v.* The Com'th, 123 Pa. 555.
Com'th *v.* Rizzolo, 126 Id. 54.
Com'th *v.* Crossmire, 156 Id. 304.
Com'th *v.* Eagan, 190 Id. 10.

It was not error to reject defendant's offers to show that jurors were prejudiced against the defence of insanity.

Hall *v.* Com'th, 22 WEEKLY NOTES, 25.

When a challenge by a defendant in a criminal action to a juror, for bias, actual or implied, is disallowed, and the juror is thereupon peremptorily challenged by the defendant, and excused, and an impartial and competent juror is obtained in his place, no injury is done the defendant, if until the jury is completed he has other peremptory challenges which he can use.

Hopt *v.* Utah, 120 U. S. 430.
Spies *v.* Illinois, 123 Id. 131.

On the trial of an indictment for murder, it is not error to permit the Commonwealth to stand aside jurors brought into Court on a special venire, as well as those returned as summoned on the regular panel.

Rudy *v.* Com'th, 128 Pa. 500.

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The fifth and sixth assignments of error are not in compliance with the rules of this Court.

Comm. Title Co. *v.* Gray, 150 Pa. 255.

It is improper to assign isolated portions of the charge as error.

Com'th *v.* Zappe, 153 Pa. 498.

The rulings of the Court on the questions of evidence as to the opinions of witnesses, were in line with the authorities on that subject.

Taylor *v.* Com'th, 109 Pa. 262.
Swails et ux. *v.* White, 149 Id. 261.
Com. Title Co. *v.* Gray, 150 Id. 255.

May 8, 1899. FELL, J. Thirteen at least of the twenty-six assignments of error are in entire disregard of the mandatory rules of this Court, which require that when error is assigned to the charge of the Court the part of the charge referred to must be quoted totidem verbis, and that when the error assigned is to the admission or rejection of evidence the specification must quote the full substance of the bill of exception or copy the bill in immediate connection with the specification. The object of these rules and the reasons upon which they are founded have been fully stated in Battles *v.* Sliney, 126 Pa. 460, and in Com'th *v.* Werntz, 161 Pa. 591. In the last case it was said by our brother MITCHELL: "The assignments are the pleadings of this Court, and the only part of the case that remains of record after the remittitur to the Court below. They should therefore be self-explanatory and self-sustaining, giving in each assignment separately the offer with so much of the proceeding or accompanying evidence as is necessary to the proper understanding of the offer, the ruling of the Court upon it, and if testimony objected to be admitted, so much of it as may suffice to show why it was injurious to the party objecting."

Because of the gravity of the crime of which the appellant has been convicted we have looked beyond the assignments to see whether any error calling for reversal was committed at the trial. We find quoted, in connection with the printed argument of counsel, a part of the testimony on which the rulings of the Court as to the competency of jurors were based, but that part only which is favorable to the appellant's contention. The balance of the testimony on the subject, which so fully sustains the rulings as not to leave any question open even for argument, and which shows that the assignments are as defective in substance as in form, has been wholly omitted.

The assignments which are good in form are without merit. They relate mainly to the burden of proof of the defence of insanity. The learned Judge properly held that the burden of proof of insanity was with the defence from the beginning, and that it never shifted; that insanity was to be established as any other fact by a fair preponderance of testimony, and that a mere doubt as to sanity would not work an acquittal. The rulings and the instructions upon the subject were in entire accord with the principles stated in Ortwein *v.* Com'th, 76 Pa. 414; Coyle *v.* Com'th, 100 Pa. 578; Com'th *v.* Gerade, 145 Pa. 289; Com'th *v.* Woodley, 166 Pa. 463, and in the quite recent case of Com'th *v.* Wireback, 190 Pa. 138, in which it was said by our brother DEAN: "To convict of murder of the first degree, the Commonwealth must prove beyond a reasonable doubt the unlawful killing and the fully formed purpose to kill; it need adduce no evidence whatever of the sanity of the prisoner; the law presumes that, and the presumption is conclusive in the absence of evidence to rebut it. If the accused alleges insanity he must establish it by fairly preponderating evidence, or the presumption of sanity which the law raises stands unshaken. . . . There is no middle ground which the law recognizes; nor does a doubt of sanity reduce the grade of the crime to murder of the second degree. . . . Either the offence of defendant is wholly excused because the jury is satisfied by the preponderance of evidence of his irresponsibility, or he is guilty because the evidence fails to so satisfy them." We have quoted from the opinion at length because it clearly expresses the principles of our decisions on the subject under consideration.

The rule for a new trial, on the ground that one of the jurors when examined on his voir dire had falsely stated that he had not formed or expressed an opinion as to the guilt or innocence of the prisoner, was discharged after a careful investigation by the Court and a finding by it from the testimony produced that the answers of the juror were honestly made and that he had not prejudged the case. Nothing short of a very clear abuse of discretion would induce us to interfere with the judgment on this ground. We are satisfied by a careful examination of the testimony that the rule was properly discharged and that in this matter, as in all others connected with the trial, every right of the appellant was carefully observed, and that he had a fair and impartial trial according to law.

The judgment is affirmed, and it is directed that the record be remitted to the Court below that the sentence may be carried into execution according to law.

W. D. N.

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WEEKLY NOTES OF CASES.

VOL. XLIV.] *FRIDAY, AUG. 18, 1899.* [No. 20.

Supreme Court.

Jan. '99. 2. Supreme Court. March 22, 1899.

Scattergood v. Kirk.

Wills — Undue influence— When the burden of proving no undue influence is on the beneficiary — Witnesses.

Where it appears that a sole beneficiary under a will had a controlling agency in procuring its execution, and that the alleged testatrix, although possessed of testamentary capacity, was eighty-eight years old, and had the bodily infirmities incident to such age, a presumption of undue influence is raised and the burden is upon such beneficiary to rebut the same by showing affirmatively that the testatrix understood the nature of the paper she signed and that the beneficiary used no undue influence over her.

Where there are two competent witnesses to a will, the fact that a third signature was added of a person not oresent at the time the will was signed, does not of itself affect the validity of the instrument.

Appeal of Helen T. Kirk, from the judgment of the Common Pleas No. 1, of Philadelphia County, in a feigned issue to determine whether or not the execution of a certain paper purporting to be the last will of Rebecca B. Cummins was procured by undue influence on the part of Sarah Scattergood.

The facts, as they appeared on the trial, are stated in the opinion of the Supreme Court, infra.

Counsel for defendant requested the Court to charge the jury, inter alia, as follows:

"1. If you shall find from the testimony that from about November, 1896, to August, 1897, Mrs. Scattergood lived in the house and company and had the care of Miss Cummins; that the latter was eighty-eight years of age, and had the bodily infirmities incident to such age; that Mrs. Scattergood gave instructions to her own lawyer from which the will and codicil in dispute were drawn, and that she was a beneficiary under the former and the sole beneficiary under the latter, then it was incumbent upon her to show affirmatively in this suit that Miss Cummins, with respect to the two papers in dispute, had advice independent of any from Mrs. Scattergood, and that she also had a full understanding of the effect of the two papers. This not having been done, I direct you to render a verdict for the defendant." Answer—"Declined." (First assignment of error.)

"4. If you believe from the evidence that after the paper of December 23, 1896, was signed by R. B. Cummins, Mrs. Scattergood procured Dr. Millick to sign it as a witness when she knew he was not present and had not seen it signed, the paper is thereby annulled.

"The principle in this behalf is rigidly enforced to protect written instruments against fraud and substitution, and in no case is its enforcement more important than with respect to wills." Answer.—"Declined." (Second assignment of error.)

The Court left to the jury the question of undue influence.

Verdict for plaintiff and judgment thereon.

Helen T. Kirk thereupon appealed, assigning for error the answer to the above points.

E. Hunn Hanson, for appellant.

In the case of an old person naming one standing in a confidential relation as the beneficiary, the burden is upon the latter to show the absence of undue influence.

Cuthbertson's Appeal, 97 Pa. 163.
Boyd *v.* Boyd, 66 Id. 283.
Wilson's Appeal, 99 Id. 545.
Armor's Estate, 154 Id. 523.
Hoghton *v.* Hoghton, 15 Beav. 278.
Miskey's Appeal, 107 Pa. 611.
Darlington's Estate, 147 Id. 629.
Worrall's Appeal, 110 Id. 349.

The procuring of the signature of the doctor as a witness at another time and not in the presence of the testatrix, made the instrument void.

Neff *v.* Horner, 63 Pa. 330.
Fisher *v.* King, 153 Id. 3.

Albert E. Peterson, for appellee.

The beneficiary lived in the home of testatrix and cared for her and carried her instructions to the attorney; this does not raise a presumption against the will which must be overcome.

Caldwell *v.* Anderson, 104 Pa. 199.

The proper execution having been proved by the subscribing witnesses, the legal presumption arises that testatrix was fully acquainted with the contents of the paper.

Linton's Appeal, 104 Pa. 228.

July 19, 1899. DEAN, J. This was an issue certified to the Common Pleas by the Orphans' Court, to determine whether what purported to be the last will of Rebecca B. Cummins was in fact and law her last will and testament. The testatrix, at her death, August 17, 1897, was in her eighty-ninth year; had never married; was the owner of a house at 321 South Eighteenth street, which was of considerable value; besides, was the owner of valuable personal property consisting of money and securities. She lived in

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this house at the time of her death, and had lived in it for twenty years. For some years before her death, one John Walker and his wife occupied the house as tenants; the testatrix boarded with them, and they cared for her rooms. The wife of the tenant having died in 1895, a widow, Sarah E. Saurman, took her place as housekeeper and also cared for Miss Cummins; this continued until October, 1896, when Catharine Scattergood, by consent of the housekeeper, took up her abode in the house. She was about seventy-five years of age, and a first cousin of testatrix. Before the death of Miss Cummins, both Walker and Mrs. Saurman left the house; after Mrs. Scattergood entered, she became the companion and confidant of the testatrix, as well as her business adviser in her affairs other than legal. A. E. Peterson, Esq., a reputable member of the bar, was the lawyer and professional adviser of Mrs. Scattergood. On December 23, 1896, she requested Mr. Peterson to draw a will for Miss Cummins, who wanted a will drawn in her (Mrs. Scattergood's) favor. The will was drawn, giving to Mrs. Scattergood one-half the estate after payment of debts, and the other half to Emma N. and Gabrielle Clements; Mrs. Scattergood was appointed sole executrix of this will. The attesting witnesses to the signature of Miss Cummins are Joseph E. Walker, S. E. Saurman and Dr. John W. Millick, the latter subscribing it as attending physician. On January 26, 1897, Mr. Peterson, at the request of Mrs. Scattergood, drew a codicil to the will, in which the testatrix revoked the bequest to the Clements, and gave the whole to Mrs Scattergood. This codicil is witnessed also by Walker and Mrs. Saurman, but Dr. Millick does not join with them. Mr. Peterson had no communication personally with the testatrix, either before or after the execution of the will and codicil. He acted solely at the suggestion of his own client, Mrs. Scattergood, who professed to acquaint him with the wishes of the testatrix. While Walker and Saurman, the two subscribing witnesses, testify that they saw the testatrix sign the paper, and affixed their signatures as witnesses, it was not read to her in their presence, nor did they know at the time the writing was a will; and the testatrix in no way indicated that she knew it was: that Mrs. Scattergood prevented Walker from looking at it. In fact, their testimony tends to show that both they and the testatrix believed the paper was other than a will. Dr. Millick, the third witness to the will, testifies he did not see testatrix sign the paper; that he signed as a witness at his office, where Mrs. Scattergood presented the paper and asked him to sign it. Besides this evidence, tending to show ignorance of the nature of the instrument by the testatrix, it was scarcely disputed that the relations between Mrs. Scattergood and the testatrix were of the most confidential character. Mrs. Scattergood herself admits this. Then, in addition to the fact of extreme old age and physical feebleness, there is abundant evidence tending to show that Mrs. Scattergood was her adviser in all her business affairs. In view of this and other evidence, counsel for contestant at the trial submitted this written request for instructions:

"If you shall find from the testimony that from about November, 1896, to August, 1897, Mrs. Scattergood lived in the house and company and had the care of Miss Cummins; that the latter was eighty-eight years of age, and had the bodily infirmities incident to such age; that Mrs. Scattergood gave instructions to her own lawyer from which the will and codicil in dispute were drawn, and that she was a beneficiary under the former and the sole beneficiary under the latter, then it was incumbent upon her to show affirmatively in this suit that Miss Cummins, with respect to the two papers in dispute, had advice independent of any from Mrs. Scattergood, and that she also had a full understanding of the effect of the two papers. This not having been done, I direct you to render a verdict for the defendant."

The learned Judge of the Court below refused the point, and although the charge is a most careful and elaborate one, he nowhere raises and affirms the proposition embraced in the point. We are of opinion it was error, as the evidence stood, to negative the point, and we cannot but think that appellant's case was thereby grievously prejudiced. True, there was evidence on part of the plaintiff, that the testatrix was a woman of firmness and inflexibility of will, and not likely to be unduly influenced by her adviser and confidant, but there was also uncontradicted evidence that she was not exempt from the mental infirmities of extreme old age. Although testamentary incapacity was not alleged, the undisputed facts fully warranted contestant's counsel in presenting the point. On these undisputed facts, we are clearly of the opinion they were sufficient to raise a presumption of undue influence on part of Mrs. Scattergood, and the burden was on her to rebut this presumption, by showing affirmatively that the testatrix understood the nature of the instrument she signed, and that her adviser and beneficiary exercised no undue influence to impel her aged relative to give to her her whole estate. The evidence offered did not outweigh or rebut the presumption. An examination of the whole of it seems to us to indicate a failure on the part of the learned Judge

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to give that prominence to the question of undue influence which it demanded. He says, in the closing words of the charge: "The main question, I think everybody will admit, is, whether Miss Cummins was falsely told that the paper which purports to be the will was something else when she signed it, and was falsely told that the paper that turned out to be the codicil was something else when she signed it." This, undoubtedly, was one of the questions raised by the evidence; but whether Mrs. Scattergood had taken advantage of the confidential relation she bore to her aged relative, to unduly influence her to make a will in her own favor, was a question just as prominently raised. Says Redfield on Wills, page 515, quoted approvingly by this Court, in Boyd *v.* Boyd, SHARSWOOD, J., in 66 Pa. 283: "Where the party to be benefited by the will had a controlling agency in procuring its formal execution, it is universally regarded as a very suspicious circumstance, and one requiring the fullest explanation." The same rule was adopted in Cuthbertson's Appeal, 97 Pa. 163; Wilson's Appeal, 99 Pa. 545; Armor's Estate, 154 Pa. 517, and other cases, especially Yardley *v.* Cuthbertson, 108 Pa. 395, where all the authorities are cited and discussed. And as said in Darlington's Estate, 147 Pa. 624: "The confidential relation is not all confined to any specific association of the parties to it. While its more frequent illustrations are between persons who are related as trustee and cestui que trust, guardian and ward, attorney and client, parent and child, husband and wife, it embraces partners and co-partners, principal and agent, master and servant, physician and patient, and generally all persons who are associated by any relation of trust and confidence. The peculiarly close and confidential relation is fully admitted by Mrs. Scattergood.

We then have these established facts: In 1888, when the testatrix was nine years younger, she had made a will in which Mrs. Scattergood was not a beneficiary; in 1896, she, by a way in itself unusual, becomes an inmate of testatrix's home, and almost immediately assumes the control of the house and servants; attaches herself to the person of her benefactress; takes charge of her money, some $4000, and claims it as a gift; goes to her own lawyer, and has him draw a will giving to her one-half of the estate; then in about a month, has him draw a codicil giving to her all of it. Then her declaration to one of the witnesses soon after she became an inmate of the house: ". . . . . Everything else I mean to have; I am the next of kin. I have consulted a lawyer; I know my rights, and I mean to maintain them. When she dies I am going to take her to Wilmington, and after that, if anyone comes in this house and tries to take anything out of it, they will have to deal with me." This conversation was not denied by Mrs. Scattergood, and may therefore be assumed correct. In connection with the circumstances which followed, it shows a grim determination on the part of a forceful and domineering woman to attain her ends, without much regard to the means. This may be the subject of future denial or explanation; we take the evidence as it is before us.

We think, as the case stood, when the Court charged the jury, appellant's counsel was entitled to an affirmance of his first point.

Of course, at another trial, the second question, as to the exercise of undue influence, by the presentation of other evidence on part of appellee, may present a different aspect, and her explanation may be wholly satisfactory to the jury; that is, they may be convinced no undue influence was exercised by her to secure the estate; but in any view of the case, taking the admitted facts, the jury must pass upon the evidence, and be instructed, that occupying the relation towards testatrix that she did, and being the sole beneficiary under the will and codicil, it is incumbent on Mrs. Scattergood to satisfy them that testatrix fully understood the nature of her act, and that it was the result of her own purpose and not that of her confidential adviser.

As to the wholly unwarranted signature as a witness, by Dr. Millick, we are of opinion that although it is evidence tending to throw suspicion upon the conduct of Mrs. Scattergood, yet, as there were two competent witnesses without him, the illegal act did not of itself affect the validity of the instrument, and the Court committed no error in so ruling.

The judgment is reversed and a venire facias de novo awarded.

W. M. S., JR.

Oct. '98, 2. Supreme Court. October 26, 1898.

Thompson's Appeal.

Legacy — Vesting of.

The testator bequeathed to his daughter M. $1000 to be invested in property two years after his death; to his daughter P. $1000, to be paid to her two years after M.'s dowry became due, and to his daughter A. $1000, to be paid to her two years after P.'s dowry became due. In the paragraph relating to his bequest to M., he said, "If she should die before her husband J., the above legacy is to go to her second son J." In the sixth paragraph of his will he devised the farm he lived on to his son J., with the instruction that he should not sell or dispose of it while his sisters P. and A. "remain single or unmarried." In the same paragraph, he devised to J. a house and lot, "which he, J., has the privilege to sell for the payment of the within legacies which he is to pay." The seventh paragraph of the will is as follows:

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"Should any of my said daughters die before they receives their dowries, in such case J. shall be exempted from the payment thereof." The testator died in March, 1891, and his daughter M. in May, 1891:

***Held*, that the legacies did not vest in the daughters previous to the time fixed for the payment of them, it being the intention of the testator that they should not receive the legacies bequeathed to them except on the condition of their surviving the period designated for payment.**

Appeal of A. B. Thompson, guardian of Joseph Wright Allen, from the decree of the Orphans' Court of Mercer County.

The facts are set forth in the opinion of the Court (MILLER, P. J.), as follows:

"This proceeding is in the nature of a citation on James E. Wright, executor of the estate of Joseph H. Wright, deceased, to show cause why he should not pay over to A. B. Thompson, guardian of Joseph Wright Allen, the minor child of Mary Allen, deceased, the sum of one thousand dollars and its interest claimed to be due the said minor under the will of Joseph H. Wright, deceased.

"Joseph H. Wright died on March 15, 1891. His daughter, Mary Allen, died on May 28, 1891, leaving to survive her a husband, James H. Allen, and a son, Joseph Wright Allen, the petitioner.

"The will of Joseph H. Wright bears date October 31, 1884, and was duly probated and letters were granted to James E. Wright, the executor nominated in the will. The provisions in the will which bear upon the questions at issue are as follows:

" 'Item Second. I give and bequeathed to my daughter Mary Allen one thousand dollars to be invested in property two years after my death. She, Mary, is to have that amount for her own use. She is not to sell or dispose of it during her husband's lifetime, and if she should die before her husband, James H. Allen, the above legacy is to go to her second son, Joseph W. Allen.

" 'Item Third. I give and bequeath to my second daughter, Phœbe, ten hundred dollars to be paid to her two years after Mary's dowry becomes due. . . .

" 'Item Fourth. I give and bequeath to my third daughter. Amelia Wright, ten hundred dollars to be paid two years after Phœbe's dowry becomes due. . . .

" 'Item Sixth. I give and bequeath to my son, James Egbert Wright all and entire the farm I now live on, including the amount purchased from the Edwards farm. He is not to sell or dispose of it while his two sisters, Phœbe and Amelia, remain single and unmarried. And also I give and bequeath to him one house and lot in the borough of Sharon, Mercer county, Penn'a, which he, James, has the privilege to sell for the payment of the within legacies which he is to pay, and also give to him all my personal property not already bequeathed to my daughters Phœbe and Amelia.

" 'Item Seventh. Should any of my daughters die before they have received their dowries, in such case James shall be exempted from the payment thereof. . . . .'

"The question to be determined is whether the bequest to Mary Allen, one of the daughters, is defeated by the seventh item of the will, she having died before the time fixed for the payment of said legacy. The petitioner contends that the legacy vested at the death of the testator; that the gift is positive and not dependent on the happening of some condition, although the time for the enjoyment of the same is fixed for the future, and that if it were not for the seventh item of the will no one would have thought but that it was vested. He further contends that if the language of the second item standing alone would be construed to vest the legacy at the death of the testator, a contrary intention to defeat such construction must be shown by clear and unambiguous language in some other part of the will; it being one of the canons of the construction of wills that a positive grant cannot be taken away by mere implication from another apparently inconsistent clause: Jarman on Wills, 5th Am. ed., vol. 3, p. 706, rule XII.; and further, that the language of the seventh item is inoperative to defeat the grant, there being no actual gift to any other definite object: Hitchcock *v.* Hitchcock, 35 Pa. 393; Bender *v.* Dietrick, 7 W. & S. 284.

"The petitioner also contends that the only contingency in which the seventh item would have proven operative to defeat the legacy in question would have been in the event of Mary Allen dying in the lifetime of her father, and hence it should be so construed, and likens it to cases where a legacy is given to one but in the event of the death of such legatee without issue, or children, as the case may be, the devise to go to another, and cites the cases of Estate of Mary Biddle, 28 Pa. 59; Fahrney *v.* Holsinger, 65 Pa. 388, and kindred cases.

"In Seibert's Appeal, 13 Pa. 501, Mr. Justice ROGERS says: 'To determine whether a legacy is vested or contingent it is a matter of great moment in the first place to ascertain whether the time is annexed to the gift or the payment of the legacy; if the former, it is vested; if the latter, it is contingent.'

"In Reed *v.* Buckley, 5 W. & S. 517, Mr. Justice SERGEANT says: "The rule borrowed from the civil law has been the ordinary guide in the first

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instance, that where the contingency is annexed to the time of payment only, and the legacy has been given by a previous bequest, then it is vested; but if the contingency is annexed to the legacy it does not vest unless the contingency happens.'

"In Gilliland *v.* Bredin, 63 Pa. 393, the decedent bequeathed to the legatee $100, 'if she shall continue under the direction of my husband until she comes of age.' Mr. Justice AGNEW says: 'The condition was inseparably connected with the gift of the legacy and not merely its payment. The right to it depends upon living out the prescribed time under the direction of the husband. There are numerous authorities that where a contingency is attached to the legacy itself and not merely to its payment, the legacy is contingent': Lamb *v.* Lamb, 8 Watts, 184; Moore *v.* Smith, 9 Watts, 403; Seibert's Appeal, 13 Pa. 503. The legacy not vesting until the condition had been performed, the want of a bequest over makes no difference, it becomes merged in the residue if it never vests.

"In Provenchere's Appeal, 67 Pa. 463, Mr. Justice SHARSWOOD says: 'There are no arbitrary or unbending rules in the construction of the words of a will. No two wills are in all respects alike. . . . Nevertheless the cardinal canon still holds good that the intention of the testator of each will separately is to be gathered from its own four corners. . . . . These remarks are particularly applicable to the controversies which have arisen as to whether future legacies give present vested or contingent interests; the determinations are very numerous, not always reconcilable, and in the nature of the subject this is inevitable.' Vice-Chancellor Sir LAUNCELOT SHADWELL has remarked very justly: 'The question is one of substance and not of form. The question in all the cases has been whether the decedent intended it as a condition precedent that the legatees should survive the time apointed by him for the payment of the legacies, and the answer to this question has been sought for out of the whole will and not any particular expressions. Thus it is true as a general rule that where the time or other condition is annexed to the gift and not merely to the payment, the legacy is contingent.'

"In Lamb *v.* Lamb, 8 Watts, 184, Mr. Justice HOUSTON says: 'The chancery books are full of very nice definitions as to what words give a vested legacy, and the amount of the whole seems to be that scarcely any form of expression can be used on which alone reliance can be placed. The whole will is to be taken into consideration and the intention of the testator is to be gathered from it, and if that can be discovered every rule of construction is to give way to it; the intention governs unless it contradicts some better doctrine of law.'

"In the light of these decisions let us look at the whole will under consideration. By the second item of the will the evident intention of the testator was that the legacy to Mary Allen was not to be paid until two years after the death of the decedent. This is further indicated by the bequest to Phœbe, her legacy is to be paid to her two years after Mary's becomes due. The sixth item, inter alia, devises a certain piece of real estate to his son James coupled with the privilege of selling the same for payment of the legacies to his daughters, which legacies 'he (James) is to pay.' The decedent has thus far fixed the amount of the legacies to each of his daughters, the time of payment of each, the source from whence the funds are to be realized to pay the legacies, and designated the person who is to pay them. The person is his son James, in his individual and not in his representative capacity. If the testator had stopped here there would be no room for controversy. He has apparently concluded his will when the thought arises in his mind that one or all of his daughters may die before the day of payment arrives. As in Seibert's Appeal, the testator, as appears from the whole tenor of the will, for reasons no doubt satisfactory to himself, seems to have had in view the exclusion of the husband of his daughter Mary from any participation in or enjoyment whatever of any part of his estate. To eventuate this part he bequeaths the one thousand dollars for her own use—'She is not to sell or dispose of it during her husband's lifetime, and if she should die before her husband, James H. Allen, the above legacy is to go to her second son, Joseph W. Allen,' and then anticipating that she might die before the time of payment arrives and before she had entered upon the enjoyment of the legacy he adds the seventh item. The language of item seven is neither ambiguous or dubious: 'Should any of my daughters die before they have received their dowries (legacies) in such case James shall be exempted from the payment thereof.'

"Applying the rule laid down in Lamb *v.* Lamb and Provenchere's Appeal, that the whole will is to be taken into consideration in deciding whether the legacy vested, we are forced to the conclusion that the legacy to Mary Allen did not vest at the death of the testator; that her right to it depended upon her living until it became due, and that the evident intention of the testator was that she was to survive two years after his death, otherwise it was not to be paid by James.

"But even if this were doubtful, still there is no doubt but that the legacy might be given in such

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terms as to vest in the legatee immediately upon the death of the testator subject to the divesture of it in the event of the legatee dying before the time appointed for the payment of it shall come around: 1 Roper on Legacies, 403-4 et seq.

"It is true that the legacy that is vested is not to be divested by ambiguous or dubious terms. It must appear clearly that it was the intention of the testator that it should be so in a certain event.

"In any view of the case we are of opinion that the petitioner is not entitled to a decree in his favor. The order prayed for is therefore refused."

The petitioner appealed and assigned for error the conclusion of the Court.

B. Magoffin, for appellant.

S. R. Mason, for appellee.

July 19, 1899. McCollum, J. The testator bequeathed to his daughter Mary ten hundred dollars to be invested in property two years after his death; to his daughter Phœbe ten hundred dollars to be paid to her two years after Mary's dowry became due, and to his daughter Amelia ten hundred dollars to be paid to her two years after Phœbe's dowry became due. In the paragraph relating to his bequest to Mary he said, "if she should die before her husband James H. Allen, the above legacy is to go to her second son, Joseph W. Allen." In the sixth paragraph of his will he devised the farm he lived on to his son James with the instruction that he should not sell or dispose of it while his sisters Phœbe and Amelia remained single or unmarried." In the same paragraph he devised to James a house and lot in Sharon, Mercer County, Pa., "which he, James, has the *privilege* to sell for the payment of the within legacies which he is to pay." The seventh paragraph of the will is as follows: "Should any of my said daughters die before they receive their dowries, in such case, James shall be exempted from the payment thereof." The testator died on the 15th of March, 1891, and his daughter Mary died on the 28th of May, 1891, or more than one year and nine months before she would have been entitled to the legacy if living.

It seems clear to us upon consideration of the whole will that the testator never intended his daughters should receive the legacies bequeathed *to them* except on the condition of their surviving the period designated for payment. This is plainly shown in the seventh paragraph of the will in which there is not the slightest ambiguity. The result and necessary consequence of this plain intention is that the legacies did not vest in the daughters previous to the time fixed for the payment of them. We concur, therefore, in the conclusion reached by the learned Court below and in the reasons assigned for them. We cannot profitably add anything to the opinion of the learned Judge of said Court in which all questions raised in the case are satisfactorily discussed, and the cases which sustain the conclusions reached are cited.

Decree affirmed and appeal dismissed at the costs of the appellant.

W. C. S.

May, '99, 13. Supreme Court. May 29, 1899.

Commonwealth to use of McDonald v. Cooper et al.

Decedent's estate — Lien of debts — Sci. fa. to charge land.

In order to continue the lien of debts not of record against a decedent's real estate, who died prior to the Act of June 8, 1893, P. L. 392, suit must be brought within five years from his death, and duly prosecuted to judgment.

Appeal of D. B. Nace, executor of Daniel Logan, deceased, Elizabeth Pittman, executrix of George J. Pittman, deceased, and Thomas Johnson and Olive D. Pittman, plaintiffs, from the judgment of the Common Pleas of Fulton County.

The facts are set forth in the opinion of the Court, Swope, P. J., upon motion for judgment non obstante veredicto, as follows:

"October 4, 1875, on petition of all the heirs and legatees of John Kittel, deceased, the Orphans' Court of this county awarded a sale of said decedent's real estate for the payment of legacies. The order was directed to Robert A. McDonald, administrator c. t. a. of said decedent, and the husband of Loretta J. McDonald, a daughter, and one of his legatees. The said trustee gave bond, with Daniel Logan, George J. Pittman and James Cooper, as sureties, which was approved the same day by the Court. January 11, 1876, a return of sale was made and confirmed. The purchase money received by McDonald, as trustee, was $11,000, who, after deducting proper expenses, on April 1, 1876, paid all the legatees, except his wife, and took their receipts and releases. The share of his wife, April 1, 1876, was $2987.78.

"Nothing further was done by this trustee until December 10, 1887, when he filed his account, to which was appended this statement: 'Leaving in the hands of the trustee, of the amount of the bequest to Ettie J. McDonald, under the last will and testament of John Kittel, deceased, the sum of $2987.78; interest from April 1, 1876.' To this account exceptions were filed by the two sur-

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viving sureties on the bond, Logan and Pittman. The substance of two of said exceptions was as follows: (2) The share of Ettie, wife of the trustee, had been paid by her husband. (3) The account was collusively filed for the purpose of defrauding the sureties on the bond, the husband having become insolvent. An auditor was appointed to make distribution, find facts, etc. The case was appealed to the Supreme Court, which filed its opinion July 19, 1893, in which they found there was due and payable by Robert A. McDonald, trustee, to Loretta J. McDonald, legatee under the will of John Kittel, deceased, $2987.78, principal.

"March 12, 1894, Mrs. McDonald brought suit on the bond against Logan, then the only surviving trustee, and, after other proceedings not necessary to detail here, on October 8, 1895, recovered a verdict in her favor for $3961.80, which was duly paid by said Logan.

"James Cooper died March 8, 1883. January 23, 1888, to No. 8, March term, 1888, Loretta J. McDonald brought suit against Sarah J. Cooper and Jennie E. Cooper, administratrices of James Cooper, deceased.

"February 28, 1888, there was filed in the prothonotary's office of Fulton county, a particular statement and copy of this bond, to No. 49, March term, 1888, to have the full lien, remedy and effect on the real estate of the said James Cooper, deceased, for the amount of said bond, as provided by the 24th section of the Act of February 24, 1834, which statement was regularly indexed against said administratrices.

"January 12, 1897, the petition of the executor of Daniel Logan, deceased, was presented to the Court asking to be substituted as the use plaintiff in the above suit of Mrs. McDonald, brought January 23, 1888, to No. 8, March term, 1888, and on September 23, 1897, this substitution was allowed.

"October 9, 1897, on motion of plaintiff's attorney, the record to No. 8, March term, 1888, was amended by adding thereto as the legal plaintiff 'Commonwealth of Pennsylvania, for use.'

"March 23, 1898, on motion the record was further amended, by adding as plaintiffs Elizabeth Pittman, executrix of George J. Pittman, deceased, and Thomas Johnson and Olive D. Pittman.

"January 28, 1898, plaintiffs' statement was filed.

"March 23, 1898, jury called and same day verdict for plaintiff against Cooper's administratrices for $993.04.

"May 15, 1898, this scire facias was issued to bring in the widow and heirs of said James Cooper, deceased, for the purpose of collecting the above judgment from the real estate of said decedent, now in the possession of his heirs and devisees.

"On the above facts, should judgment in this action be rendered against the defendants as widow and heirs?

"Section 24, Act of February 24, 1834, provides: 'No debts of a decedent, except they be secured by mortgage or judgment, shall remain a lien on the real estate of such decedent longer than five years after the decease of such debtor, unless an action for the recovery thereof be commenced and duly prosecuted against his heirs, executors or administrators, within the period of five years after his decease; or a copy or particular written statement of any bond, covenant, debt or demand, where the same is not payable within the said period of five years, shall be filed within the said period of five years, in the office of the prothonotary of the county where the real estate to be charged is situate; and then to be a lien only for the period of five years after said bond, covenant, debt or demand becomes due.'

"The above section of the Act of 1834, does not create, but limits, the lien of a decedent's debts upon his real estate.

"Its purpose, like the 4th section, Act April 4, 1797, was to establish repose and certainty in titles, by preventing, after a certain lapse of time, any other lien or encumbrance, than what is made to appear by matter of record, in the office where the diligent may discover its existence. Kerper *v.* Hoch, 1 Watts, 9; Trinity Church *v.* Watson, 50 Pa. 518; Colwell *v.* Rockwell, 100 Pa. 133; Cake's Appeal, 157 Pa. 457.

"As remarked by Mr. Justice PAXSON, in Hunt & Lehman's Appeal, 105 Pa. 137, the above section provides two ways in which the debts of a decedent can be continued upon his real estate for a longer period than five years after his death:

"First. By the commencement and prosecution of an action against his heirs, executors or administrators within the period of five years after his death.

"Second. Where the debt is not payable within five years, a copy or particular written statement of the bond, covenant, debt or demand shall be filed within the period of five years, in the office of the prothonotary of the county where the real estate to be charged is situate.

"Where the debt is due and payable the suit therefor must be commenced within five years from the death of the decedent and duly prosecuted, or the lien is lost; and where the debt is not due and payable within five years, the creditor must file a copy or particular statement of

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the instrument by which the debt is secured within five years after the decedent's death, which will continue the lien for the period of five years after said bond, covenant, debt or demand becomes due. 'These directions being statutory cannot be omitted.'

"The protection and benefit of the 24th section, Act 1834, inure to heirs and devisees as well as bona fide purchasers: Kerper *v.* Hoch, 1 Watts, 9; Quigley *v.* Beatty, 4 Watts, 13; Hemphill *v.* Carpenter, 6 Watts, 22; Com'th *v.* Pool, 6 Watts, 32; Bailey *v.* Bowman, 6 W. & S. 119; Loomis's Appeal, 29 Pa. 237.

"The liability or debt of a surety on a bond such as this, though contingent, is within the meaning of the Act of 1834, and, to secure the repose and certainty of titles, in order to recover against the widow and heirs of said surety, the action must be commenced or a copy or written statement filed within five years after his death: Com'th use of McLane et al. *v.* Adm'r of James Dugan, deceased, 3 WEEKLY NOTES, 303.

"James Cooper died March 8, 1883. The action of Loretta J. McDonald *v.* the administratrices of said decedent, to No. 8, March term, 1888, was instituted January 23, 1888, and no declaration was ever filed by the above named plaintiff.

"This contained no record notice of an action on this bond, as required by the Act of 1834, but evidenced only an individual claim against said estate.

"It was not until October 9, 1897, over fourteen years after the death of James Cooper, and over nine years after the institution of above suit, that the record was amended by adding 'as the legal plaintiff,' 'Com'th of Pennsylvania for use.' The lien of this debt as against the lands of said decedent, as far as this action is concerned, is therefore barred by the lapse of time.

"The filing of the copy or particular statement of the bond in the prothonotary's office, on February 28, 1888, was no action, but only record notice of one to be brought when liability on the bond was fixed and established.

"If, as claimed by the plaintiffs, no debt was due on this bond for which the estate of James Cooper could have been sued until October 8, 1895, when Mrs. McDonald recovered judgment against the only surviving surety, and that the filing of above statement or copy of bond prevented the operation of the Act of 1834, then clearly a new action should have been brought if they desired to resort to this decedent's real estate, and not seek to do so by issuing a scire facias on a judgment recovered against his administratrices, in an action which was commenced on January 23, 1888.

"And now, November 1, 1898, on the question of law reserved, we direct judgment to be entered on the verdict in favor of the plaintiffs and against Sarah J. Cooper and Jennie E. Cooper, administratrices of James Cooper, deceased, for the sum of $1020.68, and that judgment be entered in favor of the following named defendants: Sarah J. Cooper, widow of James Cooper, deceased, Samuel Cooper, Harvey Cooper and Jennie E. Cooper, children and heirs of said decedent, non obstante veredicto."

This action of the Court was assigned as error.

W. U. Brewer, (with him *J. Nelson Sipes*, *W. Rush Gillan* and *John P. Sipes*), for appellants.

M. R. Shaffner, (*George A. Smith* with him), for appellees.

July 19, 1899. STERRETT, C. J. This scire facias on judgment No. 8, of March term, 1888, was issued May 5, 1898, to bring in the widow and heirs of James Cooper, deceased, against whose administratrices said judgment was recovered on March 26, 1898. The original liability which is thus sought to be enforced against the widow and heirs was assumed by said decedent, James Cooper, as one of three sureties on the bond of Robert A. McDonald, trustee to make sale of the real estate of John Kittel, deceased, to pay legacies. The present use plaintiffs are the legal representatives of the other co-sureties who made payments under the obligation of the bond on which they and Cooper were sureties, and the effort here is to enforce contribution from the estate of Cooper, their co-surety. A brief outline of the facts may conduce to a clearer understanding of the case.

Robert A. McDonald, administrator *cum testamento annexo* John Kittell, deceased, was appointed trustee to make sale of said decedent's real estate for the purpose of paying legacies, and gave bond with Daniel Logan, George Pittman, and James Cooper, as sureties. Loretta J. McDonald, a daughter of said decedent and one of his legatees, was the wife of the trustee. The sale was made, returned and confirmed *nisi* January 11, 1876. No account was filed until December 16, 1887, at which time it is admitted the trustee was insolvent. That account showed a balance of $10,656.78 in the hands of the trustee. Appended to it, was a statement showing a distribution of this balance to the parties entitled, except Mrs. McDonald, to trustee's wife, and concluding thus: "Leaving in the hands of the trustee, of the amount of bequest to Ettie J. McDonald, under the last will and testament of John Kittel, deceased, the sum of $2987.78, interest from April 1, 1876."

James Cooper, one of the sureties having died

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March 8, 1883, exceptions to the account were filed by Logan and Pittman, the surviving sureties. These exceptions were not confined to the account, as they should have been, but attempted to raise the question of payment or discharge of the balance in favor of Mrs. McDonald. An auditor was appointed "to take testimony, find the facts and report a distribution, if necessary." He reported distribution, fixing Mrs. McDonald's share at $2987.78, with interest from April 1, 1876, the date of confirmation absolute of the trustee's sale; and further reported that Mrs. McDonald's distributive share had not been paid. On appeal, etc., interest was disallowed on the ground that the claimant had delayed making demand, etc. Kittel's Estate; McDonald's Appeal, 156 Pa. 445.

On January 23, 1888, suit was brought by Mrs. McDonald against the personal representatives aforesaid of James Cooper, deceased, but judgment (on which this scire facias was issued) was not recovered until March 26, 1898. In the meantime, the surviving sureties, Logan and Pittman, having been compelled to pay Mrs. McDonald's claim, were substituted as use plaintiffs; and the record was further amended, by adding the Commonwealth as legal plaintiff.

On February 28, 1888, a copy of the bond given by the trustee and his sureties was filed in the office of the prothonotary with the view of obtaining a lien on the real estate of which Cooper, the deceased surety, died seised.

On the trial of the scire facias the records above referred to, etc., were put in evidence, and a verdict was directed for the plaintiffs, subject to the question of law reserved, whether under all the evidence (none of which was disputed) judgment should not be entered for defendants non obstante veredicto.

Under that reservation, judgment was afterwards entered on the verdict in favor of the plaintiffs and against Sarah J. Cooper and Jennie E. Cooper, administratrices of James Cooper, deceased, for the sum of $1020.68, and judgment non obstante veredicto was entered in favor of the following named defendants, Sarah J. Cooper, widow of James Cooper, deceased, Samuel Cooper, Harvey Cooper and Jennie E. Cooper, children and heirs of said decedents.

Notwithstanding the able and ingenious argument of the learned counsel for appellants, we are not convinced that the learned president of the Common Pleas erred in holding that the debt in question had ceased to be a lien on the land of which James Cooper, died seised, and that, upon the undisputed facts, the plaintiffs were not entitled to judgment against said land in the hands of his widow and heirs at law. His conclusions are so well sustained by both reason and authority that little can be profitably added to what is contained in his opinion disposing of the reserved question. It is well settled that in order to continue the lien of unsecured debts for a period of ten years after the death of the debtor, suit must be brought within five years and duly prosecuted to judgment: Hope *v.* Marshall, 96 Pa. 395. In that case, speaking of the scire facias to bring in the widow and heirs, etc., it was said: "It issued more than ten years after the death of the decedent debtor, and the lien of the debt, as against their lands, was barred by lapse of time. The learned Judge therefore erred in entering judgment against the plaintiffs in error. It should have been entered against Hope, the administrator, only." Again, in Allen *v.* Krips, 119 Pa. 1, it was held that in proceedings to charge the real estate of a decedent in the hands of his widow and heirs, under the Act of 1834, the proceedings must be instituted against them within ten years after the death of the debtor. To the same effect are Allen *v.* Krips, 125 Pa. 504, and other cases that might be cited. There appears to be nothing in the facts of the case before us to take it out of the rule recognized in the cases referred to. In this case, the judgment on which the scire facias was issued was not recovered until more than ten years after suit brought, and fifteen years after the death of James Cooper, the decedent. The present proceeding was, of course, commenced still later.

We find nothing in either of the specifications of error that requires further notice. They are all dismissed.

Judgment affirmed.

W. C. S

Jan. '99, 34 and 35. Supreme Court. March 23, 1899.

Gleeson's Estate.
Gleeson's Appeal.

Ejectment—Bond on appeal—Signature of obligors — Defence— Damages — Improvements to land.

Where one of several obligors on a bond omits to join in the execution thereof, although named as an obligor in the body of the instrument, it is no defence to the obligors who did sign.

Where a bond is given for damages "for the use and detention of the property and the costs of the suit and just damages for the delay and costs and interest on the appeal," with the provision that "it be void if the appellant should prosecute the said writ to effect, and answer all damages and costs if he fail to make his plea good," the obligors are bound to respond for all damages arising from the use and detention of the property pending the appeal.

When improvements have been put upon the land by the defendants while they are in possession, but

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subsequent to the entry of the judgment in the Court below, no allowance can be made for these expenditures by way of abatement from the amount to which the plaintiff in the suit is entitled.

Appeal of Cornelius Gleeson, individually, and as administrator of Daniel Gleeson, deceased, from the decree of the Orphans' Court of Philadelphia County.

The facts of the case are stated in the adjudication of the auditing Judge, ASHMAN, J., as follows:

"Daniel Gleeson died June 17, 1897, intestate, leaving surviving a widow, Johanna Gleeson, but no issue. He left as his sole surviving next of kin under the intestate laws, a brother, Cornelius Gleeson, a sister, Bridget Gleeson, and nephews and nieces, James, Mortimer, Owen, Michael and Margaret Gleeson (children of Mortimer Gleeson, a deceased brother, who also left a widow, Mary Gleeson). The decedent had another brother, Michael Gleeson, who has been absent and unheard from for thirty years. The said parties are all of full age.

"On behalf of Mary K. L. Black, a claim was submitted in the sum of $3500 upon a bond to prosecute an appeal with effect from a judgment in ejectment in U. S. Circuit Court of October sessions, 1893, in which bond the decedent was a surety. The bond was in $5000 to Mary K. L. Black, the plaintiff in the original suit, conditioned that the principals therein, who are the defendants below, should prosecute their appeal to effect, and should answer all costs and damages if they should fail to make good their plea. The appeal was afterwards, March 17, 1898, quashed by the U. S. Supreme Court. The plaintiff claimed that the writ of error being a supersedeas, she was kept out of possession of her property from May 12, 1896, to March 17, 1898, and she asked for the damages which had accrued from the loss of rent during that interval. The premises owned by the claimant, and which were the subject of the action, comprised some 912 acres which lay partly in Philadelphia and partly in Delaware counties, and they were known as Black's Island. Three questions were presented: (1) What amount of damage, if any, had been sustained? (2) Whether loss of rent arising from the detention of the property was among the damages covered by the bond? and, (3) Whether the appeal contemplated by the bond had been in fact taken?

"The testimony respecting the rental value during the period of eviction, given by the expert witnesses, differed. One of them fixed it at $2.75 per acre for the whole tract, an aggregate of $2508 yearly, and another at $1.75 per acre, or a total of $1596 yearly. These witnesses appeared for the claimant. Frederick Black, one of the defendants, who already occupied a part of the land, accepted, in 1894, a lease of the entire tract from the plaintiff at the yearly rent of $2000, payable on condition that the plaintiff should insure him possession. He never paid the rent, and continued in his original holding only by an arrangement which he made with the other defendants. After the appeal was determined, the land was subdivided, part being occupied by Frederick Black and part by the remaining children. The former rented 218 acres at $2 per acre, and 143 acres at $1.50 per acre, a total rent of $650.50. The others rented from claimant 200 acres at $2 per acre, and 78 acres at $1 per acre, making $478 yearly. The remaining 273 acres do not seem to have been rented at all, and were worth to a tenant, according to the testimony of one of the children, $1 per acre. Accepting as the standard of value the estimate which was adopted by both parties, by the claimant as lessor when she executed the leases, and by the children as lessees when they agreed to pay the rent, the total rent for the tract would be $1401.50 per annum, or $2452.59 for the time now claimed for. The improvements which it was alleged were made by the tenants cannot be set off against an award for the claimant for the reason that some of them were necessary repairs which it was the duty of the lessees to provide, and others, although apparently permanent, were not annexed to the freehold. Among the latter was a dwelling house, which was erected on piles expressly to facilitate its removal. The auditing Judge finds the damages amount to $2452.59.

"Exactly for what damages the obligor in a bail bond upon an appeal in ejectment is liable, is a point which the cases have left in some obscurity. It was quite elaborately considered in Kountze *v.* Omaha Hotel Co., 107 U. S. Rep. 378, and the Court held that the bail bond entered in that case in the Circuit Court did not operate as security for rents or profits or for use and detention of the property pending the appeal, but simply for costs and for such damage as might arise from the deterioration of the property. The appeal was from a judgment in a suit to foreclose a mortgage, and the reasoning of the majority opinion was that the mortgagee had no right to the land, but simply to the amount of the mortgage debt with interest, and that he therefore could not recover for torts to which the mortgagor as owner of the land was alone entitled.

"The damage, in other words, for which the bond was an indemnity, could not be the loss of mesne profits, because the judgment in the foreclosure suit was not for the land, but for its sale

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and for payment out of the proceeds. This was directly controverted by the dissenting opinion of MILLER, J., in which FIELD, J., concurred; and even outside of their opinion, it is apparent that the cases referred to by BRADLEY, J., who represented the majority of the Court, are cases in which additional security to cover damages on appeal was refused, because moneys were already deposited in Court or were in the hands of a receiver, which were sufficient to meet the demand, and because at all events the amount of security was always a matter to be determined by the lower court. But the opinion concedes that to be the law which must govern this case, by distinguishing, as it does, between a suit in ejectment (which is the action in controversy) and a suit for foreclosure of a mortgage.

"Its language is: 'The difference is this: In ejectment the property of the land is in question, and if the plaintiff has the right he is entitled to immediate possession and to the perception of the rents and profits which belong to him, and for which the defendant in possession is accountable to him. Every dollar or dollar's worth is so much of the plaintiff's property of which he is deprived. But in the case of a mortgage, the land is in the nature of a pledge; and it is only the land itself—the specific thing—which is pledged. The rents and profits are not pledged; they belong to the tenant in possession, whether the mortgagor or a third person claiming under him.' (Page 392.) This practical admission by the highest Federal Court that rents and mesne profits are within the damages provided against in a bond on appeal in ejectment proceedings in United States Courts, was accompanied by a distinct reference to Roberts *v.* Cooper, 19 How. 373, which in 1856 seems to have laid down a different doctrine. In 1867 and perhaps partly in consequence of the ruling in Roberts *v.* Cooper, the Court adopted rule 29, providing that supersedeas bonds in the Circuit Courts shall be taken, conditioned that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect and answer all damages and costs if he fail to make his plea good; and providing further that 'in all suits where the property in controversy necessarily follows the event of the suit, as in real actions indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property and the costs of the suit and just damages for delay and costs and interest on the appeal.'

"This rule was in pursuance of section 1000 of the revised statutes, requiring a bond conditioned that the plaintiff in error or the appellant, if he failed to make good his plea should answer all damages and costs. The statute and the rule prescribed the course of procedure in the United States Courts, and it is idle to attempt to fasten upon that system the rules of practice which prevail under State statutes and which may have, even among themselves, as many points of variance as there are States. In Pennsylvania, for instance, the Act of June 11, 1879, P. L. 125, gives a distinct remedy for mesne profits, which may be pursued during the actual pendency of an ejectment suit, and that remedy alone is to be followed. (Warren *v.* Steer, 118 Pa. 534.) The bond on appeal in ejectment proceedings in this State does not, therefore, embrace damages for mesne profits, and this was all that was decided in Johnson *v.* Hessel, 134 Pa. 315. It is clear that that case bears no analogy to a case in which the remedy for damages from loss of mesne profits is given by the bond itself, and not by a separate and independent action.

"The remaining question is whether the appeal for whose prosecution the bond was given, was ever entered. Both the præcipe and the bond included the names of all of the defendants, four in number, but the bond was signed by only three defendants. These three defendants, sixteen days after the filing of the præcipe and the execution of the bond, petitioned the Court for a writ of error in their names, and for a severance from the person who had refused to sign; and without notice to the sureties the writ thereupon issued as prayed for. There was hence a variance between the bond and the writ which it was meant to subserve, and the surety in case he was mulcted could look for reimbursement to three parties instead of four. By parity of reasoning the præcipe might be for a writ of error for fifty plaintiffs in error, of whom forty-nine might withdraw and only one take out the writ; the surety in that case who should sign on assurance that fifty would prosecute, could have recourse only to one.

"The case as presented is different from that in which a plaintiff dies, or in which his name is stricken from the record by the Court. In the former event his legal representatives are substituted, and in the other the case is as though he had never existed. But the weak point in this instance, on the part of the surety, is that it was neither alleged nor proved that he signed the bond only on condition that all of the principals should join in the suit, or in the bond. The purpose of the obligation was to secure the prosecution of the appeal; it was entitled as of the term and number of the suit; it took effect as of the date of the suit; and it was not only executed, but delivered, which latter fact was shown when it was docketed. After the bond had been delivered by the surety, it is doubtful whether the

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obligor could complain effectually even if it had not been signed by any of the principals, because his own engagement was complete. That engagement was that the plaintiffs in error should prosecute with effect, and not that they should execute a bond to do it. This, at least, seems to be the principle pervading the decisions.

"The bond in Keyser *v.* Keen, 17 Pa. 327, was said to be joint and several, although the words 'jointly and severally' did not occur in it. It recited that the obligee had become surety for a third party on the promise of six persons to indemnify him, and it named those persons as so agreeing. Suit was brought against a single obligor, and he set up that the bond had been signed by five only of the proposed signers. It was held that the refusal of one to join did not discharge the others from their promise, evinced as it was by the delivery of the bond. This ruling was approved and adopted in Grim *v.* School Directors, 51 Pa. 219.

"The claim of Mary K. L. Black is allowed in the sum of $2452.59."

Exceptions filed to this finding were dismissed by the Court in banc, and this action was assigned as error on appeal.

John T. Greene, for appellant.

The judgment in ejectment at the most is merely conclusive that the defendants were in possession at the time of the service of the writ, and even that, in some instances, can be rebutted.

Miller *v.* Henry, 84 Pa. 33.
Bronson *v.* Lane, 91 Id. 153.
Sopp et al. *v.* Winpenny, 68 Id. 78.
Kuhns *v.* Bowman, 91 Id. 504.

It is needless to cite authorities to show that the defendants, principals, in the action against them for the use and occupation can set off improvements, and that the sureties can use any defense that the principals could use. It is also clear that a release by the claimants of property belonging to the principals, and in the hands of the claimants, is a discharge of the surety pro tanto.

Schock *v.* Miller, 10 Pa. 401.
Ege *v.* Kille, 84 Id. 333.

The claimant cannot recover against the surety on the bond.

(*a*) Because no damage has occurred by reason of the bond herein that can legally be charged to the sureties as the appeal for which this bond was given was never taken.

(*b*) One of the plaintiffs in error was stricken out by order of Court.

Tarver *v.* Nance, 5 Ala. 718.
Richards *v.* Storer, 114 Mass. 101.

In the case at bar there was a severance, and Frederick Black was stricken out of the appeal by order of Court.

(*c*) The bond was not signed by Frederick Black.

(*d*) Accord and satisfaction.

The writ of hab. fa., issued March 18, 1898, contains this levy clause: "Levy of the goods and chattels of defendants, $75.35, which to the said plaintiff in the said Court were adjudged for the damages, which she sustained by occasion of the trespass upon the said premises of the said plaintiff," etc. This is an assessment by plaintiffs, and they are estopped from further claim—and even this itself was practically released.

(*e*) Because the claim is for use and occupation of the premises pending the appeal, and under the decisions such cannot be recovered on the bond.

Johnson *v.* Hessel, 134 Pa. 315.
Roberts *v.* Cooper, 19 How. 373.
Kountze *v.* Omaha Hotel Co., 107 U. S. 378.
Burgess *v.* Doble, 21 N. E. Rep. 438.

N. Dubois Miller, (*Biddle & Ward* with him), for Mary K. L. Black, appellee.

The bond was valid and binding upon all of the parties to it, and upon its breach can be sued upon.

Keyser *v.* Keen, 17 Pa. 327.
Grim *v.* School Directors of Jackson Twp., 51 Pa. 219.
Simpson's Exec'r *v.* Bovard, 74 Id. 351.
Whitaker *v.* Richards, 134 Id. 191.

The object of the bond was to cover the loss of rents pending the appeal, and under the law damages therefor can be recovered.

Shunick *v.* Thompson, 25 Ill. App. 620.
Green *v.* Sternberg, 15 Mo. App. 32.

No allowance should be made for improvements, or for any other cause.

There are two improvements which it is said were made by the defendants in the ejectment suit, and which it is claimed they could set off against the claim for damages, and if so, that the sureties on the bond are equally entitled to do so. One was the rebuilding and adding to an old house, in consequence of the destruction of one of the houses by fire, the other was the cost of a movable structure not affixed to the freehold, and so built as to be removed at any time.

The argument of the appellant is singularly barren of authorities in support of his proposition. The only explanation offered for the decision in Steele *v.* Spruance, 10 H. 256, is the statement of the facts which make it a precisely analagous case to this. The only explanation of Walker *v.* Quigg, 6 W. 87, and Wilkinson *v.* Pearson, 11 H. 117, is that they are "particularly hard cases," and seem to go even farther than Steele *v.* Spruance. The true rule which governs this case was admirably stated in Morrison *v.* Robinson, 31 Pa. 456.

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July 19, 1899. GREEN, J. This Court has so frequently decided that the omission of one of several obligors in a bond, to join in the execution of the bond, although named as an obligor in the body of the instrument, is no defence to the obligors who did sign that the question must be considered as settled. In Keyser *v.* Keen, 17 Pa. 327, the action was brought against one of six obligors as named in the bond though five only had signed and the instrument was a bond of indemnity to indemnify the obligee against loss for having become surety for a deputy sheriff on his bond to the sheriff. The bond contained an admission that the obligee had become surety for the deputy on the promise of the six to indemnify him against loss by reason of his suretyship. It was claimed for the surety sued that he was not liable because he signed upon the faith that all were to sign, but we said, LOWRIE, J.: "This bond was prepared for six obligors and is executed by only five of them; yet we can not therefore infer that it is incomplete and not binding on those who did execute it. . . . . The bond declares that the plaintiff below had become surety for another person, on the promise of the six persons named in it that they would indemnify him. This is an admission by the five who executed the bond that they were jointly bound to indemnify the plaintiff; and although they do allege that another person agreed to become bound with them, yet when we find their bond in the hands of the plaintiff it is impossible to imply that it was not intended to bind them to their admitted duty. The refusal of one of the six to join in the bond did not discharge the others from their promise."

This ruling was repeated in Grim *v.* School Directors, 51 Pa. 219; Simpson's Exr. *v.* Bovard, 74 Pa. 351, and Whitaker *v.* Richards, 134 Pa. 191. There was no evidence in the present case that it was the agreement of the parties that the bond was not to be binding upon any unless it was signed by all, and as it was duly delivered and found in the proper custody where it belonged as a fully executed instrument, it was an undoubtedly valid instrument as to all who did sign. We have not been referred to a single contrary decision.

The verdict in the ejectment case was rendered on April 26, 1896, and the appeal from the judgment on the verdict, was taken on May 14, 1896, and on May 16, 1896, the appeal bond was filed. The appeal was quashed by the Supreme Court of the United States on March 17, 1898, and in the present proceeding on the settlement of the estate of Daniel Gleeson, deceased, who was one of the bondsmen on the appeal bond, the claim is made by the plaintiff in the ejectment, to recover damages for the loss of rental of the lands in question during the pendency of the appeal in the Supreme Court from May 12, 1896, to March 17, 1898. The bond was given in pursuance of rule 29, of the Supreme Court of the United States, which in real actions gives damages "for the use and detention of the property, and the costs of the suit and just damages for the delay and costs and interest on the appeal." The condition of the bond is that it is to be void if the appellants "shall prosecute the said writ to effect and answer all damages and costs if they fail to make their plea good."

It can not be doubted that under this bond the obligors were bound to respond for all damages arising from the use and detention of the property pending the appeal. Some contention was made in the Court below and is made here to the effect that no damages can be recovered on appeal bonds given in ejectment cases, for the use and detention of the property pending the appeal, in consequence of the decision of the Supreme Court of the United States, in Kountze *v.* Omaha Hotel Co., 107 U. S. Rep. 378. But while the whole subject was exhaustively discussed in the opinion in that case, and it was held there could be no recovery for use and detention of the property pending the appeal, the decision was put upon the express ground that the case in which the bond was given, was not an ejectment for the land, but a foreclosure proceeding on a mortgage. In this latter class of proceedings, it was held, the land is not the subject of the controversy, it does not belong to the mortgagee, but to the mortgagor, and he has a lawful right to continue in possession until the final termination of the case. But in ejectment for the land the plaintiff claims the land itself because it belongs to him and he is wrongfully deprived of its possession. Hence the mere continuance of the use and possession after verdict, is a wrong to the plaintiff who has recovered a verdict and judgment, and is a just cause for damage for which he is to be paid. This distinction is carefully drawn in the opinion and the decision is therefore inapplicable to the present case which is an ordinary ejectment for the recovery of the land itself. There is nothing in conflict with this in Roberts *v.* Cooper, 19 How. 373. That was only an application for additional security on a bond in error, and the Supreme Court held they had not power to interfere with the Court below in fixing the amount of the bond. We are very clear that in the present case there was a right in the plaintiff in the ejectment suit to recover damages for the use and detention of the land pending the appeal.

It was further contended for the appellant that

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there could be no recovery for the detention of part of the land because the plaintiff in the ejectment had leased it to Frederick Black, one of the defendants, who paid her rent for it. But the fact was that the lease to Frederick Black was made in March, 1894, and terminated in March, 1895, which was a year before the appeal bond was given, and that he never had possession under that lease while the appeal was pending, and never paid a dollar of rent to the plaintiff for any part of the land while the appeal was pending. He distinctly testified that he never obtained possession of the land under the lease, and he also testified as follows respecting that lease: "Q. This lease expired in March, 1895, did it not? A. Yes, sir, she never had possession of it. Q. And you never got possession under this lease? A. Not of the entire tract. Q. And you never felt justified in paying the rent which was agreed to be paid under this lease did you? A. No. sir. Q. And this lease terminated, as I say, in March, 1895, prior to the appeal being taken? A. Yes, sir. Q. And from that time until the day when the marshall put the plaintiff in possession of the land, you never paid anv rent at all? A. Not to my knowledge; no, sir, or to Mrs. Mary K. L. Black."

There was no testimony in contradiction of the foregoing, and it is very evident that the claim of the appellee is not subject to any deduction on account of any rents received from Frederick Black.

The only remaining matter to be considered is a claim for the value of improvements which it is alleged for the appellant were put upon the land by the defendants in the ejectment case while they were in possession. There were two of these improvements for the value of which claim was made. One was a new frame house built by Daniel N. Black, one of the defendants in the ejectment case, which he testified cost him $1300. But he also said it was built on piles so that it could be removed, and he expected to remove it whenever he left the land. The other improvement was the repair of an old house so as to make it inhabitable. It was done by Daniel Black's mother for her own use, and it cost $1000. This was, of course, permanent, and would remain with the land. It was built, however, in 1897, after verdict and judgment in the ejectment cause and while the appeal was pending. The Court below decided that no allowance could be made for either of these improvements and the authorities are certainly that way. The general rule applicable in this class of cases is perhaps best stated in Morrison *v.* Robinson, 31 Pa. 456, thus: "But one who forcibly disseizes another and makes such improvements, or one who makes them after action brought to try the title, can have no claim to have his improvements estimated; because he has no right to choose the mode of improvement of another man's property against his known will, and justice will not compensate him at the hazard of doing wrong to the owner." In Wilkinson *v.* Pearson, 23 Pa. 117, it was held that it was not error to refuse to receive evidence on the trial of an ejectment that valuable improvements had been made by the defendant in possession, since the trial of a former ejectment for the same premises. In Steele *v.* Spruance, 22 Pa. 256, the same ruling was made in a case in which the improvements were made after the verdict in an ejectment.

But a still more serious objection to any allowance for these improvements is that so far as the mother is concerned she simply made a necessary repair to an old building so that she could live in it. The other house which was previously occupied had burnt down and was not rebuilt. The old one that was repaired was simply used in its place.

It is very clear to us that no allowance can be made for these expenditures by way of abatement from the amount to which the plaintiff in the ejectment suit was entitled, as damages for use and detention, and hence no error was committed by the learned Court below in refusing to abate the claim upon the present fund. There is no question as to the correctness of the computation of damages by the Court below and hence it is not discussed. The assignments of error are all dismissed.

The decree of the Court below is affirmed and appeal dismissed at the cost of the appellant.

W. C. S.

Jan. '98, 393. Supreme Court. May 22, 1899.

Gulick's Appeal.

Election law—Marking of ballots—Act June 10, 1893, P. L. 432—Act July 9, 1897, P. L. 232.

Each elector is entitled to vote for as many candidates for office as the election is held to choose; if the ballot does not contain the entire number in one of the columns, the marking of the X at the head of the column in conformity with the terms of the law, whereby every one of the candidates in such column receives that vote, does not preclude the elector from voting in another column by marking the X opposite the name of another as candidate, the additional candidate being omitted in the other column.

When voters are entitled to vote for two assessors and the column of nominees of one party contains the name of but one, the elector may vote for all of the nominees in such column by marking at the top, and also for one of the nominees for the office of assessor in another column.

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Newberry Township's Election, 187 Pa. 297, distinguished.

Appeal of M. F. Gulick, from the decree of the Court of Quarter Sessions for Northumberland County, in the matter of the election of assessor in Gearhart Township.

At the general spring election for township officers for the township of Gearhart, held on February 15, 1898, one person was to be elected as assessor in the district. The candidates were M. F. Gulick, republican, and Theodore Robinson, democrat.

At the same election two supervisors were to be voted for; the republican column contained the name of but one candidate, while the democratic column contained two names. Eleven voters marked the republican column at the head, in the place for voting a straight ticket, and also voted for one of the democratic candidates for supervisor. Counting these eleven ballots there were fifty votes each for Gulick and Robinson, the respective candidates for assessor, and there being a tie, the county commissioner appointed the former.

Thereupon a petition was presented to the Court of Quarter Sessions and upon hearing, the Court, on the authority of the case of Newberry Township's Election, 187 Pa. 297, declared the ballots in question illegal and that Robinson was "duly elected assessor of Gearhart township."

M. F. Gulick appealed and assigned as error this action of the Court.

C. B. Witmer, for appellant.

There is no analogy between the Newberry Township case and the case in hand. In that case each column contained a complete number of candidates to be voted for.

Where the column does not contain the full number of candidates to be voted for the voter may mark his intention of voting the entire ticket by marking the X in the circle at the head of the column and may make up the deficiency in the number of candidates by voting for the requisite number of candidates in another of the columns.

Reed *v.* McArthur, 15 Pa. C. C. 136.
Com'th ex rel. *v.* Mercer et al., 190 Pa. 134.

Lewis DeWart and *J. H. McDevitt*, for appellee.

The ballots were clearly illegal.

Redman's Appeal, 173 Pa. 59.
Flynn's Appeal, 181 Id. 457.
Newberry Twp. Election Case, 187 Id. 297.

July 19, 1899. STERRETT, C. J. Appellant's contention is that the eleven contested ballots—a correct sample of which is attached to his answer in this proceeding—are strictly legal, and that the Court below erred in rejecting them as illegal, and in decreeing that Theodore Robinson is duly elected assessor of Gearhart township, etc.

It appears that at the general election for township officers in February, 1898, one person was to be elected to serve as assessor in said district. The appellant, M. F. Gulick, who was the republican candidate and Theodore Robinson, the democratic candidate. The election board returned that Gulick had received fifty votes for assessor, and that Robinson had also received fifty votes for the same office. There thus being a failure to elect an assessor, the county commissioners appointed Gulick to fill the vacancy. Whereupon the petition of William H. Treas and twenty-five other qualified electors of the district was presented to the Court of Quarter Sessions, representing that the election board had erroneously counted and returned eleven ballots, for said Gulick, which should have been rejected, and that said Robinson was the legally elected assessor of said township, etc., and praying the Court to hear and determine who was legally elected, etc. In due course, the case was heard on petition and answer, and said eleven ballots were adjudged illegal, and it was accordingly decreed that Robinson was duly elected assessor.

The only ground, on which it is claimed by the appellee that said ballots are illegal, is that the electors, who respectively cast them, voted for all the persons named in the republican column, on the respective ballots, including appellant, by placing a cross (X) in the circle at the head of said column, and also voted for one person, nominated for the office of supervisor in the democratic column by placing a cross (X) in the square ([ ]) to the right of the name of said person, in that column.

There might be some merit in the position thus taken by the appellee, if it were not for the admitted fact that the republican column, on the ballots, was incomplete, in that it contained the name of one person only to be voted for as supervisor, when in fact two persons to fill the office of supervisor were to be voted for and elected at that time, and two were actually then elected.

Each and every one of the eleven electors, by whom the contested ballots were respectively cast, had an undoubted right to vote once for each of the offices to be filled at that election. By placing a cross in the circle at the head of the republican column, they voted once for each nominee named in that column; and if that column had contained a complete ticket, that is, a nominee for each office to be filled, their respective rights to vote at that election, would have been fully exercised; but, as we have seen, the republican column did not contain a nominee for every office to be filled. Two supervisors were

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to be elected, but the republican column contained only one nominee for that office. While, therefore, the said electors had legally voted for every nominee in that column, they had voted for only one person for the office of supervisor. They had an undoubted right to vote for one other person for that office, and they respectively exercised that right legally by placing a cross in the square to the right of name of one of the nominees for supervisor in the democratic column. By so doing, they cast one vote for each of the offices to be filled at that election, and nothing more.

If the electors aforesaid had placed a cross in the square to the right of each nominee in the republican column they would have accomplished precisely the same result as they did by placing the cross in the circle at the head of said column, —they would have voted once for each nominee in said column; but they would not thereby have fully exhausted their right to vote. They were clearly entitled to vote for one other person for the office of supervisor, and that right could be legally exercised in the manner they adopted, or by placing the name of the person they desired to vote for in the blank column, immediately under the title "supervisor." The Act of June 10, 1893, as amended by that of July 9, 1897, P. L. 232, is too plain to leave any room for doubt on that subject. Section 14 provides: "That a voter may designate his choice of all the candidates of a political party by one cross (X) in the circle above such column, and such mark shall be equivalent to a mark against every name in the column." It further provides that "the ballots shall be so printed as to give to each voter a clear opportunity to designate his choice of candidates by a cross (X) mark in a square of sufficient size at the right of the name of each candidate and inside the line enclosing the column."

The appellee and the Court below appear to have been misled by the fact that the republican column contained one nominee less than the number of offices to be filled at that election. Each voter had a right to vote for two persons for the office of supervisor, and those who voted for every nominee in the republican column, had still the right to one additional vote for the office of supervisor. Aside from the exceptions created by that instrument itself, the Constitution guarantees to each elector the right to vote for one person for each office to be filled by election in his district.

The learned Judge was clearly mistaken in holding that Newberry Township's Election, 187 Pa. 297, "settles the law applicable to this case." As to its material facts, as well as the principal involved, that case is unlike the one now under consideration. As was well said by the learned counsel for appellant, each column on the ballot in that case contained names of candidates for all the offices to be filled or voted for, so that when the voter had marked a cross in the circle at the head of the column, he had exhausted his privilege of voting, and could not, of course, vote for any other person in another column, nor could he indicate his choice by erasures or by striking out names by pencil marks. This undoubtedly was not marking the ballot as directed by the Act. On the contrary, it was such an unauthorized mutilation of the ballot as made it uncertain what the intention of the voter was, and therefore required its rejection. In the case before us, the republican column on the ballot was incomplete. Two persons were voted for and elected to the office of supervisor. The name of only one person for that office was in said column, while the names of two persons for the same office were in the democratic column. By voting the republican ticket by placing a cross in the circle, the voters had not exhausted their privileges, and they therefore had the undoubted right of voting, as they did, for one candidate for supervisor in the democratic column.

We are all of opinion that the learned Court, erred in holding otherwise, and accordingly the specifications of error are all sustained.

The decree of the Court below is reversed and set aside, and it is now considered and adjudged that the eleven contested ballots were legal, and having been rightly counted for the appellant, the return of the election board was and is correct, and the same is accordingly confirmed. It is further ordered that the costs of the proceeding, including the costs of this appeal, be paid by the petitioners.

W. D. N.

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WEEKLY NOTES OF CASES.

VOL. XLIV.] *FRIDAY, AUG. 25, 1899.* [NO. 21.

Supreme Court.

Jan. '99, 156. Supreme Court. May 17, 1899.

Myers' Appeal.
Myers' Estate.

Judicial sales— When set aside — Inadequacy of price — Sale by assignee under Act February 17, 1876.

Inadequacy of price is not sufficient ground for setting aside a sheriff's sale where there has been no irregularity and misapprehension as to material facts.

The right, however, to set aside a sale under proceedings in Orphans' Court, for inadequacy of price is undoubted.

Although a sale under the Act of February 17, 1876, by an assignee for the benefit of creditors, discharged of liens, is for the purpose of obtaining the best price, there are not the same interests to be protected as in an Orphans' Court sale, and the question of a resale rests in the sound discretion of the Court.

Where such a sale is regular and a fair price is paid and the only person to be benefited by a resale is a relative who is a judgment creditor, the Court will not order such sale.

Appeal of Andrew J. Myers, assignor, Edmund B. Myers, an assignee, and Dr. Jacob M. Gross, from a decree of the Common Pleas of York County, discharging a rule to set aside a sale of the real estate belonging to said Andrew J. Myers, by his assignee for the benefit of creditors.

The facts are stated in the opinion of the Supreme Court, infra, and in the opinion of STEWART, J., discharging the rule, as follows, viz:—

"I am not convinced that this sale should be set aside. The only technical reason for so doing is an irregularity in the conduct of the sale, the allegation that Dr. Gross, the holder of the last judgment, was misled to his injury by the statement of Edmund B. Myers, one of the assignees, that the property would not be sold for less than $90 per acre. Had this been made on the day of sale I would feel compelled to set it aside, much as such a course would be against the best and safest rules on the question of setting aside such sales. But that statement was made almost a month before the sale, before December 6, and the sale took place on December 31. Dr. Gross was present on the ground at 12 o'clock noon on the day of the sale, which took place in the afternoon, and so far as appears made no arrangement or inquiry looking to the protection of his judgment. This being the case, the Court is not moved to undo the sale on this account and involve the purchaser and those who have acted upon the faith of the sale in consequent loss against which the Court would have no authority to protect and no power to repair. I am not convinced that the sale was made in undue haste. All the notice was given that the law requires. Besides, the assignment came late in the year, on December 1, and to obtain the best price and enable parties to make the necessary arrangements for the change of possession, tenants, and to pay the purchase money April 1, the usual time for such transfers of title, the sale had to be made promptly. The testimony shows, and I think common experience would suggest, that the sale of a large farm, such as this was, after January 1, would not be as advantageous to the venders as before. It is perhaps a rare thing in this county for any but the sheriff to sell farms between January 1 and April 1. Farms are usually sold in the fall of the year so that farming arrangements for the next year may be completed before January 1. In view of these well-known facts I am not convinced that the sale was unnecessarily hurried. Had it not been made when it was, the assignees would probably have been obliged to carry the property over until next fall, with a consequent increase of liabilities to be met in the future.

"Dr. Gross has offered to give a bond conditioned to bid at another sale at least $92 for the property. If this were an Orphans' Court sale, and he an heir or creditor, this would move the Court to order a re-sale, but it is not, and the rule is different, and by these rules the Court is bound: Snyder's Estate, 2 C. C. R. 546. A sale by an assignee under the Act of February 17, 1876, is a substitute for a sheriff's sale, and must be regulated more nearly by the rules applicable to such sales. One unvarying rule is that mere inadequacy of price is not sufficient ground for setting aside a sheriff's sale. T. & H. Pr., sec. 1269, and cases cited. Here there is no fraud or irregularity in the sale. Under such circumstances it is said with reference to sheriff's sales that inadequacy of price is not sufficient to set aside the sale even where security is offered that a higher bid will be secured at another sale: Whiteacre *v.* Pratt, Dist. Court, Phila., cited in T. & H. Pr., Vol. 1, p. 728, note 1.

"This case stands on a different footing from Kast's assigned Estate, 7 York Legal Record, 93. There a bond was filed agreeing to bid 33

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per cent. (the Court said 25 per cent.) more than what the property sold for, and there were irregularities in the sale.

"On the question of value it may be said, judging from the testimony, that the property brought a fair price. The purchaser possibly has acquired some advantage by his purchase, but who would become a purchaser if he did not believe he was getting a bargain, and how would property be converted and creditors satisfied, if purchasers be compelled to pay the last cent of value in property offered at assignee's sales?

"And now, February 27, 1899, the rule to set aside the sale is discharged."

This appeal was thereupon taken and the above action of the Court assigned as error.

Nevin M. Wanner, for appellants.

Edward Chapin and *H. C. Niles*, (*Horace Keesey* with them). for appellees.

July 19, 1899. FELL, J. From Weitzell's Lessee *v.* Fry, 4 Dallas, 218, to Trust Co. *v.* Kelly, 185 Pa. 131, it has been uniformly held that inadequacy of price, without more, is not sufficient ground for setting aside a sheriff's sale. The principles on which this line of decisions rests, as announced in Young's Appeal, 2 P. & W. 380, were restated in the opinion in Stroup *v.* Raymond, 183 Pa. 279, in which it is said that the rule that sheriff's sales should not be set aside for inadequacy of price, where there has been no irregularity and no misapprehension as to material facts, is founded on the soundest reason and should be adhered to.

A different rule obtains where sales are made under proceedings in the Orphans' Court, and the power of that Court to set aside a sale of real estate, made in pursuance of its order, for inadequacy of price, is indisputable. In such cases the purchase is not complete until confirmed, and the purchaser is regarded as standing in the situation of a bidder at a master's sale in chancery; his bid is but an offer to the Court, which may be accepted or not in its discretion: Demmy's Appeal, 43 Pa. 155; Hamilton's Estate, 51 Pa. 58; Brown's Appeal, 68 Pa. 53; Bowers's Appeal, 84 Pa. 311.

An assignee's sale under the Act of February 17, 1876, by order of the Court for the discharge of liens stands upon an intermediate ground. The purpose of the Act is to enable assignees for the benefit of creditors to sell discharged of liens, not excepted by its provisions, when the real estate assigned is so encumbered that it is difficult to determine the amount of the liens and a bidder cannot know in advance of the sale whether he will get a clear title. In such a case it is manifestly in the interest of all that a sale discharged of liens should be made, and it is on this ground only that the intervention of the Court should be had. In many cases which have been brought to our attention there has been an improper use of the Act to the prejudice of lien creditors. Sales under the Act are judicial sales, and interest on liens ceases on the date of confirmation: Carver's Appeal, 89 Pa. 276; Tomlinson's Appeal, 90 Pa. 224. Delay in distribution or the imposition of terms which postpone payment may seriously affect the rights of lien creditors. It is not the purpose of the Act to take from them the right to collect their claims by execution in order that the general creditors or the assignor may be benefited; and it is not taken from them at all except in cases where the estate "is encumbered with liens to such an extent as to render it difficult to determine whether the same can be sold for enough to pay all the liens," and then only "where the Court shall deem it for the manifest interest of all parties." In speaking of a sale under the Act of 1876, it was said in White *v.* Crawford, 84 Pa. 433: "The object is to pass to the purchaser a title as free and unencumbered as if acquired by virtue of a sheriff's sale, made upon execution upon a judgment lien."

This object should be kept in view in granting or refusing an order for sale and in confirming or setting aside a sale made under the Act. The reason for ordering a sale which will discharge liens is that a better price may be obtained by enabling bidders to know what they are buying. The supervision to be exercised by the Court after the sale is in the interest of all parties, but the limited purpose of the Act should be kept in view. There are not the same interests to be protected in an Orphans' Court sale, and on the other hand the rule that a purchaser has a right to his bargain does not apply with the same force as in the case of a sheriff's sale.

In this case the discretion of the Court was exercised within the lines indicated. There was no fraud or irregularity in the sale, and the land brought a fair price. The offer to bid ten dollars per acre more at another sale is made by the trustee for the wife of the assignor, to whom a judgment was confessed before the assignment under which all the personal property was sold. As the fund realized is sufficient to pay all judgments prior in lien to hers, and the increase would produce nothing for the unsecured creditors, she is the only party to be benefited by a resale, and the other judgment creditors and the purchaser may be prejudiced by the delay.

The order of the Court is affirmed at the cost of the appellants.

W. M. S., Jr.

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Jan. '98, 182. Supreme Court. May 19,1898.

Musser v. Stauffer.

Contract—Parol agreement—Conflict of law.

Matters connected with the performance of a contract are governed by the law prevailing at the place of performance; and if upon the trial of a case it is shown that by the laws of Virginia a contemporaneous parol agreement is not available as a defence to a written contract, it is sufficient to rebut the presumption that the law of the forum is the same as the law of the place of the performance of the contract.

Burnett *v.* Penna. R. R. Co., 176 Pa. 45, followed.

Appeal of Samuel D. Stauffer, defendant, from the judgment of the Common Pleas of Lancaster County, in an action by Henry C. Musser upon certain promissory notes.

On September 23, 1890, Henry C. Musser, plaintiff, purchased from the Melrose Land Company, eight lots of ground in Roanoke, Va., and as part of the consideration for the said lots of ground, plaintiff gave to the Melrose Land Company sixteen promissory notes, each bearing date Roanoke, Va., September 23, 1890, twelve of them being for $83.33 each, and four for $83.34 each, in all amounting to $1333.32, eight of which became due and payable in one year, and eight in two years, from September 23, 1890, and all payable at the Commercial National Bank of Roanoke, Va.

On November 11, 1890, the plaintiff sold to Samuel D. Stauffer, the defendant, the said eight lots of ground for the sum of $2800, and defendant signed a written contract for the purchase of said lots, of which the following is a copy:

Roanoke, Virginia, November 11, 1890.

I have this day bought of H. C. Musser the certain eight lots as follows:

Lots	9, 10, 11, 12	in	Section	79.
"	4,	"	"	64.
"	15, 16,	"	"	60.
"	7,	"	"	74.

All of the above-named lots located in the tract of the Melrose Land Co. Price to be paid $350 per lot, amounting to $2800.

Terms to be: One-third cash, said S. D. Stauffer to assume two notes of $666.66 each, payable in one and two years from September 23, 1890. Balance due in one and two years from date with interest at 6 per cent. S. D. STAUFFER.

The notes assumed in the above contract were the sixteen notes which the plaintiff gave to the Melrose Land Company on September 23, 1890, but they were described in the above contract as two notes of $666.66 each, which fact is set forth in the plaintiff's statement, and admitted to be true in the defendant's affidavit of defence. In pursuance of the contract between the plaintiff and the defendant, and as part of the purchase money for the lots of ground sold by the plaintiff to the defendant, the defendant, on November 11, 1890, made, executed and delivered to the plaintiff sixteen promissory notes, each bearing date, Roanoke, Va., November 11, 1890, twelve of said notes being for $33.33 each, and four for $33.34 each, amounting in all to $533.32, all payable at the Commercial National Bank of Roanoke, Va.; eight of them in one year, and eight in two years, from November 11, 1890.

On or about November 11, 1890, the plaintiff executed and delivered to defendant a deed for the said eight lots, in which deed the defendant assumed payment of said sixteen notes given by plaintiff to the Melrose Land Company. The defendant accepted and still holds the said deed. Defendant paid none of the notes. Plaintiff proved that he had paid eleven of them, and to recover the amount of these, as well as the sixteen notes given directly to him, he brought this suit. In his affidavit of defence, the defendant admitted the execution of the sixteen notes; but he alleged, and offered to prove on the trial, a contemporaneous and collateral parol agreement that plaintiff was to pay to a corporation, in which defendant was largely interested, $45,000 for the use of certain patents, and upon his failure to do so defendant was to be relieved from all liability on these notes. He also alleged and offered to prove an oral agreement on the part of plaintiff with defendant that the Monitor Steam Generator Manufacturing Company of Roanoke would pay to the Monitor Steam Generator Manufacturing Company of Lancaster $80,000 for the transfer and assignment of the territorial right under patent No. 382,863, issued by the United States, which promise made to the said Monitor Steam Generator Manufacturing Company of Lancaster was of value to the defendant in that he owned one-fourth of the stock of said company, and would therefore be entitled to one-fourth of the profits arising from the sale of said patent, and that it was part of the consideration of the notes upon which the suit is brought that said money should be paid to the said Monitor Steam Generator Manufacturing Company of Lancaster, Pa. That said agreement between said two companies was dated on the 2d day of October, 1890. And that Henry C. Musser had knowledge of said agreement, and was interested in the same as a stockholder of said company of Roanoke, and made said agreement; and the advantages resulting to defendant from the execution thereof were a part of the consideration of said notes, and if said consideration failed said notes were not to be paid. The defendant further alleged that a part of the consideration of the notes on which the suit was

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brought was the promise and undertaking of plaintiff to see that said $45,000 was paid by said company of Roanoke to said company of Lancaster, and which consideration having failed the said notes were not to be paid.

The sufficiency of an affidavit of defence setting forth these matters was before this Court in Musser *v.* Stauffer, reported in 178 Pa. 99, and it was held the affidavit was sufficient.

When the case came on for trial all the offers of defendant to prove these matters were overruled on the ground that the notes were Virginia contracts; that they were governed by the laws of Virginia, which admitted no defence of contemporaneous parol agreements; all offers of payment were also overruled, and binding instructions for the plaintiff were given by the Court (BRUBAKER, J.).

Defendant appealed and assigned as error the refusal to admit his offers of evidence to prove the parol agreement and payment.

William U. Hensel, (*J. Hay Brown* with him), for appellant.

Louis N. Spencer and *George Nauman,* (*E. D. North* with them), for appellee.

July 19, 1899. MCCOLLUM, J. On the first appeal in this case the only question for our determination was whether the Court below erred in holding that the affidavits of defence were sufficient to prevent summary judgment on the plaintiff's claim. The claim was based on certain notes executed and delivered by the defendant to the plaintiff in consideration of a conveyance by the latter to the former of certain lots situate in the city of Roanoke, Va. The notes appeared on their face to have been made in Roanoke, Va., and were, by their express terms, negotiable and payable at the Commercial National Bank of Roanoke in said city. The lots conveyed by the plaintiff to the defendant were conveyed by the latter to Horace M. Engle in trust to secure the payment of said notes as they matured. The defence to the claim was that the defendant was induced to purchase the lots and execute and deliver the notes by a contemporaneous parol agreement the performance of which was a condition precedent to the payment of the notes, and which agreement the plaintiff had not complied with. The nature and terms of the alleged parol agreement were fully set forth in the affidavits of defence which appear in 178 Pa. on pages 100, 101 and 102. We held that the question raised by the rule for judgment must be determined upon the claim and the affidavits of defence constituting the answer thereto; that in the absence of evidence to the contrary the law of the forum was presumed to be the same as the law of the place of the contract, and that the Court below did not err in discharging the rule and refusing judgment. The ruling complained of was therefore sustained.

On the trial of the case in the Court below it was shown by evidence, recognized by the Courts of this State as relevant and competent, that by the laws of Virginia a contemporaneous parol agreement was not available as a defence to a written contract. The evidence consisted of the decisions of the highest Court of the State of Virginia, and appeared in the authenticated reports of such decisions. The evidence unanswered may therefore be considered as a sufficient rebuttal of the presumption that the law of the forum is the same as the law of the place of the contract.

It is well settled that matters connected with the performance of a contract are governed by the law prevailing at the place of performance: Brown *v.* The Camden & Atlantic Railroad Company, 83 Pa. 316; Waverly National Bank *v.* Hall et al., 150 Pa. 466, and Burnett *v.* Penna. R. R. Co., 176 Pa. 45. The law applicable to the principal questions we have to consider is stated by our brother FELL in the case last cited, as follows: "Generally as to its formalities and its interpretation, obligation and effect, a contract is governed by the laws of the place where it is made, and if it is valid there it is valid everywhere; but when it is made in one State or country to be performed in another State or country, its validity and effect are to be determined by the laws of the place of performance. It is to be presumed that parties enter into a contract with reference to the laws of the place of performance, and unless it appears that the intention was otherwise these laws determine the mode of fulfillment and obligation and the measure of liability for its breach." It is not necessary to cite in this opinion other decisions and cases applicable to the questions raised by the assignments, because the cases and decisions already referred to are clearly sufficient to sustain the rulings complained of. The offers contained in the third and seventeenth assignments do not require special notice. It is not averred in the offers that the alleged parol agreement was made subsequent to the delivery of the notes or the completion of the negotiations which resulted in the sale and conveyance of the lots. The offers were substantially the same as the offers to prove a contemporaneous parol agreement as the inducement to the execution of the written contracts. There is no designation in the offers of the time when or place where the alleged agreement was made, nor anything discoverable in them which warrants an inference of a parol agreement entered into be-

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tween the parties after the written contracts and obligations were executed and delivered and by which said contracts and obligations were annulled or modified.

The assignments of error are dismissed and the judgment is affirmed.

W. C. S.

Jan. '99, 127. Supreme Court. April 26, 1899.

Brooks v. Hastings et al.

Soldiers' Home—Pensions—Contract—Act Congress February 28, 1883—Act June 3, 1885, P. L. 62—Act May 4, 1893, P. L. 30.

The admission of an applicant for membership in an eleemosynary institution is necessarily conditioned upon his acceptance of the rules and regulations prescribed by proper authority for the government and management of such institution.

Equity will not assist such an applicant in avoiding a regulation prevalent in a community to which he seeks admission at the time the admission is actually sought and with which since his admission he has complied.

A regulation legally adopted by the governing board of a soldiers' home, providing for turning into the treasury of the home excess of pension beyond a fixed sum, is not in conflict with the Act of Congress of February 28, 1883, 22 U. S. Stat. 432.

Appeal of Andrew Brooks, from the decree of the Common Pleas of Erie County, in equity, on a bill wherein Daniel H. Hastings et al., Board of Trustees of the Soldiers' and Sailors' Home at Erie, were defendants.

Andrew Brooks, on March 24, 1898, made application in due form for membership in the Pennsylvania Soldiers' and Sailors' Home at Erie. On December 20, 1892, the trustees of the home had passed the following resolution:

"Resolved, that the members of the home, who are pensioners, shall upon receipt of pension, or within ten days thereafter, pay over to the commander or some officer designated by him a sum of money equal to the amount which said pensioner may have drawn in excess of $4 per month, and that when arrearages on original claim for pension or arrearages accruing from increase of pension may be paid to members of the home, this rule shall apply to such arrearages for the time the pensioner receiving the same may have been a member of the home; provided, that in special cases the board of trustees may direct that the money which may have been paid by any member can be expended for the support of the wife or minor children of such member to such amount as the board may deem expedient.

"And on July 11, 1893, the said board passed the following resolution: 'Resolved, that any member of the home failing to comply with the rules of the board of trustees, governing pensions shall be discharged by the commander for violation of rules, and any member so discharged shall not be re-admitted except by vote of the board of trustees, and in no event until the expiration of six months after such discharge.'

"Resolved, that members of the Pennsylvania Soldiers' and Sailors' Home, or members of any other State Soldiers' and Sailors' Home, or of the National Homes for Disabled Volunteer Soldiers, who may have been honorably discharged therefrom at their own request or for any other reason, shall not be admitted to the Pennsylvania Soldiers' and Sailors' Home within six months from date of such discharge."

In conformity with the resolution of December 20, 1892, the plaintiff paid to the home $12.73, being his pension in excess of $4 a month since his admission to the home and up to the time of the filing of his bill, and requested the commander and quartermaster of the home, defendants, to forward it to his wife who was living in need at Scranton.

The bill set out that the resolutions of the board of trustees above recited were in violation of the Act of Congress of February 28, 1883, sec. 4745 of the revised statutes.

The bill prayed that it be "treated as the bill of your orator and all other members of the Soldiers' and Sailors' Home of Erie, Pennsylvania, who may see fit to join herein and be made parties hereto," and for an injunction restraining defendants from taking from your orator or requiring him to pay over to them any portion of his said pension money.

The defendants' answer admitted the facts as alleged in the plaintiff's bill and set out further that the payments made by the defendants were entirely voluntary and further averred that when plaintiff entered the home on April 23, 1898, he entered into an agreement with said board of trustees wherein it was provided, inter alia, that he would abide by and obey all of the rules and regulations made by the board of trustees or by their order, including the pension rule above recited, and the defendants further averred that without making said agreement, the plaintiff could not have obtained admission to the said home.

The Court, WALLING, P. J., dismissed the bill upon the ground that the rule was not in conflict with the Act of Congress of February 28, 1883.

Plaintiff thereupon appealed.

C. L. Baker, (*Clark Olds* with him), for appellant.

The necessary qualifications for admission to the Soldiers' Home are established by the Legislature.

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Act June 3, 1885, sec. 6, P. L. 62.

The board can only adopt rules as to the number and character of those who shall be admitted and for the regulation and management of the home and admission of members. The resolution of December 20, 1892, was not within the powers of the trustees to enact.

Under section 4747 of the revised statutes the pensioner may use money received from his pension for his own use and benefit and to secure the comfort of his family in any manner he may see proper, free from the attacks of his creditors.

Holmes *v.* Tallada, 125 Pa. 133.
Yates County Nat. Bank *v.* Carpenter, 119 N. Y. 551.

The board of trustees have no right to determine what relatives are dependent upon the pensioner for support.

Loser et al. *v.* Managers of the Soldiers' Home, 92 Mich. 633.

The plaintiff has been deprived of his money without due process of law.

Brown *v.* Hummel, 6 Pa. 86.
Ervine's Appeal, 16 Id. 256.
Menges, *v.* Dentler, 33 Id. 495.
Palairet's Appeal, 67 Id. 479.

H. M. Rumsey, (*E. L. Whittelsey* with him), for appellees.

The resolution of the board provides that when an inmate receives a pension he shall pay over a certain amount voluntarily to the home. It is true that his failure to comply with the rule would result in his discharge. But he is familiar with the rule when he enters the home and enters into an agreement to comply with it, which is a precedent step to his admission.

When the pension check has come into the pensioner's hands, the proceeds are not exempt under the Act of Congress. The protection only extends to the pension in course of transmission to the pensioner.

Friend *v.* Garcelon, 77 Maine, 25.
Crane *v.* Linneus, 77 Id. 59.
Rozelle *v.* Rhodes, 116 Pa. 135.
Jardain *v.* Saving Fund, 44 N. J. Law, 377.

The board of trustees had power to adopt the pension resolution.

Loser *v.* Home, 92 Mich. 633.
Ball *v.* Evans, 98 Iowa, 708.
Bryson *v.* Home, 168 Pa. 352.
Act June 3, 1885, sec. 7, P. L. 62.

The nature and purpose, for which a corporation was created, are the controlling considerations in determining the validity of its by-laws and regulations, and if they are foreign to its character, and a departure from its purposes, they are void; but if otherwise and in harmony with the general laws, public policy and common right, they are valid.

5 Am. & Eng. Encyl. (2d ed.) 91.
People *v.* Board of Trade, 45 Ill. 113.
Comm. *v.* St. Patrick's Ben. Soc'y, 2 Binney, 441.

The board of trustees has been delegated by the State to perform certain duties, and the Legislature has committed to that board the exercise of discretion in its duties. A Court of equity will refuse to interfere with or control the exercise of a discretion thus committed, unless fraud, improper conduct or abuse of discretion can be first shown.

Hill on Trustees, (4th Am. ed.) *70, *485 et seq.
Perry on Trusts, (4th ed.) sec. 508.

The discretion of an officer in the discharge of duties not merely ministerial, cannot be interfered with by injunction or mandamus.

High's Ex. Rem., (2d ed.) secs. 24 and 97.
Dechert *v.* Com'th, 113 Pa. 241.
Petition of Newlin, 123 Id. 544.
Com'th *v.* George, 148 Id. 463.
Warfel *v.* Cochran, 34 Pa. 381.
Pavement Co. *v.* Wagner, 139 Id. 623.

The payments were voluntary and cannot be recovered.

McCrickart *v.* Pittsburgh, 88 Pa. 133.
Union Ins. Co. *v.* City of Allegheny, 101 Id. 250.
Hospital *v.* Philadelphia, 24 Id. 229.
De La Cuesta *v.* Insurance Co., 136 Id. 62.
Bryson *v.* Trustees, 168 Id. 357.

July 19, 1899. GREEN, J. When the plaintiff made application for admission to the home, he did so in the exercise of his own volition. He was at liberty to seek admission or to remain outside just as he chose. Of course when his application was accepted and his admission was granted, it was necessarily conditioned upon his acceptance of the rules and regulations prescribed by the commission for the government and management of the home. One of these rules was a resolution adopted on December 20, 1892, six years before the plaintiff's application was made, and was in part in the following words, to wit: "Resolved that the members of the home who are pensioners shall, upon receipt of pension, pay over to the commander, or to some officer designated by him, a sum of money equal to the amount which said pensioner may have drawn in excess of four dollars per month."

The application of the plaintiff for admission, signed and sworn to by him, contains the following stipulation, "And said applicant further stipulates and agrees that he will perform all the duties required of him, and will abide by and obey all the rules and regulations made by the board of trustees or by their order."

On the faith of this special agreement, being otherwise qualified, the plaintiff was admitted to membership of the home, and from and after his admission, he was duly supported and maintained by the home. Having subsequently received some pension money from the United States

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Government he paid over his proper proportion thereof, $12.73, to the commander of the home, and he now seeks to recover this money back, and to restrain the defendants or their successors in office from taking or requiring of him any more of his pension money, and also to restrain the defendants from discharging him from the home for his refusing to pay over any more of such pension money. The cause was heard in the Court below upon bill, answer and proofs, and was decided in an able and exhaustive opinion against the plaintiff, dismissing the bill at the cost of the plaintiff, in which we entirely concur.

That the plaintiff obtained his admission to the home by means of his contract, is not, and cannot be, questioned. It is just as certain that the payments he subsequently made were voluntary payments made in accordance with his contract. No kind of imposition, fraud, duress or coercion was used to obtain the payments from him, and he showed a proper sense of his duty when he voluntarily performed the terms of his contract. He obtained the support and maintenance he sought from the home and he rendered the consideration which he agreed to pay therefor. In the case of Bryson *v.* Trustees, etc., 168 Pa. 352, we had the same question before us except that it arose upon the sufficiency of an affidavit of defence. The action was against the same home and the same body of trustees, etc. The question arose under the same Acts of Assembly, and the same resolutions as are now under consideration. The answer in this case, as in that, alleged that the payment of the pension money was voluntarily made by the plaintiff who had made the same kind of a contract as was made in this case. We did not then decide the question as to the validity of the rule under which the payment was made because it was not necessary to the decision of the case and therefore did not arise. But we did then say, "If the payments shall turn out to be voluntary, as is alleged, and in pursuance of an agreement under which the plaintiff's admission was obtained, and that admission depended upon the contract, and not upon the positive provisions of the statute organizing this institution then the plaintiff can not recover."

In the present case all these matters have been distinctly established by the testimony, and are found as facts by the Court below. In the fifth finding of fact the Court finds that the plaintiff was admitted to the home at his own request, upon his sworn application, "and that before the making of said application the plaintiff had read and fully understood the above-quoted resolutions known as the pension rules of said board, and that the plaintiff was admitted as a member of said home by virtue of his said application and agreement, and would not otherwise have been admitted thereto."

In the fifth conclusion of law the Court finds, "That the payments made by plaintiff to defendant were in legal contemplation voluntary payments and can not be recovered back." An examination of the testimony of the plaintiff himself fully establishes the correctness of these findings. It follows therefore that the ruling in the Bryson case above cited, is directly applicable to the facts of this case and decides it. On the question whether the pension rules of the home in this case are in conflict with the Act of Congress of February 28, 1883, making void certain pledges, assignments, etc., of pensions the learned Court below held that there is no such conflict, and is so manifestly correct in that ruling that it is unnecessary to repeat the reasons given in the opinion, which are there so well expressed. There was no pledge, assignment or other transfer or conveyance of the pension money in the case. The pension check was received by the plaintiff for the whole amount due him and he voluntarily and freely handed it to the proper officer for the purpose of paying out of it the amount due under his contract, which being deducted a proper check was given to him for the balance.

The opinion also expresses very clearly the reasons why the pension rules are entirely valid and not in conflict with our legislation establishing the home. Similar questions have arisen in other States under similar enactments and the rules have been uniformly held to be entirely valid. See Loser *v.* Home, 92 Mich. 633; Ball *v.* Evans, 98 Iowa, 708. Undoubtedly the seventh section of the Act of 1885, expressly conferred upon this commission the "power to adopt rules and regulations for its management and government . . . and to formulate rules for the admission of disabled and indigent soldiers not inconsistent with the preceding section." The contention that a payment of a part of the pension money to the home, in the case of applicants who are also United States pensioners, is not one of the qualifications prescribed by the Act for the admission of members, and therefore such a requirement is contrary to the Act of 1885, is not tenable. If it is not prescribed as a qualification, it is not prohibited as such, and therefore its legal validity is not determined by the Act, and the question simply remains whether it is so unreasonable in its character as to be invalid on that account. We are of opinion that it is not unreasonable in any degree, but a fair and rational requirement, exacted, as it is, only in the cases of soldiers and sailors who draw pensions. There is no provision in the Act for such persons and when it appears

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that any such are applicants, it is but right and reasonable that they should be required to make some small contribution for the maintenance of the home in which they are supported, or it may be in a proper case, to put it in the power of the commission to make provision for the support of the families of the inmates, where they are needy and the pensioner neglects to provide for them. Our State poor laws require the application of the pauper's property to his support, where he has any, and numerous Acts of Congress provide for the surrender of the pensions of disabled and indigent soldiers and sailors who are supported in homes, into the hands of the treasurer or other officer of the home to be by them disbursed according to the rules and regulations prescribed by the managing bodies of the homes.

If they were powerless to contract with applicants who draw pensions as to the surrender of some portion of their pensions to the support of the homes, it would follow that such applicants could get all the support of the homes, and keep the whole of their pensions also, a result which does not seem fair either to the State or the taxpayers who provide the means for supporting the homes.

The contention that the requirement in question is contrary to that provision of the State and Federal Constitutions which prohibits the taking of property of the citizen without due process of law, and without making just compensation, has no application. This is not the taking of property in any conceivable sense. It is the creation of a condition upon which charitable support may be obtained, under a contract, which is voluntarily made, providing for the contribution of something towards the maintenance of the institution which furnishes the support. The applicant is under no obligation to make such a contract, but if he does make it, and gets the benefit, he must take it as it is given and keep his contract like all other good citizens are obliged to do. Seeing no error in the several assignments we dismiss them all.

The decree of the Court below is affirmed and appeal dismissed with costs.

W. D. N.

Jan. '97, 259. Supreme Court. March 14, 1898.

Beardslee v. Columbia Township.

Testimony — Order of — Photograph — Use of, as evidence — Hypothetical question — Negligence.

While photographs are competent evidence and when properly taken are judicially recognized as of a high order of accuracy, it is requisite that there should always be preliminary proof of care and accuracy in the taking of them, and of their relevancy to the issue before the jury, before they are permitted to be used in the trial. It is also necessary for their proper use that they be taken at or about the time of the accident upon which the suit is based.

The evidence of those who are not experts, to whom a hypothetical case is presented, is not admissible.

It is not error for the trial Judge to tell the jury, in answer to one of defendant's points, that "if the place of the accident was so dangerous that an ordinarily prudent person would not have attempted to pass it, but would have taken another road under the circumstances, then the plaintiff cannot recover in this case and your verdict should be for the defendant," unless it be shown that the remarks are injurious to the appellant.

Exceptions to remarks of the trial Judge, which are taken only under the Act of May 24, 1887, will not be favored, and the rule that the error assigned must appear to have been injurious to the appellant will be most rigidly applied to such cases.

Appeal of Charles Beardslee and Martha Beardslee, his wife, for the use of Martha Beardslee, plaintiff, from the judgment of the Common Pleas of Bradford County, in an action of trespass.

On the trial of this cause, before DUNHAM, P. J., the following facts appeared: On September 6, 1894, Martha Beardslee was riding to Troy, Pa., in an open wagon, drawn by a pair of colts, one three years old and the other four years old, driven by her son Edward Beardslee, carrying one other grown person and two small children. The wagon did not have any brake, and the harness was without any breeching. While going down a long, steep and narrow road, known as "Bailey Hill," where the road bent at an angle and was from twelve to fourteen feet wide, the off horse plunged down the side of the road five or six feet dragging the near horse, occupants and wagon with it, and the plaintiff was injured. Suit was brought by the plaintiff and her husband to recover damages, and on the trial of the case, while one of the witnesses called by the plaintiff was under cross-examination, a photograph of the locality of the accident was offered in evidence, and he was permitted to testify under objection. There was no proof that this picture showed the road as it existed at or about the time of the accident. Other witnesses were asked: "What would you consider the conduct of a party who would ride in a platform wagon going down the Bailey Hill road, with five persons in the wagon (three grown persons and two children), with twelve cheeses in the same, weighing thirty pounds each, exclusive of the boxes, and from thirty to thirty-five dozen eggs; hitched to two colts, one a three-year-old and one a four-year-old colt, one of the colts unshod, and using a harness without any breeching, or having any

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brake upon the wagon, and not locking the same, and he was familiar with the road on September 6, 1894?" To this question it was objected, that the evidence showed that the person injured was not the owner of the wagon or team, but a passenger, had nothing to do with the driving, and no control over the teamster, nor any interest in the trip, except as an accommodation ride; and that the whole question is a question of fact for the jury and not for an expert, or a witness who is not an expert, and that this witness is not competent as an expert. The Court sustained the objection in the following language: "A person that rides with another, as we understand the law, is responsible for all patent and known defects that he knows of, or by reasonable diligence should know. It would be just as much an act of negligence for a person to get in and ride with another person who had an unsafe conveyance, and go over a place, as it would for the person who drove the conveyance, if she knew it. Mrs. Beardslee in this case has testified that she knew of the load that was in the wagon and knew that the wagon had no brake upon it, and she knew or could have known by reasonable care that the harness had no breeching on, and we do not think that the Court would be justified in ruling that a woman does not know anything about business, and is not responsible for her acts the same as a man. So far as this is concerned we will admit the evidence; but as to the competency of this witness, we have some doubt, as we do not think he has given sufficient knowledge of his being an expert teamster to permit him to testify upon that subject."

Verdict and judgment for defendant, whereupon the plaintiff appealed, assigning as error the rulings on the evidence as above stated.

D'A. Overton and *E. B. Parsons*, for appellant.

A photograph must be verified by proof that it is a true representation of the subject, and whether it is sufficiently verified is a preliminary question of fact to be decided by the Judge presiding at the trial.

Blair v. Pelham, 118 Mass. 420.

The road had been straightened, widened by blasting the rocks at the bend, and guard rails placed at the side, after the accident and before the photograph was taken.

The general rule is that witnesses must testify to facts, and not to opinions.

Am. & Eng. Ency. Law, vol. 7, 492.
Graham et al. v. Penna. Co., 139 Pa. 149.
Platz v. McKean Twp., 178 Id. 601.
Cookson v. Railway Co., 179 Id. 184.
Auberle v. McKeesport, Id. 322.

Although a person may know that a township bridge is not in a safe condition, yet if he knows that the general public still continues to use it . . . . . and he uses reasonable care and caution according to the circumstances in crossing, he cannot be charged with contributory negligence for injuries caused by the defective condition of the bridge.

Sheridan v. Palmyra Twp., 180 Pa. 439.
Trexler v. Greenwich Twp., 168 Id. 214.
Pittston v. Hart, 89 Id. 389.

Where a person is driving with a friend, and is injured by the negligence of another, the contributory negligence of the driver cannot be imputed to the person injured.

Finnegan v. Foster Twp., 163 Pa. 135.
Dean v. R. R. Co., 129 Id. 514.

William Maxwell and *A. C. Fanning*, for appellee.

The preliminary questions and proof necessary to be established in order to entitle the photographs to be received in evidence are entirely for the Court "and it is said that the judgment of the trial Court as to the sufficiency of such foundation is conclusive and not open to examination on the trial."

18 Am. & Eng. Ency. of Law, 424.
Conrad v. Richter, 13 Co. Ct. Rep. 478.
Udderzook v. Com'th, 76 Pa. 340.
Com'th v. Connors, 156 Id. 147.
Chestnut Hill & Spring House Tpk. Co. v. Piper, 15 WEEKLY NOTES, 55.

No clearly defined rule is to be found in the books as to what constitutes an expert. Much depends upon the nature of the question in regard to which an opinion is asked. Nor is it imperatively required that the business or profession of the witness should be that which would enable him to form an opinion.

Ardesco Oil Co. v. Gilson, 63 Pa. 146.
Delaware Tow Boat Co. v. Starrs, 69 Id. 36.
Ryder v. Jacobs, 182 Id. 624.

The judgment on a verdict will not be reversed by the Supreme Court, because the trial Judge, after hearing the evidence as to the qualifications of a witness as an expert, and after permitting him to testify as an expert, subsequently left it to the jury to say whether or not the witness had such experience as would make him an expert.

Exec'r of Whitmire v. Montgomery, 165 Pa. 253.

Whether a given act is performed in a prudent and proper manner is a subject upon which a witness qualified to speak may express an opinion.

Elder v. Lykens Valley Coal Co., 157 Pa. 490.

November 14, 1898. MITCHELL, J. The first three assignments of error are to the use of a photograph and permitting witnesses to indicate upon it to the jury, the exact place of the accident, without any preliminary proof that it represented the place at all, and especially in view

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of the admission that it was not taken until after changes had been made in the road. This was error at the time. But it appears that before the photograph was formally admitted in evidence, proof had been supplied of the identity of the locality, the general faithfulness of the representation, and the nature of the changes in the condition of the road between the time of the accident and the time of photographing. It becomes therefore a mere question of the order of testimony which is largely within the discretion of the trial Judge, and the initial error was cured so that it did appellant no harm.

Photographs are competent evidence, and when properly taken are judicially recognized as of a high order of accuracy. See Udderzook *v.* Com'th, 76 Pa. 340, 353. But in careless or inexpert, or interested hands they are capable of very serious misrepresentation of the original. Before they are permitted to be used in the trial therefore there should always be preliminary proof of care and accuracy in the taking of them and of their relevancy to the issue before the jury.

The further objection in the present case, that the photograph was not taken until after the township defendant had made changes in the road at the place of the accident, is not without difficulty. In photographs as in plans, maps or other drawings used as evidence, there ought to be substantial identity in the person, place or thing photographed and that which the jury are to consider in the case. But photographs of the scene of an accident taken at or near to the time are not always obtainable, and bearing in mind the object sought, the assisting of the jury by knowledge of the locality to judge the conduct of the parties with reference to the issue raised, the only practicable rule would seem to be that the changes must not be such as to destroy the substantial identity, and that the changes whatever they are must be carefully pointed out and brought to the jury's attention. This would have to be the course pursued if a view were allowed to the jury at the trial, and no other appears practicable in regard to plans, photographs or other substitutes for a view. With these safeguards the subject must be left largely to the discretion of the trial Judge. In the present case we cannot say that there was any error in regard to the photograph of which the appellant is now entitled to complain.

The fourth to ninth assignments inclusive, we are obliged to sustain. A hypothetical case as to the horses, the harness, the wagon, and the load as defendant viewed the evidence in regard to the accident, was asked of a number of witnesses and their opinions were admitted as evidence of contributory negligence on part of the plaintiff. They were not experts, several of them expressly disclaiming such character, and so far as appears, none of them knew any more about the subject than the average juryman. There is no view on which the admissibility of such opinions can be sustained.

The subject was carefully considered and the rule intended to be finally settled in Graham *v.* Penna. Co., 139 Pa. 149. See Dooner *v.* Canal Co.. 164 Pa. 17; Cookson *v.* Rw. Co., 179 Pa. 184; and Auberle *v.* McKeesport, Id. 321. For this error in a generally well-tried case we are obliged to reverse the judgment.

The assignments relative to the duty of the plaintiff to have avoided the road where the accident occurred by taking another one need not be considered in detail. The jury were told in answer to one of defendant's points, "That if the point of the accident was so dangerous that an ordinarily prudent person would not have attempted to pass it, but would have taken another road under the circumstances, then the plaintiff cannot recover in this case, and your verdict should be for the defendant." Appellant complains that there was no sufficient evidence that the other road was any safer, but as the case must go back for another trial it would be of no use to discuss this point any further.

The last assignment is to some remarks made by the Judge in sustaining appellant's objection to an offer by the defendant. As the ruling of the Court was in his favor, appellant would, of course have no exception at common law, and his standing to object here must rest entirely on the Act of May 24, 1887, par. 3, P. L. 199; which authorizes exceptions to rulings. orders and remarks of the Judge made in the hearing of the jury at any stage of the proceedings. This is a provision of very doubtful wisdom, and under it the ordinary rule that the error assigned must appear to have been injurious to the appellant will be most rigidly applied. The remarks of the Judge here complained of are susceptible of an interpretation that would indicate that he had in mind the earlier rather than the later cases on the subject of the negligence of a driver as imputable to a voluntary passenger. But it is not entirely clear that such was his meaning, and as he sustained appellant's objection the jury could hardly have drawn any inference adverse to the appellant from the occurrence.

Judgment reversed and venire de novo awarded.

W. C. S.

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Jan. '98, 205. Supreme Court. February 21, 1899.

O'Malley v. Scranton Traction Company.

Negligence — Contributory negligence— Question for jury.

Where, in an action for damages for personal injuries caused by the negligence of defendant, there is no positive proof of contributory negligence on the part of the plaintiff, the trial Judge must refuse to direct a verdict for the defendant, and must submit the question to the jury to be determined from all the evidence.

Appeal of the Scranton Traction Company, defendant, from the judgment of the Common Pleas of Lackawanna County, in an action of trespass by Thomas J. O'Malley, to recover damages for personal injuries received through the negligence of the defendant.

On the trial of this cause, before GUNSTER, J., the following case appeared:

"On June 27, 1894, the plaintiff was engaged at work in repairing the pavement on Washington avenue in the city of Scranton, between Gibson street and Green Ridge street, the place where the accident is alleged to have occurred, being a short distance south of Larch street.

"The plaintiff's testimony was, that he was on June 27, 1894, at work repairing the pavement on Washington avenue, as I have already said to you; that he was working on the track on the part of the highway covered by the track of the defendant company; that he had gone to the side of the avenue for the purpose of getting a shovelful of cement; that he was engaged in spreading the cement upon part of the road that had already been covered with the asphalt while the asphalt was warm; that he was covering that part of it, a narrow strip of it some fourteen inches wide and some fifteen feet long, that he was covering that part of it with cement or cement dust; that after he had got the shovelful of cement he came back to the track, and that before stepping upon the track he stopped and looked and listened to see, presumably, whether he could safely go upon the track; that a car had only shortly before passed going north, and that the car stood upon the switch some distance the other side of Larch street; that he stepped upon the track, turning his face to the south, and began sprinkling this cement upon the warm asphalt; that he was stooped over, and that he had been so occupied only a short time, had covered perhaps some seven or eight feet, I do not remember just exactly how much, but about half of this narrow strip which he was covering with cement, having covered only about half of that when suddenly he was struck by the car of the defendant company; that he was knocked down, thrown under the car and dragged for some distance.

"He further alleged that he was using all the care which a reasonably prudent person, under the circumstances of the case, situated as he was, engaged in the occupation in which he was and doing what he was, would have used under like circumstances, and that the motorman who was running the car was negligent, in that he was running the car at an unreasonable or an unusual rate of speed; that instead of looking forward ahead of the car to see whether anybody was upon the track, the motorman was looking sidewise westerly down Larch street, and that the motorman was further negligent in not giving any alarm or warning by the ringing of the bell.

"Upon the part of the defence it was testified that the motorman slowed the car after he ran on to the switch above Larch street, or north of Larch street, that he slowed the car coming down towards Larch street, that he was ringing the bell, that he was on the lookout for passengers at Larch street, but that he was on the lookout there, and that he was ringing the bell as he was crossing Larch street, and that the plaintiff was only a short distance south of Larch street; that the motorman saw the men who were engaged at work on the road get off; that O'Malley, the plaintiff, himself got off the track, and then, without looking, suddenly stepped back on the track again and was struck by the car and knocked down and injured in that way."

The defendant submitted, inter alia, points, which, with the answers thereto, were as follows:

"8. That the plaintiff was guilty of contributory negligence in this case and, therefore, is not entitled to recover." Answer—"I decline to affirm that proposition. It is a question of fact for you." (Third assignment of error.)

"7. That under all the evidence in this case the plaintiff is not entitled to recover." Answer—"I decline to affirm that proposition. In my judgment the case is for your consideration, under the instructions which I give you, to determine whether or not he is entitled to recover." (Fifth assignment of error.)

Verdict for plaintiff, $4558.75, and judgment thereon. The defendant took this appeal and assigned error, inter alia, as above indicated.

Everett Warren, (with him *Edward N. Willard* and *Henry A. Knapp*), for appellant, cited—

Aerkfetz *v.* Humphreys, 145 U. S. 418.
Lynch *v.* Boston & Albany R. R., 159 Mass. 536.
Schaible *v.* Railway Co., 97 Mich. 318.
Keefe *v.* C. & N. W. R. Co., 92 Iowa, 184.
Act April 4, 1868, P. L. 58.
Mullherin *v.* D., L. & W. R. R. Co., 81 Pa. 366.
Cummings *v.* P., C. & St. L. Ry. Co., 92 Id. 82.
Miller *v.* Cornwall R. R. Co., 154 Id. 473.

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Hestonville R. R. *v.* City of Phila., 89 Id. 210.
Rafferty *v.* Central Traction Co., 147 Id. 579.

Joseph O'Brien, (with him *M. F. Sando* and *John P. Kelly*), for appellee, cited—

Owens *v.* People's Pass. R. W., 155 Pa. 334.
Quirk *v.* Holt, 99 Mass. 164.
Goodfellow *v.* Boston, Hartford & Erie R. R., 106 Mass. 461.
Illinois Central R. R. *v.* Shultz, 64 Ill. 172.
Brown *v.* Barry, 3 Dall. 365.
Vanhorne's Lessee *v.* Dorrance, 2 Id. 304.
Gyger *v.* Railway Co., 136 Pa. 96.

May 15, 1899. STERRETT, C. J. This action was brought to recover damages for personal injuries caused by the negligence of defendant company in carelessly and recklessly running one of its cars into a gang of workmen (of which the plaintiff was one), then engaged in repairing or paving Washington avenue on which the defendant's railway was laid.

The evidence tended so strongly to establish the fact of negligence, on which the action was based, that, in order to escape the consequences thereof, the defendant contended that plaintiff was guilty of negligence which contributed to his injuries, etc., and accordingly in its seventh and eighth points for charge, it requested the Court to give these binding instructions to the jury:

"7. That, under all the evidence in this case, the plaintiff is not entitled to recover."

"8. That the plaintiff was guilty of contributory negligence in this case and is therefore not entitled to recover."

The learned trial Judge, rightly refusing to affirm either of these propositions, as matter of law, fairly and impartially submitted the question of plaintiff's contributory negligence to the jury, as a question of fact to be determined by them from all the evidence. In view of the testimony that was then before the jury, it is impossible to see how he could have done otherwise without usurping the functions of the jury and undertaking to determine questions of fact which were exclusively within their province, and wholly outside the scope of a presiding Judge's duties, under any rational system of trial by jury.

Without unnecessarily consuming time in commenting on the testimony, for the purpose of showing that it contains no undisputed evidence, and no admitted fact or facts that would have justified the Court below in holding, as matter of law, that the plaintiff was guilty of contributory negligence, it is sufficient to say that, after a careful consideration of the record, we reached the conclusion that there is nothing therein on which such binding instructions could have been legally based.

Without disregarding his own duty, and usurping that of the jury, the learned trial Judge could not have done otherwise than refuse to affirm defendant's seventh and eighth requests for instructions.

We find no substantial error in either of the six remaining specifications; nor is there anything in the questions presented by them that requires discussion.

Judgment affirmed.

W. C. S.

Jan. '98, 383. Supreme Court. February 7, 1899.

Devlin et al v. Beacon Light Co.

Damages— Negligence— Contributory negligence —Question for jury.

Two actions of trespass were brought, one in the name of a minor by her next friend, and the other by her father and mother to recover damages for injuries sustained by the minor's coming in contact with a live electric light wire negligently left upon the sidewalk by defendant's employés, and upon the trial the joint plaintiffs were non-suited because "the plaintiff either saw the dangerous wire and trod upon it, or was negligent in failing to see it, and in either case having contributed to the accident, we must direct an entry of a compulsory non-suit." The motion to take off the non-suit was denied:

***Held*, that the evidence tended strongly to prove the gross negligence of the defendant company and that while there was some evidence on the subject of contributory negligence sufficient to go to the jury, it was not of such a character as would justify the trial Judge in holding as a matter of law that because of the plaintiff's contributory negligence there can be no recovery, that conclusion being reached only by inferences of fact such as can be legally drawn only by a jury.**

Appeal of Sarah K. Devlin, a minor, by her next friend James K. Devlin and the said James K. Devlin and Sarah Devlin, his wife, plaintiffs, from the judgment of the Common Pleas of Delaware County, in an action for damages for injuries caused by the alleged negligence of the Beacon Light Company, defendant.

The facts are set forth in the opinion of the Court, HEMPHILL, P. J., granting a compulsory non-suit, as follows:

"The defendant has moved for a non-suit upon two grounds:

"1. Because plaintiff has failed to prove negligence upon the part of the defendant, and

"2. Because plaintiff was guilty of contributory negligence.

"The evidence showed that the defendant in making some alterations in its line allowed an arc wire to lie upon the pavement in a much-traveled part of the city without guard or warning to passers-by; that the plaintiff stepped upon it, and immediately received a shock that felled her to the ground, and which occasioned the in-

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juries of which she complains. This, in our judgment, was sufficient to establish the negligence of the defendant in the first instance and require it to make answer.

"As to the second ground for defendant's motion. The evidence discloses the following facts: That the accident occurred in daylight, about 8 A. M. That the wire that caused it was plainly visible, and that she knew it was an electric wire and that it was dangerous to tread on it; that she was looking where she was going and did not see it until after she arose.

"That a person is bound to avoid a known danger on a public highway is so well settled that I need only quote the language of the Court in the case of Pittsburgh, etc., Ry. Co. *v.* Taylor, 104 Pa. 314: 'A man is as much bound to avoid a known danger on a public highway as anywhere else. Such obstructions are always liable to occur; the person or persons by whose negligence they have been placed there, or suffered to remain there may be liable in damages to the parties injured thereby where they have used reasonable care to avoid such injury, but it would be a harsh rule to hold that because a man has a right to pass along a public road that he is under no duty to avoid a known danger; such is not the law.'

"That the plaintiff was aware of the danger of treading on an electric wire seems clear. She was asked on cross-examination:

"Q. Are you sure that you did not see it, and after you had received the shock forgotten that you had seen it? A. Well, when I picked myself up my foot was on the wire. Q. Would you have had any reason in your own mind for not stepping on it, if you had seen it; understand me, I mean as a person would step on a rope or anything of that sort to keep it from tripping them, would you have had any objection to doing that with that wire? A. I do not think I would have touched it at all if I had seen it. Q. Why not? A. I would not want to tread on it purposely. Q. What would be your objection to doing it? A. I do not know that it would benefit me to tread on it. Q. Except as persons tread on an obstacle of that kind to keep them from coming up and tripping them. You say you would have objection to doing that? A. If I would have seen it I would not have tread on it, of course. Q. You would have been afraid? A. Yes. Q. Why? A. Because I knew that it was an electric wire. Q. That is you would have thought it to be dangerous to tread on it. A. Yes, sir. Q. So that makes you feel sure you did not purposely tread on it? A. I did not tread on it purposely.

"It will thus be seen that it was not for want of knowledge of the danger that existed but her failure to see it that she alleges caused her to tread on it.

"Yet her own testimony shows that she could have seen it had she looked for it. It was in the daytime upon the public sidewalk with no one near to interfere with her vision and was seen by her as soon as she arose.

"Then she testified: 'I don't know why I did not see the wire, I was looking where I was going. My attention was not called to anything else.'

"If, under the circumstances, she did not see it, it could have only been by reason of her negligence in not looking where she was going, and if she did see it and failed to avoid what she knew was dangerous, she was equally negligent and cannot recover in this action.

"The case of Shallcross *v.* Philadelphia, 187 Pa. 143, is much like this one. It occurred in the daytime and the injury complained of was from a fall caused by a woman striking her foot against a stone block wedged in a hole and projecting from four to six inches above the pavement. In entering the judgment of non-suit the Supreme Court says: 'The plaintiff was bound to look where she was going; and if, as she testified, the stone block projected between four to six inches above the pavement, she either saw it or was negligent in not doing so. If she saw it and nevertheless tripped over it and fell, she was negligent in failing to avoid an obvious danger.'

"So in the present case the plaintiff either saw the dangerous wire and tread upon it or was negligent in failing to see it, and in either case having contributed to the accident, we must direct the entry of a compulsory non-suit."

Plaintiffs appealed and assigned as error the refusal of the Court to take off the non-suit.

V. Gilpin Robinson, (*John E. McDonough* with him), for appellants.

The facts that a horse stepped upon a rail on a trolley road, and immediately fell to the ground in a dying condition, also that its driver upon touching the hames, received a severe shock, was held to be prima facie proof of defective insulation, and of negligence on the part of the railroad company.

American Electrical Cases, vol. 6, p. 234, 9 App. Div. 51 N. Y.
Thomas *v.* Western Union Tel. Co., 100 Mass. 156.
Haynes *v.* Raleigh Gas Co., 119 S. E. Rep. 344.
Clements *v.* Louisiana Electric Light Co., 44 La. An. 692.

In City of Allegheny *v.* Gilliam, 30 Pittsburgh Legal Journal, 461, the Court below charged the jury, among other things, that "men going along well-established sidewalks on parts ordinarily traveled in a city are not bound to be watching their toes. They have a right to assume the pave-

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ment is in reasonably good traveling order and therefore are not held to the vigilance of watching every step," and this was affirmed by this Court.

Fee *v.* Columbus Borough, 168 Pa. 382.
Potter *v.* Gas Co., 183 Id. 590.
Bruch *v.* Philadelphia, 181 Id. 590.

O. B. Dickinson, for appellee.

The plaintiff's allegation is that she received an electric shock. The only evidence of negligence against defendant is that its workmen permitted a piece of wire to lie along the pavement without an attendant to warn pedestrians.

If she had seen an apparently harmless wire upon the pavement and not knowing it to be dangerous she had trod upon it to prevent being tripped up, it is not contended that the Court would have been justified in convicting her of negligence in so doing. But this is not the case before us. On the contrary had she seen the wire and knowing it to be dangerous had intentionally trod upon it, she would have been guilty of contributory negligence for incurring a known risk, even though she might have believed she could incur that risk with impunity.

Wood *v.* Diamond Electric Co., 185 Pa. 529.

Omission to see an obstruction in broad daylight is positive proof of actual negligence on the part of the pedestrian.

Stackhouse *v.* Vendig & Co., 166 Pa. 588.

July 19, 1899. STERRETT, C. J. In 1897, two actions of trespass were brought against the defendant company,—one by Sarah K. Devlin by her father and next friend, to recover damages for injuries she sustained by being brought in contact with a live electric light wire which was negligently left upon the sidewalk in the city of Chester by defendant company's employés while they were engaged in re-adjusting the wires used for public street lighting, and the other, by her parents, James K. and Sarah Devlin to recover damages sustained by them in consequence of their said daughter's injury. Before trial, these cases were consolidated by order of Court under the provisions of the Act of May 12, 1897.

On the trial, the joint plaintiffs were nonsuited by the learned trial Judge for the reason given by him in the concluding sentence of his charge, viz.: "The plaintiff either saw the dangerous wire and tread upon it, or was negligent in failing to see it, and in either case having contributed to the accident, we must direct the entry of a compulsory non-suit." Doubtless for the same reason—because there is no possible ground for any other—he afterwards denied the motion to take off the non-suit. Hence this appeal by the plaintiffs. The specifications of error, so far as relevant, are directed to the Court's action in refusing to take off the judgment of non-suit.

It was not denied, nor could it be with any reasonable hope of success, that the evidence tended strongly to prove that the defendant company was grossly negligent in leaving the wire in a position where it was liable to come in contact with other wires heavily charged with electricity and thus endanger the lives of unsuspecting pedestrians and others passing and repassing along and across the public street. One of the two reasons assigned in support of the motion for a non-suit was: "Because plaintiffs failed to prove negligence upon the part of the defendant." This was wholly unwarranted by the testimony, and the learned trial Judge rightly disposed of it by saying: "The evidence showed that the defendant in making some alterations in its line allowed an arc wire to lie upon the pavement in a much-traveled part of the city without guard or warning to passers-by; that the plaintiff stepped upon it, and immediately received a shock that felled her to the ground and occasioned the injuries of which she complains. This, in our judgment, was sufficient to establish the negligence of the defendant in the first instance and require it to make answer."

As to the alleged contributory negligence of the injured plaintiff, it is sufficient to say that a careful consideration of the testimony has satisfied us that the learned Court below erred in denying the motion to take off the judgment of non-suit. While there is some evidence, bearing on the subject of contributory negligence, that may be regarded as sufficient to go to the jury, it is not of such a character as to justify a trial Judge in holding, as matter of law, that because of the plaintiff's contributory negligence there can be no recovery. In order to reach that conclusion, resort must be had to inferences of fact such as can be legally drawn only by a jury. We are of opinion that the legal conclusion of contributory negligence is unwarranted by any of the admitted or conclusively established facts in this case. In other words, upon the evidence before us, the case should be properly submitted to and disposed of by a jury, and not by the Court alone.

Inasmuch as the case goes back for trial by a jury, further comment on the questions involved is neither necessary nor desirable.

Judgment reversed, motion to take off nonsuit granted, and record remitted with a procedendo.

W. C. S.

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Superior Court.

Oct. '98, 176. Superior Court. December 15, 1898.

Becker v. Pennsylvania R. R. Co.

Railroad crossing—Contributory negligence—Stop, look and listen.

To warrant binding instructions for defendant in an action for damages by being run down by a train, there must be no doubt or uncertainty about the facts attending the accident to justify the Court in treating the question of contributory negligence as one of law, and when there is a doubt raised by the evidence as to the necessary facts or the inference to be drawn from them, the case is for the jury and not for the court.

When one is struck by a moving train which was plainly visible from the point he occupied when it became his duty to stop, look and listen, he must be conclusively presumed to have disregarded that rule of common prudence and to have gone negligently into obvious danger.

When the plaintiff testifies that he had complied with the mandate to stop, look and listen, and met with the accident as he was leaving and not approaching the crossing, and those in charge of the train testified that they did not see him until close upon him, the question of negligence must be passed on by the jury.

Appeal of the Pennsylvania Railroad Company, from the judgment of the Common Pleas No. 2, of Philadelphia County, in an action of trespass in which John Becker was plaintiff.

The facts of the case, appearing upon the trial before PENNYPACKER, P. J., were as follows: On January 19, 1895, the plaintiff was struck on a crossing of the Pennsylvania Railroad at Rope Ferry road, in the city of Philadelphia. The Rope Ferry road runs north and south and the railroad east and west, crossing each other at about right angles. There are three tracks, and the railroad is straight for a distance of over a mile in each direction from the crossing. The accident occured in daylight. The plaintiff was driving a covered milk wagon with the seat inside, coming from the north towards the south. There is a bank fourteen feet back from the first track of the crossing, from the corner of which a clear view to the east or left could be had down the track for a distance varying from sixty feet to three hundred feet, according to the testimony of the various witnesses.

The plaintiff testified that he stopped and looked out of the wagon towards the left after he cleared the bank, and saw no train approaching, and that he then leaned back into his covered wagon, from which he could not see up the track, and did not again look, but drove upon the crossing, and was struck while the wagon was on the third track.

The defendant presented points (first and second) that the plaintiff could have seen the train at a sufficient distance from the crossing to avoid the danger had he looked, and (third) that the plaintiff was guilty of contributory negligence; (fourth) that the verdict must be for defendant. The Court refused all these points.

Verdict for plaintiff for $800, and judgment thereon. The defendant appealed, assigning as error the refusal of its points.

J. H. Barnes, (*George Tucker Bispham* with him), for appellant.

The Court erred in submitting this case to the jury, because upon all the testimony it appeared that the plaintiff stopped at a point where he could see down the track a distance varying from sixty feet, as he said, to a hundred and fifty feet, as some of his witnesses said, and from three hundred to five hundred feet, as the defendant's witnesses said. That, having so looked, he leaned back inside of the covered wagon, where he could not see again, and drove upon the track where he was struck.

Obstruction to the view of the track does not relieve the plaintiff from care in approaching the crossing. The law requires listening as well as looking for a coming train, and obstruction to the view is no defence against a failure to listen.

Penna. R. R. Co. *v.* Mooney, 126 Pa. 244.
Hovenden *v.* R. R. Co., 180 Id. 248.

Under the circumstances the plaintiff was guilty of contributory negligence.

Myers *v.* B. & O. R. R. Co., 150 Pa. 386.
Gangawer *v.* R. R., 168 Id. 268.
Beynon *v.* Penna. R. R. Co., 168 Id. 642.

Maxwell Stevenson, for appellee.

It cannot be declared as a rule of law that he must stop, look and listen between the different tracks lying close to each other. Indeed, to stop instead of hastening to cross all of them, might have been evidence of negligence. He did not stop the second time to listen. Whether it was less dangerous to move continuously across the tracks, than to loiter between them, was a question for the jury.

Penna. R. R. *v.* Garvey, 108 Pa. 369.

Where the facts are uncontested or the inference of negligence the only one that can be drawn, the Court must pronounce the result as a matter of law; but where the facts are in dispute, or the inference from them open to debate, they must go to the jury.

Gray *v.* Railroad, 172 Pa. 383.

The rights and duties of travelers using a highway are mutual, reciprocal and equal; each must use ordinary care to avoid injury.

Penna. R. R. *v.* Goodman, 62 Pa. 329.
Penna. R. R. *v.* Ogier, 35 Pa. 60.

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March 23, 1899. ORLADY, J. This case was properly described by the learned trial Judge in the first sentence of the charge to the jury, viz.: "The case that you have before you to decide is one which raises many questions of fact, and it is one about which you will have difficulty in reaching a conclusion." The defendant contends that, under the circumstances disclosed by the evidence in the case, the plaintiff was guilty of contributory negligence in driving upon the crossing, and that the Court should have directed the jury to return a verdict in its favor.

To warrant such a direction there must be no doubt or uncertainty about the facts attending the accident in order to justify the Courts in treating the question of contributory negligence as one of law: Davidson *v.* Railway Co., 171 Pa. 522. In Ely *v.* Railway, 158 Pa. 236, the legal duty of persons driving over a grade crossing is defined in clear and expressive language, and is repeated in Gray *v.* Railroad, 172 Pa. 383, viz.: "The cases beginning with Railroad *v.* Heileman, 49 Pa. 60, and Railroad *v.* Beale, 73 Pa. 504, have established not only the rule that the traveler about to cross a railroad track must stop, look and listen, as an absolute and unbending rule of law founded in public policy for the protection of passengers in railroad trains as much as for travelers on the common highways, but also that such stopping, looking and listening must not be merely nominal and perfunctory, but substantial, careful and adopted in good faith for the accomplishment of the end in view. The traveler must stop and look where he can see, and he will not be allowed to say that he did so, when the circumstances make it plain that the proper exercise of his senses must have shown him the danger." The rule of law is clear and definite, and must be followed. When one is struck by a moving train which was plainly visible from the point he occupied when it became his duty to stop, look and listen, he must be conclusively presumed to have disregarded that rule of law and common prudence, and to have gone negligently into an obvious danger: Myers *v.* B. & O. R. R. Co., 150 Pa. 390. To apply this rule to the cases as they are presented with their varying environments is often difficult, and where there is a doubt raised by the evidence as to the necessary facts, or the inferences to be drawn from them, the case is for the jury and not for the Court. This plaintiff testified that in attempting to pass over this grade crossing, which was over a three-track railroad, he came to a full stop when the horse's head was six or seven feet from the first track, and then leaned forward, looked in both directions along the line of the railroad, and did not see nor hear any approaching engine or train; he then sat back in his wagon and started to cross at a faster gait than he had been driving, and when he had nearly cleared the crossing the rear part of his wagon was struck by a shifting engine which was running with the tank end towards him.

The speed of the train; the use of appropriate signals; the view of the track; obstructions by trees, vines, and a train, which was standing on another track a short distance from the crossing; the place he selected so as to see and hear; and the subsequent removal of objects alleged to have interfered with a fair view of the tracks were each fully investigated and each thoroughly pressed and disputed. The plaintiff's testimony, if believed, made out a case clear of contributory negligence, and the fact that it was to some extent impaired by one of his own witnesses would not justify the Court in ignoring it altogether.

The degree of contradiction must be such as to make it manifest that the plaintiff is willfully misstating the facts, or that he is entirely mistaken in his recollection of them, or, as was said in Kohler *v.* Railroad Co., 135 Pa. 357, "If, on the whole evidence in behalf of the plaintiff, his own testimony is overthrown by that of his own witnesses, in such number and weight that the Court could not support a verdict in his favor, then it would become the duty of the Court to direct a non-suit or a verdict. But such a case should be clear and without doubt." This plaintiff had a right to cross, and he had almost passed over in safety; he had complied with the mandate to stop, look and listen; he was struck as he was leaving, not approaching, the crossing; and his cause is materially aided by the defendant's witnesses. The fair analysis of that side of the case tends to show that the conductor did not see him "until the engine came against the wagon." The engineer did not see him until notified by the fireman that they were "pretty near the road crossing, a few feet from it;" the fireman could not see owing to the tank and the coal upon it, and when within ten feet of the crossing he "looked out and hallowed to the engineer to stop immediately;" the division engineer "thought the plaintiff could have seen as well from where he did stop as he probably could from anywhere else." Although it was clear daylight and the track a straight one, the persons who controlled the engine did not notice the traveler until they were within a few feet of the crossing. The facts were contested, the evidence was conflicting, and the inferences to be drawn were not at all one-sided. The case was rightly submitted to the jury in a clear and adequate charge which contained careful instructions as to the law.

The judgment is affirmed. W. D. N.

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WEEKLY NOTES OF CASES.

VOL. XLIV.] *FRIDAY, SEPT. 1, 1899.* [NO. 22.

Supreme Court.

Jan. '99, 39. Supreme Court. March 23, 1899.

Hopper's Estate.

Insolvency—Assignment for benefit of creditors—Appeal—Judgment—Decree.

A Court with equity powers having a fund in its custody may require a claimant to proceed diligently to ascertain how much is due him.

The refusal of the Court below to grant a petition for the appointment of an auditor to distribute a fund in the custody of the Court is not such "final judgment or decree" as will sustain an appeal.

Appeal of W. G. Hopper and Henry S. Hopper, trading as W. G. Hopper & Co., from the decree of the Common Pleas No. 1, for Philadelphia County, entered in refusing the appointment of an auditor on the answer of Emma C. Wilson, respondent, to their petition.

W. G. Hopper & Co. were bankers and stockbrokers doing business in the city of Philadelphia with whom Emma C. Wilson opened an account as her bankers. On December 21, 1895, she gave an order to them to purchase certain stock which amounted to $6187.50. They that day notified her of the purchase and of the price. All the prior orders of Mrs. Wilson had been for purchases or sales to be carried for her account on deposit of margin and appellants maintained this order to have been of the same character. Mrs. Wilson claimed that it was intended as an investment. The appellants settled with the seller for the stock, and the account as stated after that, showed that Mrs. Wilson was indebted to them in the sum of $2383.15. The day after the settlement for the stock appellants failed. The stock in question, having been pledged by appellants, was sold at a profit of $362.50 for which Mrs. Wilson was given credit, and on January, 1896, the account showed that the appellants were indebted to her in $4179.13. She offered to pay the balance which, on December 23, 1895, the account showed her to be indebted to the appellants, and demanded delivery of the stock. She declined any settlement with the appellants which did not involve delivery of the stock to her. Appellants thereupon obtained a rule on the creditors to show cause why the assignee should not reassign the assets remaining in his hands to appellants, and for the appointment of an auditor to make distribution of the fund. Appellee objected to the appointment of an auditor and demanded a trial by jury.

The Court ordered a reassignment, but refused to appoint an auditor.

Appellants thereupon appealed and assigned as error the refusal of the Court to appoint an auditor as prayed for.

William C. Hannis, for appellants.

The paramount rule in assessing damages for the wrongful detention of property belonging to another is that he should be at least fully compensated for the injury sustained.

Bank *v.* Reese, 2 Casey, 143.

But this rule applies only where the parties bear to each other a fiduciary relation.

Wilson *v.* Whitaker, 13 Wright, 114.
R. R. Co. *v.* English, 86 Pa. 252.
North *v.* Phillips, 89 Id. 250.
Pa. Co. etc. *v.* R. R. Co., 153 Id. 168.
Jamison's Estate, 163 Id. 143.

The damages sustained by appellee are ascertained by the market value of the stock at the time of the conversion from which should be deducted the amount due upon the stock by claimant.

Neiler *v.* Kelley, 69 Pa. 406.
Work *v.* Bennett, 70 Id. 484.
R. R. Co. *v.* English, 86 Id. 247.
Pa. Co. *v.* R. R., 153 Id. 160.

The decree of the Court refusing the appointment of an auditor is a definitive decree from which an appeal will lie.

Schwilke's Appeal, 100 Pa. 628.

W. H. Lex, for appellee.

The Court had no power to appoint an auditor in this case.

An appeal will not lie from the decree of the Court below refusing to appoint an auditor.

Woolley's Estate, 6 Pa. 351.
McCredy's Appeal, 64 Id. 428.

The auditor would have had no jurisdiction over this claim.

Wear's Assignment, 1 Kulp, 104.
Woods *v.* White, 97 Pa. 222.

July 19, 1899. MITCHELL, J. Appellants after an assignment for the benefit of creditors having made settlement with all the creditors except one, applied to the Court for an order on the assignee to reconvey. This was granted upon the deposit in Court of the fund now in controversy to secure the objecting creditor. The order for reassignment originally contained a provision for the appointment of an auditor to determine the amount due, but on the objection of the creditor who desired her claim passed upon by a jury, this was struck out by the Court.

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Under these circumstances the regular practice would have been for the creditor to apply to the Court for an issue. But apparently without objection from any one, the creditor brought suit in a different Court. That terminated in a discontinuance, and a new suit was then brought in the Court where the fund is. The appellants then moved the latter Court to appoint an auditor to distribute the fund. This was refused and from the refusal we have this appeal.

From this statement it is apparent that the appeal is premature. There is no final judgment or decree. Undoubtedly a Court with equity powers, having a fund in its custody may require the claimant to proceed diligently to ascertain how much is due him. In the present case the money, $6700, is the money of the appellants, and will so continue until it or the proper part of it is awarded to the creditor, and if the latter is tardy in the legal assertion of her claim, or dilatory in the prosecution of it, the Court may determine the question for itself or release the fund. It is the right of the depositing debtor not to have his money tied up indefinitely or perversely by the creditor for whom it is as yet only a security.

But the Court below, on this application, had before it, the circumstances under which the delay in the first action occurred and it was within its discretion to await the settlement of the claim by a jury, in the action now pending on its own docket and then award the fund in accordance with the judgment rather than by a summary proceeding before an auditor.

There was no approach to an abuse of discretion, and there is no other ground on which the case is as yet open to our review.

W. D. N.

Jan. '98, 326. Supreme Court. April 18, 1899.

Hughes v. Miller.

Subrogation—Sheriff's sale—Defaulting bidder—Judgment—Statute of limitations—Appeal—Act May 19, 1897, P. L. 68—Practice.

Where the widow of a decedent who was defendant in a judgment, has by payments on account reduced the judgment, subrogation to her rights in such judgment cannot be allowed to her creditor who is a defaulting bidder at a sheriff's sale twelve years after the entry of the judgment, in that her payments were voluntary and barred by the statute of limitations.

Under the Act of May 19, 1897, P. L. 68, where a party is deprived of going to the jury but judgment is entered in his favor non obstante veredicto, the practice which will be followed in future where the attention of the appellate Court is called to a desire for appeal by the successful party below in the event of a reversal, will be merely to reverse the judgment and send the record back to the Court below to enter such judgment as it should have entered in the first instance.

Appeal of J. H. Miller, from the decree of the Common Pleas of Blair County, entered in an action of assumpsit wherein T. D. Hughes was plaintiff.

The facts of the case are set forth in the opinion of the Supreme Court.

The Court, BELL, P. J., entered the following decree:

"Now, September 5, 1898, the rule at the instance of J. H. Miller, defendant for subrogation and satisfaction, is hereby discharged. It is further ordered that said defendant on pain of having execution pressed against him on or before September 12, pay to C. M. Piper, guardian of Ella Donithan, child of James Judge, deceased, or his attorneys two-thirds of the debt and interest on the judgment in this case, and further that he pay the remaining one-third to a trustee to be appointed by this Court; said trustee to invest the same, principal for use of Ella Donithan; interest for the use of Mrs. Judge, widow, or as the Court may direct."

Defendant appealed and assigned the entry of said decree as error.

T. H. Greevy and *Edmund Shaw*, for appellant.

The defendant in this case was entitled to be subrogated to the rights of Mrs. Alice Judge for the money paid by her on judgment No. 142, October term, 1881, in the Court of Common Pleas of Blair county, held by the Logan Loan and Building Association against James Judge.

Shannon *v.* Newton, 132 Pa. 375.
McCahan *v.* Elliott, 103 Id. 634.
Brown's Appeal, 91 Id. 485.
Shippen & Robbins's Appeal, 80 Id. 391.

An equitable right to a judgment may exist without actual assignment of it.

Fleming *v.* Beaver, 2 Rawle, 128.
Wallace's Appeal, 5 Barr, 103.
Cottrell's Appeal, 11 Harris, 294.
Mosier's Appeal, 56 Pa. 76.
Shippen & Robbins's Appeal, 80 Id. 391.
Maurer's Appeal, 86 Id. 380.
Webster & Goldsmith's Appeal, 86 Id. 409.
Campbell *v.* Foster Home Ass'n, 163 Id. 609.

H. C. Madden, (with him *M. M. McNeil* and *Heinsling*), for appellee.

As to subrogation, the right of the appellant could not possibly exceed that of Mrs. Judge.

Searight's Estate, 163 Pa. 210.

Mrs. Judge's claim against her husband's estate would be merely a simple debt barred in six years.

If unsecured by judgment or mortgage, and no action was brought within the limitary period, under the act of 1834, to continue the lien, the debt ceased to be a lien against the real estate five years after the death of the decedent.

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Ferguson *v.* Yard, 164 Pa. 586.
Kerper *v.* Hoch, 1 W. 9.
Oliver's Appeal, 101 Pa. 299.
Bindley's Appeal, 69 Id. 295.
Fink *v.* Mehaffy, 8 W. 384.
Bank *v.* Potius, 10 Id. 148.
Rittenhouse *v.* Levering, 6 W. & S. 190.

Subrogation does not arise in favor of a stranger but only on the part of a party who, in some sort of compulsion, discharges a demand against a common creditor.

Hoover *v.* Epler, 52 Pa. 522.

July 19, 1899. MITCHELL, J. Judgment being recovered by the sheriff against the appellant as a defaulting bidder, for the deficiency at a second sale of the real estate of James Judge, the appellant filed a petition setting forth that the action was brought and the judgment would enure entirely to the benefit of Mrs. Judge, the widow of the former owner; that Mrs. Judge was not only widow, but a creditor of her husband's estate, under such circumstances as made her the equitable owner of the present judgment; and that Mrs. Judge was indebted to the petitioner, defendant, so that it would be inequitable to permit the judgment to be enforced against him for her benefit. He therefore prayed that he might be subrogated to the claim of Mrs. Judge and thereupon the judgment be decreed to be satisfied. To this petition the sheriff made no answer, but the guardian of Ella Donithan, daughter and heir of James Judge, answered denying the status of Mrs. Judge as a creditor of her husband's estate, and as the alleged equitable owner of this judgment, and on the contrary averring the title of his ward to the money represented by the judgment, subject to her mother's life interest in one-third. On the petition and answer the Court discharged the rule for subrogation, and that action is the error assigned in the present appeal.

From the facts set up in the answer, which were not denied, it is clear that Mrs. Judge's payments on the judgment against her husband's estate if not uncollectible because voluntary, were barred by the statute of limitations, and that the largest equity in this judgment is in the daughter. The rule for subrogation was therefore properly discharged and this appeal must be dismissed.

Pending this appeal, however, the appellant obtained a rule to show cause why the judgment heretofore entered in this Court should not be opened or modified, so as to permit a jury to pass upon his defence. The circumstances were as follows: At the trial in the Court below the appellant, then defendant, presented two defences, one on the facts and one on the law. The Court ruled against him on the first, and directed a verdict for plaintiff, giving defendant exceptions on which he would of course have had an appeal. But the Court being of opinion that his defence on the law was good, subsequently entered judgment in his favor non obstante veredicto. This judgment, however, on plaintiff's appeal, was reversed by this Court, 186 Pa. 375, and our attention not being directed to the fact that the verdict was by peremptory instruction of the Court, we entered judgment for the plaintiff on the verdict. The defence set up on the facts at the trial in the Court below was that defendant was not a defaulting bidder, but that he had failed to take title under his bid because of an amicable agreement between the parties interested that there should be another sale. Such an agreement would, of course, estop the parties to it from the present suit. Whether the sheriff was party does not appear, but it seems that Mrs. Judge was, and as she is the equitable owner of this judgment to the extent of the interest on one-third of it for life, the defence would seem to be good, at least pro tanto, if the defendant can establish it as a fact. This he has had no opportunity to do The Court below precluded him from going to the jury on it, and yet he was prevented from appealing by the entry of judgment in his favor on the point reserved. When this Court reversed that judgment and entered judgment on the verdict, it only intended to do what in the position the case then appeared to stand, the Court below should have done. The affirmance of a judgment on one appeal does not prevent the subsequent reversal of it on an appeal by another party. Hitherto no practical difficulty has arisen in cases like the present because ordinarily the judgment of this Court has been pronounced while there was still time for the party winning below, but losing here, to take his own appeal if he had any grounds for reversal in his favor. But with the shortening of the time for appeal by the Act of May 19, 1897, P. L. 68, it is manifest that this cannot usually be the case hereafter. The most convenient practice therefore which will be followed in future where our attention is called to a desire for an opportunity for appeal by the winning party below, in case he should lose here, will be merely to reverse the judgment and send the record back to the Court below to enter such judgment as it should have entered in the first instance. The time for appeal by a different party will then begin to run from such judgment, so that no one will be barred without a fair opportunity to be heard.

In the present case we have already entered judgment on the verdict, and the time for defendant's appeal has passed. To reach an equitable result, therefore, we now, on the rule to open or modify our previous judgment, rescind so much

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of it as gives judgment for the plaintiff but let the reversal of the judgment of the Court below stand, and remit the record to the Court below for such judgment as law and justice require.

In doing this we express no opinion on the merits of the defence alleged. We have no knowledge of the evidence by which it was sought to be sustained or of the objections made to it. All we decide is that the defendant should have an opportunity either to have a jury pass on his defence, or to have this Court decide that he has not made out a sufficient case to justify its submission to a jury.

The appeal is dismissed. And so much of the judgment heretofore entered as renders judgment on the verdict for plaintiff is now reconsidered and rescinded and the record is remitted with directions to the Court below to enter such judgment as law and right require.

W. D. N.

Jan. '99, 57. Supreme Court. March 24, 1899.

Thornburn v. Thompson. Harrity's Appeal.

Sheriff's sale—Personalty—Preference—Fraud on unsecured creditors—Purchase by debtor's wife.

Where at a sheriff's sale under executions on confessed judgments the personalty is bought in by the attorney for the execution creditors, who on the same day deliver the same to the defendant's wife, who had neither property, credit nor competency to conduct the business, taking her judgment notes covering the defendant's entire indebtedness to such preferred creditors, and she thereupon appointed the defendant to manage the business, from which the preferred creditors were eventually paid in full, it is not error, in a contest between the unsecured creditors of the defendant and his wife as garnishee, to leave to the jury the question of fraudulent purpose, notwithstanding no witness contradicted the testimony of the defendant, his wife, a preferred creditor, and the attorney for the execution plaintiffs, that there was no understanding that the defendant's wife should become the purchaser, and that no benefit to the defendant or his family, or disadvantage to his unsecured creditors, was contemplated.

Appeal of William F. Harrity, assignee for creditors of Lavinia B. C. Thompson, trading as Thompson & Co., from the judgment of the Common Pleas No. 2, of Philadelphia County.

William Thornburn and Robert A. Murray, trading as Lowe, Donald & Co., brought assumpsit against Robert J. Thompson et al., trading as R. J. Thompson & Co., and recovered a judgment for $2241.27 against Robert J. Thompson alone. Thereupon an attachment execution issued against Lavinia B. C. Thompson, trading as Thompson & Co., garnishee. Interrogatories were filed by plaintiff, and to them, after answer filed, the garnishee pleaded nulla bona.

On the trial of this issue, the garnishee being defendant, it appeared that the garnishee is the wife of Robert J. Thompson, the judgment debtor; at the time of the issuance of the attachment execution she was doing business as a merchant tailor at No. 1100 Chestnut street, Philadelphia. The establishment had previously belonged to the husband, who had, on November 2, 1895, while doing business as a merchant tailor at No. 1100 Chestnut street, confessed judgments aggregating $42,000, upon liabilities as follows: To John B. Ellison & Sons, cloth merchants, $21,664.50; to William Ewing, bookkeeper, employed by Robt. J. Thompson, $5312; to five other creditors, Harrington & Goodman, Herman J. Custer, Fred M. Walton, Joseph S. Albright and Emhart & Bartram, in divers amounts. Executions issued on all of these judgments, but the execution of John B. Ellison & Sons had priority. The sheriff levied under all the executions upon all the goods at the tailoring establishment, and sold the same November 12, 1895, to the attorney for all the judgment creditors, for $15,763. The sheriff had collected while in possession a further sum of $499.54, making a total of $16,262.54. After paying costs there remained a sum of $16,148.92, which was applied on the execution of John B. Ellison & Sons, and the attorney for all the judgment creditors receipted to the sheriff for this amount on the writ as attorney for John B. Ellison & Sons. After the sale, on the evening of the same day, the creditors, in joint meeting, sold the goods purchased to the garnishee here, taking in payment her several judgment notes in the different amounts of their respective claims against her husband, Robert J. Thompson, amounting to $42,000. The garnishee ever since conducted the business, employing her husband as manager.

PENNYPACKER, P. J., charged the jury as follows:

"This is a case in which, in order to reach a correct conclusion, you will be required to exercise the most careful consideration. The plaintiff held a judgment against R. J. Thompson, and upon that judgment issued an attachment execution under which there was a seizure of goods in the hands of this defendant upon the allegation that those goods were not hers, but were in fact goods belonging to the husband, and that her title was fraudulent.

"It seems that in November, 1895, R. J. Thompson, who had for some years been conducting a clothing business at the corner of Eleventh and Chestnut streets, was in very bad financial shape. He owed general debts to the amount

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of $91,286.09, and he further owed debts to other persons, who may perhaps not inappropriately be called preferred creditors, to the amount of about $42,000. In order to meet these obligations he had assets to the value of $5069.77, and he had besides a stock of goods, the value of which is somewhat uncertain, but which subsequently sold at a sheriff's sale for $16,142.98.

"Being in this situation, on November 2, 1895, he confessed judgments to these preferred creditors to the amount of about $42,000, an execution was issued, and a levy made upon the goods on November 4, and the sheriff sold them on November 12, for the sum I have named to you, to Mr. Henry C. Thompson, Jr., who acted as attorney for the preferred creditors. That sale occurred about nine o'clock in the morning of November 12, and that afternoon these goods which had been bought at the sheriff's sale were sold to the wife of R. J. Thompson, and since that time she has been conducting the business.

"If this was a bona fide attempt upon the part of the creditors to whom judgments had been given to collect their claims, they had a perfect right to buy at the sheriff's sale, and after having so bought, they might dispose of the goods in any way in which they chose; they might even sell them upon terms of credit to the wife of R. J. Thompson.

"If, however, the object was not alone to collect their claims, but it was because of some arrangement, either express or tacit, between the parties that there was to be some benefit conferred upon R. J. Thompson or his family, or that the other creditors of R. J. Thompson were to be put to some disadvantage in the collection of their claims, so that in effect the purpose of it was to delay and hinder the other creditors in getting what was due to them, then it constituted a fraud, and the defendant here has no title.

"That is the question which you are called upon to decide under the evidence which has been presented to you in this case. Upon that question you have the evidence of Mrs. Thompson, and of R. J. Thompson, the husband, and Mr. Henry C. Thompson, Jr., the attorney for the creditors, and Mr. Ewing, who is one of those creditors who were benefited, all of whom practically unite in saying that there was no such prior arrangement or agreement or understanding; that the proposition that Mrs. Thompson should purchase those goods was not made in any way before the afternoon subsequent to the sheriff's sale. If that be correct, that is an end of the plaintiff's case.

"On the other hand, the plaintiff has produced before you no direct testimony to show that such an arrangement was made; that is, no witness testifies that there was any such conversation, or any such bargain. But you will remember that fraud lurks in concealment; that where people have formed a design to defraud others, they are not apt to put it in definite language and shape, or to write it down so that it may be seen. The contention of the plaintiffs is that looking at all of the facts of this purchase, they inevitably lead to the conclusion that there was such an agreement or understanding between the parties. The plaintiff points to you, and argues to you, that the facts when properly read lead you necessarily to this conclusion. The judgments were confessed a few days before. It appears that at the sheriff's sale there was no payment made for the goods in cash. On the same day of the sale, upon that afternoon, without any apparent effort to ascertain the actual value of these goods, certainly without an appraisement, they were handed over to the wife of Robert J. Thompson for the exact amount of the sums which were owed by R. J. Thompson.

"You will look at that transaction both from the point of view of the vendors and of the purchasers. If the creditors had bought those goods for their own purposes alone, then they owned them. Now, the contention is that they would not be likely to sell them to a married woman, who tells us that she has no property, that she had never been in business before, and would take for them her promise to pay, in the form of judgment notes. From the point of view of the wife, she tells us that she had no conversation with her husband before upon the subject. You are, then, to understand that a woman, without business experience, enters upon a venture to the amount of $42,000 without any money, and which involves the conduct of a business. It appears, too, that after she made the purchase, she employed her husband to look after the business for her, upon what terms does not appear, but it does appear that she had very little acquaintance with the character of the business.

"There is one fact which is presented to you, and argued upon by the plaintiff, which seems to have considerable significance, perhaps the most significant fact in the case. Ellison & Co. were the largest preferred creditors, to the extent of $21,000. The goods were sold at sheriff's sale and were bought by the purchasers for about $16,000. There was no payment to the sheriff, but there was a settlement with the sheriff, which involved, if it was an actual sale, a credit to Mr. Thompson to the extent of the amount which the goods brought. Now it is argued that if that were really a sale, then when Mr. Thompson, through the sheriff, had paid on account of his claim, the books of Ellison & Co. ought to contain an en-

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try of that credit, but if these goods were to remain as they were before, for the benefit of Mr. Thompson, and the indebtedness remain, then there would be no credit on account of it until a payment in cash was made as against that claim. Now, what appears upon the books? That the entry to the credit of the claim against Mr. Thompson does not appear to have been made until at the later period when Mrs. Thompson, having the goods in her possession, makes a payment in cash. This, as I say, is one of the significant facts in this case.

"I have gone over now with you what seemed to me to be the important features upon the question of fact. As I said to you, you have four witnesses who testify directly that no such arrangement was made; you have on the other hand the argument made by the plaintiff, based upon the facts which appear in the testimony.

"I am asked to charge you for the defendant:

"First. If the jury believe that Robert J. Thompson, being financially embarrassed, confessed judgments to certain of his creditors, who proceeded in a legal way to collect their judgments, and at the sheriff's sale became the purchasers of said goods levied on, and afterwards sold them to the wife of Robert J. Thompson, the defendant in the execution, taking a judgment note for the entire purchase money, there is no fraud committed by any one, and their verdict must be for the defendant." Answer—"I affirm that point, provided it contains substantially the testimony which there is in this cause."

"Second. The evidence in this case does not show that there was any fraud in the transactions in question, and their verdict should be for the defendant." Answer—"I decline that point."

"Third. That Robert J. Thompson, the defendant in the case, having made a general assignment for the benefit of creditors on the fifth day of November, 1895, which assignment was duly recorded prior to the sheriff's sale of November 12, 1895, and prior to the judgment in the case, which was entered on October 14, 1896, all the interest of the said Robert J. Thompson in and to the goods levied upon passed to his assignee, subject to the lien of the levy of the executions under which they were sold; and the plaintiff is not entitled to recover in this action, and their verdict should be for the defendant." Answer—"I decline that point."

"Fourth. That under all the evidence their verdict should be for the defendant." Answer—"I decline that point."

Verdict for plaintiffs, $2401.17.

After verdict the garnishee assigned for creditors to William F. Harrity, who, after the discharge of a rule for new trial and the entry of judgment for plaintiffs, suggested the assignment of record and took this appeal, assigning as error the refusal of the fourth point above quoted.

Dwight M. Lowrey, (*Alfred R. Haig*, with him), for appellant.

In this case, the plaintiffs, appellees, seek to invalidate a solemn judgment, with the subsequent execution and open sheriff's sale, on the ground of fraud, by inference and circumstantial evidence only, in the face of positive denials by the persons accused and by their attorney. The fraud set up was an alleged corrupt agreement between Robert J. Thompson, a failing debtor, and J. B. Ellison & Sons, creditors, to the effect that if Thompson would confess the judgment to Ellison & Sons, they would, after levy and sale, allow him, through his wife, to take possession of the property and pay them the debt. Not a single fraudulent, irregular, or deceptive act or utterance in respect of the proceedings on the part of any one connected with the transaction was proved or suggested; nor was any act or utterance, by way of commission or admission, shown which was inconsistent with the most entire good faith. Appellant contends—

(1) The evidence which is relied on to mark with fraud a judicial proceeding must be clear, satisfactory, and convincing; and if the evidence be a chain of circumstances, some one of those circumstances at least must wear a fraudulent color.

Mead *v.* Conroe, 113 Pa. 220.
Bank *v.* Tinker, 158 Id. 17.
Hagy *v.* Poike, 160 Id. 526.
Bear's Estate, 60 Id. 430.
Hartman *v.* Shaffer, 71 Id. 312.
Lasher *v.* Medical Press Co., 3 Pa. Super. Ct. 571.

(2) Where, as in the present case, the act in question and all the attendant circumstances are regular and lawful, both in themselves and in their consequences, and are not to be deemed fraudulent, unless done in pursuance of a prior agreement between the parties, the jury will not be permitted to infer the corrupt agreement from the acts themselves. This would be to assume fraud.

Walter *v.* Jones, 148 Pa. 589.
Werner *v.* Zierfuss, 162 Id. 360.

(3) Still less can fraud be so assumed when, as in the present case, there is direct, unshaken, and uncontradicted testimony from the parties to the transaction denying the imputation of the corrupt agreement and asserting the good faith of the transaction. This is not the place for the jury to determine the credibility of the witnesses. They must give effect to the testimony, for there is no conflict.

Mead *v.* Conroe, 113 Pa. 220.
Bank *v.* Tinker, 158 Id. 17.
Hagy *v.* Poike, 160 Id. 526.

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The plaintiffs have not "clearly proved" a single fact which is not shown to be irrelevant and inconclusive under the authorities cited.

Charles Biddle, for appellees.

The appellees established to the satisfaction of the jury, that the consideration for the agreement which R. J. Thompson made with J. B. Ellison & Sons, to confess a judgment to them, was that, after the execution, they would allow him to take possession of the property and pay them their debt; that the agreement for protection was mutual, and that Thompson was to retain his interest, either through Mr. Ewing, his head clerk, or through his wife, or in some other way, as he could not, of course, hold the property in his own name. Such an agreement was a secret trust, which, in the eyes of the law, was a fraud upon the creditors of R. J. Thompson. If the confession of judgment and the sheriff's sale were not made for the purpose of paying the debt of Ellison, and in good faith, making a transfer of the title to the goods levied upon, the whole transaction was a sham, and being merely for the purpose of delaying creditors, Mrs. Thompson obtained no title to the goods, which she received, as against the creditors who had been defrauded.

Rogers *v.* Hall, 4 Watts, 362.
Schott *v.* Chancellor, 20 Pa. 195.
Twyne's Case, Sm. Lead. Cas. 44.
McCulloch *v.* Hutchinson, 7 Watts, 434.
Bentz *v.* Rockey, 69 Pa. 77.
Connelly *v.* Walker, 45 Id. 449.
Lowe *v.* Dalrymple, 117 Id. 564.
Werner *v.* Zierfuss, 162 Id. 368.

The evidence which was produced to support this contention was properly submitted to the jury, who found by their verdict that the transaction was a fraud.

July 19, 1899. GREEN, J. The only assignment of error there is in this case is to the refusal of the Court below to give a binding instruction to the jury that under all the evidence their verdict should be for the defendant. This involves only the question whether there was any evidence, more than a scintilla, sufficient to sustain a verdict for the plaintiff. The contest was upon the validity, as against existing creditors of an insolvent, of a transaction between the debtor and a few of his creditors to whom preferences were given by means of judgments confessed in their favor, upon which executions were issued, the insolvent's property was seized and sold by the sheriff and bought in by the attorney for the preferred creditors. It was claimed and proved that on the afternoon of the day when the property was sold by the sheriff, an agreement was made by the purchasers with the wife of the debtor to sell and transfer to her the entire stock of goods purchased, taking from her judgment notes in favor of the preferred creditors in various amounts aggregating about $42,000, representing the whole of the indebtedness due to the preferred creditors. This plan was carried out and the debtor's wife was put in possession of the property on the same day, and she appointed her husband to manage the business, which he did, and conducted it until the issuing of the attachment by the present plaintiff. The wife of the insolvent debtor was made garnishee, and upon her answers filed and a plea of nulla bona, issue was joined and the cause tried before a jury. A large amount of testimony was given, involving a great many matters of detail, and upon the whole case the contention of the plaintiffs was, that the transaction as between the preferred creditors and the debtor and his wife was, that an ulterior benefit to the debtor and his family was sought to be accomplished after the payment of the debts due to the preferred creditors out of the subsequent sales of the goods of the wife, the object of which was to hinder delay and defraud the other creditors of her husband. On the trial the learned Judge of the Court below, after making a careful explanation to the jury of the precise matter they were to decide, submitted the whole question of fraudulent purpose to them, stating briefly the respective contentions of the parties. He called their attention specifically to the fact that no less than four witnesses, including the debtor and his wife, the attorney for the preferred creditors, and one of those creditors, all testified that there was no agreement or arrangement of any kind between them for any benefit or advantage to the debtor or his family to arise out of the transaction. He also called their attention briefly to the contentions of the plaintiffs that certain facts given in evidence were consistent only with the theory that there must have been such an intent and purpose in the transaction and hence that the entire arrangement was made in fraud of the rights of the plaintiffs and others as creditors of the husband. The jury returned a verdict in favor of the plaintiffs, thus determining that there was a fraudulent intent and purpose in the transaction, the Court below declined to interfere with the verdict by refusing to grant a new trial, and it thus appears that both the jury and the Court, who heard and decided the case, were of the same mind in regard to its fundamental character. It would not be within our power or right to reverse the judgment unless we should be thoroughly convinced upon a careful examination of the testimony that there was no evidence sufficient to sustain the verdict. We have made such an examination of the evidence, and we are quite unable to reach such a conclusion.

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The credibility of witnesses and the weight of the testimony are not for us to decide. We think there was a considerable amount of testimony developed that supports and sustains the verdict. Without going into a review of it all, it is enough to say, that if the judgments were merely given to secure the payment of honest debts without any further purpose, it was a very singular fact that immediately after the sheriff's sale the preferred creditors, who had bought the whole stock of goods for about $16,000, should turn it all over to the wife of their debtor without receiving any money or security for it, taking her judgment notes for the whole amount of their debts, $42,000, and allowing her to appoint her husband as manager of the business without any agent of their own being placed in charge. The wife was not only a married woman, but she had no property or credit of her own, nor any competency to carry on such a business. Then, too, the manner in which the books were kept, and the books of Ellison & Co., showing no credit to Thompson of the proceeds of sale until afterwards, when Mrs. Thompson, having the goods in her possession and making sales of them, made payments in cash, which were credited on the old account. It is alleged and not denied that Mrs. Thompson, or her husband for her, gradually paid off the whole amount of the preferred debts, and then of course remained in possession of the stock of goods and of the business, and thus the debtor and his wife were enabled to hold the property against the claims of the other creditors and did reap a very solid advantage to themselves by means of the confessed judgments, sales to the preferred creditors and subsequent transfer of the whole stock of goods to the wife of the debtor. Now, while it is true that all of this might result consistently with an honest intent, yet it is just as true that it might be equally consistent with that kind of intent which the law characterizes as dishonest and fraudulent as against creditors. And it is mainly the intent which affects, one way or the other, the whole subject.

There is no real dispute about the law of such cases. In Schott *v.* Chancellor, 20 Pa. 195, BLACK, C. J., after stating that a bona fide purchaser of chattels at a judicial sale might safely and lawfully leave them in the possession of the debtor, said: "If personal property is purchased at a sheriff's sale and left with the defendant in the execution, and it appears that the defendant himself furnished the money which paid for it, who can doubt that it might be taken again on another execution against the same person? If the money was not furnished at the time but paid afterwards, the case would be equally clear as showing, either that the pretended purchaser was a mere agent of the defendant, or else that a contract existed between them by which the title was to revert to the original owner when he refused the price. Where the plaintiff in the execution is the purchaser at the sale, and he gives no credit for the proceeds, and afterwards receives full satisfaction of his debt in another way, there is still stronger reason for believing that the business was a sham from the beginning. In neither of these cases can it be said that the purchase was made in good faith, and it is only in favor of bona fide purchasers that the law will make an exception to the wholesome rule which requires possession of personal property to accompany and follow the transfer of title."

In the recent case of Werner *v.* Zierfuss, 162 Pa. 380, our brother MITCHELL,, in a contest very much like the present in some of its circumstances, summed up the legal aspect of the subject thus, "It would seem to follow necessarily from the foregoing that where there is payment of an actual debt there can be no question of fraud in fact for the jury without additional evidence of something which may be considered, either in itself or in its connection with the circumstances, a badge of fraud. What evidence will be sufficient for that purpose will, of course, depend upon the circumstances of each case. It may be of excess in amount in a judgment of inadequate price in a conveyance of reservation of advantage to the grantor, as in Bentz *v.* Rockey, 69 Pa. 71, or of giving the debtor a weapon to force other creditors to a compromise, as in Bunn *v.* Ahl, 29 Pa. 387, or the more common case of delaying or hindering them altogether. The forms and devices of fraud are legion, and it would be vain to attempt to enumerate or define them, but it may be said as a general rule, that to impeach the payment or securing of an actual debt, there should be evidence tending to show either, first, some other advantage or benefit to the debtor beyond the discharge of his obligation; or, secondly, some other benefit to the creditor beyond mere payment of his debt; or, lastly, some injury to the other creditors beyond mere postponement to the debt preferred." After referring to some of the facts in the particular case, the opinion proceeds, "These facts, while not perhaps of much weight singly, went to show that the relations between Zierfuss and Gross were very close and their transactions proper for investigation. We cannot say that they were not sufficient to justify the Court in putting the whole law on the subject before the jury. Whether the verdict was in accord with the weight of the evidence is not for us to determine."

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In Bentz *v.* Rockey, 69 Pa. 71, we said, "But while an insolvent debtor may make an absolute sale of his property in payment of his debts, he cannot reserve any portion of the property or its proceeds for his own benefit and advantage; and if he stipulate for such reservation it will render the whole transaction fraudulent and void. In McClurg *v.* Lecky, 3 P. & W. 91, Mr. Justice ROGERS said, 'The rule clearly deducible from all the cases, is that no debtor can in an assignment, make a reservation, at the expense of the creditors of any part of his income or property for his own benefit; nor can he stipulate for any advantage either to himself or family.' This rule is equally applicable when the transaction takes the form of an absolute sale, and there is a secret stipulation by which some pecuniary benefit or advantage is reserved for the vendor, and accordingly it has been held that a bill of sale, absolute upon its face, by an insolvent debtor, and delivery of possession of the goods in pursuance of it, is fraudulent and void as against creditors, if accompanied by a secret trust from which the debtor might derive advantage of pecuniary benefit."

Applying this doctrine in the present case, it is almost impossible to resist the conviction that there was a secret understanding when the judgments were confessed, that the goods should be bought in by the preferred creditors and thereupon ostensibly sold to the defendant using his wife as a medium, and that the defendant should continue the business and pay to the preferred creditors the whole amount of their claims and then have complete title in the name of his wife to all that was left, divested of all claims of other creditors. This was precisely the course of the subsequent events and it cannot be wondered that the jury found that it was the result of a previous understanding of some kind between the preferred creditors and their debtor. We are of opinion that the case was rightly tried and disposed of in the Court below and therefore dismiss the assignment of error.

Judgment affirmed.

Jan. '99, 66. Supreme Court. April 3, 1899.

McGovern v. Union Traction Co.

Negligence—Street crossing—Street railways.

Whether or not the actions of the plaintiff, at the time of the accident, in a trespass suit for injuries received, constitute contributory negligence, is a question of fact, to be determined by the jury, unless the evidence distinctly shows that plaintiff was either not looking at the impending danger or claimed to have looked and not seen what was manifestly and unavoidably visible, or sees the danger and accepts the risk, believing that he can escape.

Where the evidence as to the speed of the car, its distance from the plaintiff at the time it could have first been seen and the action of the plaintiff thereafter up to the time of the accident is conflicting, it is error to enter a compulsory non-suit.

Appeal of Bernard McGovern, from the judgment of the Common Pleas No. 4, for Philadelphia County, in refusing to take off a non-suit entered in an action of trespass in which the Union Traction Company was defendant.

On the trial of this case, before AUDENRIED, J., the following facts appeared: Plaintiff's wife was killed by a car of the defendant on November 23, 1895, at the intersection of Bardwell street and South street, in the city of Philadelphia. There was testimony that at the time Mrs. McGovern attempted to cross South street from the south to the north side, a car bound westward was about two hundred feet east of the point at which she was to cross. The street at that point is twenty-seven feet wide. There was no evidence that she delayed crossing the street, but at the moment that she was stepping from the roadway to the north curb of the street the car approached, her skirts were entangled with the fender and she was thrown under the wheels and fatally injured.

There was a conflict of testimony as to the speed of the car, but it was shown that the motorman had not rung the bell and some of the witnesses testified that the speed of the car was unusually great and that it was not slackened as it approached decedent.

The Court entered a non-suit on the ground that decedent contributed to her injury in attempting to cross the street under the circumstances disclosed by the evidence.

As an additional reason for the non-suit the Court pointed out that at the time of the accident the defendant was not operating the South street road, but the same was under the control and management of the Electric Traction Company, but by virtue of a lease made between the companies the Union Traction Company had covenanted to indemnify the Electric Company from all liability arising from the management or operation of the road.

The Court subsequently refused to take off the non-suit. (First assignment of error.)

The second assignment of error was the sustaining of the objection of defendant to the question: If that car had been going at the ordinary rate of speed in that locality would Mrs. McGovern have had time to safely cross the intersection to the north side of South street?

The third assignment was the sustaining of

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the objection of defendant to the question asked by the plaintiff whether or not James R. Beetem was appointed general manager of the Union Traction Company in October, 1895. Plaintiff proposed to follow the question by asking whether he had not also been appointed general manager of the Electric Traction Company.

A. T. Freedley, (*U. S. Koons* with him), for appellant.

Mrs. McGovern had the right to cross the street at the intersection at which she did and the chance that she took was that she could safely pass before a car, running at an ordinary rate of speed, controlled by a motorman who was attending to his business, would reach her.

Streitfield *v.* Shoemaker, 185 Pa. 268.

There is no assumption that she was negligent. The presumption is that she did what was "reasonable and necessary under the circumstances."

Tiffany *v.* Delaware R. R. Co., 185 Pa. 308.

The fact that she stopped and looked at the curb before crossing is of itself opposed to the idea of negligence upon her part when she reached the north track of defendant.

Ely *v.* Pittsburgh Co., 158 Pa. 233.

There is an inference of fact to be drawn from her action in stopping and going on, and the distance that the car was from her at the time she was actually seen to stop and look.

Smith *v.* Balto. & Ohio R. R. Co., 158 Pa. 83.

The evidence upon the question of unusual speed of the car was sufficient to carry the case to the jury.

Jackson *v.* Pittsburgh Trac. Co., 159 Pa. 399.
West Phila. Pass. Ry. *v.* Mulhair, 6 WEEKLY NOTES, 509.
Callahan *v.* Traction Co., 184 Pa. 425.

The plaintiff was not required to prove negatively that his wife was not guilty of any contributory negligence.

Bardwell *v.* Pittsburgh R. R. Co., 139 Pa. 405.

Thomas Leaming, (*W. H. Lex* with him), for appellee.

The action of Mrs. McGovern contributed to the accident.

Buzby *v.* Phila. Trac. Co., 126 Pa. 559.
Warner *v.* People's St. Ry. Co., 141 Id. 615.

If she did not see what she could and should have seen she cannot recover.

Carroll *v.* Penna. R. R. Co., 12 WEEKLY NOTES, 348.
Flanagan *v.* P. W. & B. R. R. Co., 181 Pa. 237.
Blaney *v.* Electric Trac. Co., 184 Id. 524.
Rauscher *v.* Phila. Trac. Co., 176 Id. 349.
Nugent *v.* Phila. Trac. Co., 181 Id. 160.

July 19, 1899. MITCHELL, J. It is conceded that with reference to the speed of the car and the inattention of the motorman there was evidence to take the case to the jury, but the Judge non-suited the plaintiff on the ground of contributory negligence of the deceased.

There are two classes of cases, considered with regard to this kind of accident, in which non-suits are properly entered, first, the class of which Carroll *v.* Railroad Co., 12 WEEKLY NOTES, 348, is the prototype, where a person not looking, or claiming to have looked and not to have seen what was manifestly and unavoidably visible, steps directly in front of a moving car; and secondly, where a person seeing a clearly impending danger, accepts the risk, relying on his own judgment that he can escape it. Of this class Smith *v.* Electric Traction Co., 187 Pa. 110, is a fair example. In either class the negligence of the injured must be the clear and unavoidable inference from the undisputed facts before the Court can pronounce it as matter of law.

In the present case there is affirmative evidence that the deceased stopped at the curb and looked before starting to cross the street. The car which subsequently struck her was then approaching on the north track, at a distance variously estimated at one hundred and twenty to one hundred and eighty-five feet. At least one witness testified that it was at about this latter distance, being east of Twenty-sixth street, with the intervening street which the car would have to cross. It is argued by the appellee that the deceased stood "some time" on the curb after looking, before stepping into the street. How far this may have modified her act of looking was, however, clearly for the jury. But it is further argued by appellee, and this is perhaps the pinch of the case, that although the car may have been east of Twenty-sixth street when she started, yet it had crossed that street and was so close to her by the time she reached the north track, and going at such speed that she was bound to see the danger and stop before putting foot on the track. If this was clear, unquestionably it was negligence. A foot passenger crossing a street, especially a wide one with double tracks, does not do his whole duty by a single look before starting. In the space where cars and other vehicles have concurrent rights with his own, he is bound to keep eyes and ears open for new dangers and to use reasonable care in avoiding them: Nugent *v.* Traction Co., 181 Pa. 160.

But in the present case the facts are not undisputed. The distance of the car and the rate of speed were the subject of testimony not entirely uniform, and there was no evidence as to the action of the deceased at this point in regard to the approaching car. It was not one of those clear cases that should be taken from the jury.

Another point was made in support of the non-suit, that there was no sufficient evidence

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that the car was under the control of the defendant. It appears that the South Street Railway was operated formerly by the Electric Traction Company, which was subsequently leased to the defendant with a guarantee of indemnity as to liabilities, etc. It is claimed by appellant that in fact the railway was under the defendant's control at the time of this accident, though the formal lease was not signed till later. Little attention was given to this branch of the case by either party, and the Judge distinctly put the non-suit on the other ground. It is not clear to us how plaintiff can avail himself of the Electric Company's rights of indemnity, or the Union Traction Company's liability under contract, but as he may be able to establish a duty to him under the facts or the law, we leave this question open for further development, and reverse on the first ground alone.

Judgment reversed and procedendo awarded.

W. D. N.

Jan. '99, 95. Supreme Court. March 1, 1899.

Faust v. Philadelphia & Reading Railway Co.

Negligence—Care of minor children—Contributory negligence—Judgment non obstante veredicto.

In an action of trespass brought by a father to recover from a railroad company damages for the killing, by one of its trains, of two sons who were at the time of the accident in a wagon accompanied by an employé of the father, it appearing that the said employé was guilty of contributory negligence and it also appearing that the plaintiff, while he had permitted his children on former occasions to go with the employé, had no knowledge that they had so gone on the day of the accident, it is for the jury to say whether at the time of the accident, the children were in the driver's charge by the consent, express or implied, of the plaintiff, and only in the event of its so finding can the negligence of the driver be attributed to the plaintiff.

Appeal of the Philadelphia and Reading Railway Company, defendant, from the judgment of the Common Pleas of Berks County, in an action of trespass by Allen E. Faust.

This was an action brought to recover for the killing of the two sons of the plaintiff, by the negligence of those in charge of a train of the defendant.

The facts as they appeared on the trial, before ENDLICH, J., are stated in the opinion of the Supreme Court, infra.

The defendant submitted points, which, with the answers thereto were as follows:

"1. It is the duty of a railroad company to give notice of the approach of its trains to a crossing, so that a traveler on the highway who performs his duty of stopping and listening, can hear the coming of a train in time to avoid danger (and it is immaterial whether notice of the approaching of the train is given by the watchman, by the whistle or ringing of a bell, or the noise of the train itself); and the undisputed evidence in this case, both of the plaintiff and defendant, showing that the stock-train in the present case was distinctly heard by persons at and about Frush Valley crossing, during all the time that the train was traveling from a point half a mile or more away from the crossing down to the crossing; and it being evident that Hiester, the driver who had charge of the plaintiff's children, could have heard the noise of this approaching train if he had stopped and listened, the whole duty of the railroad company was performed, and the jury are not warranted in finding the defendant guilty of negligence, and the verdict must be for the defendant." Answer—"Declined."

"2. There is no evidence in this case that the crew in charge of the stock-train was incompetent, nor is there any evidence that will warrant the jury in finding negligence from the fact that the engine was run with the tank ahead; nor is there any evidence that the train was run at too great a speed, and if the Court will submit to the jury the question whether the defendant was guilty of any negligence (against which submission, we, however, protest), we respectfully request that the Court confine the investigation of the jury to the simple question whether sufficient notice of the approach of the train was given to enable a traveler on the highway to hear it coming in time to avoid danger, if such traveler had performed his duty to stop, look and listen." Answer—"Declined."

"3. The undisputed evidence of the plaintiff and defendant in this case showing that Hiester, the driver of the wagon, who had the plaintiff's children in charge, had a clear and unobstructed view of the train in the direction of the approaching train for a distance of at least 1000 feet from a point twelve feet from the nearest rail, had he stopped and looked; and the uncontradicted evidence in the case showing further that the said Hiester did not stop, look and listen as he approached the Frush Valley crossing, the said Hiester was guilty of contributory negligence; and it further appearing from the plaintiff's own evidence that the said Hiester was a member of the plaintiff's family at the time of the accident and for eight years prior thereto, and in whose charge the plaintiff's children were accustomed to be entrusted by the plaintiff, the negligence of the driver, Hiester, is imputed to the plaintiff and the plaintiff is not entitled to recover." Answer—"Declined."

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"4. Under all the evidence in the case, the verdict must be for the defendant." Answer—"Declined."

The Court reserved the following point:

"The plaintiff's evidence in this case showing that Hiester, the person with whom the children killed were riding, was in plaintiff's employ and living with him; that the children's mother was absent when Hiester took them with him; that, while at their parents' home, they were in charge of the maid-servant, another man, and Hiester; that on previous occasions, Hiester had taken one or both of the children with him on his trips to deliver flour; that plaintiff knew he had done so and had not forbidden him to do so; that, in this particular instance, plaintiff did not know the children had gone with Hiester; that, in approaching the railway crossing at which the collision happened, said Hiester neither dismounted, nor stopped, looked, or listened; that the approach of the train was audible when the train was more than half a mile away from the crossing; that, at a distance of a few feet from the track there was an unobstructed view of the same in the direction of the approaching train of over 1000 feet; and that said Hiester was familiar with the crossing; and it being further undisputed that there was a caution-board on the road approaching the crossing sixty-eight feet from the same—the question is reserved, whether, under these circumstances, there can be a recovery by plaintiff."

Verdict for plaintiff, $3500. The Court subsequently discharged a rule for judgment non obstante veredicto, and entered judgment on the verdict. The defendant took this appeal and assigned as error the refusal of the points and the discharge of the rule for judgment non obstante veredicto.

Jeff. Snyder, (with him *G. F. Baer* and *P. S. Zieber*), for appellant.

The defendant came up to the full requirement of its duty as stated in Pittsburgh, Fort Wayne & Chicago R. R. Co. *v.* Dunn, 56 Pa. 280, where it was said:

"It is the duty of those in charge of a train when approaching a public crossing to give notice by whistling, ringing the bell, or other device sufficient to warn of their approach, and in sufficient time to enable those coming to the crossing to stop in safety, or, if on the track, to get out of danger."

Which statement of the rule was approved in—

Haverstick *v.* Penna. R. R. Co., 171 Pa. 105.

Hiester, the servant of the plaintiff, was the custodian of the children with the plaintiff's permission, and the negligence of that custodian and servant must be considered as that of the plaintiff himself.

Penna. R. R. Co. *v.* Zebe et ux., 33 Pa. 329.
R. R. *v.* Robinson, 44 Id. 179.

It was the imperative duty of the plaintiff to care for and protect his children. The duty of parental protection is legal and imperative.

Penna. Co. *v.* James, 81* Pa. 194.
Smith *v.* O'Connor, 48 Id. 223.

The injury of which the plaintiff complains being directly and proximately caused by the negligence of his own servant in the course of his employment, the plaintiff cannot recover.

Toledo, etc., R. W. Co. *v.* Goddard, 25 Ind. 185.
Louisville, etc., R. W. Co. *v.* Stommel, 126 Id. 35.
Thorogood *v.* Bryan, 65 Eng. Com. Law, 114.

J. H. Jacobs, (with him *Keiser* and *Rothermel Bros.*), for appellee.

The rule is not that any negligence on the plaintiff's part will preclude him from recovering, but that though there has been negligence on the plaintiff's part, still he may recover unless he could by ordinary care have avoided the consequence of the defendant's negligence.

Davies *v.* Mann, 10 Meeson & Welsby, 546.

The presumption in the absence of other evidence is that the traveler stops and looks and listens before crossing a railroad.

Although from the uncontradicted evidence in this case it might have been inferred that if the traveler had stopped and looked and listened he would have seen the approaching train, it was for the jury to determine the fact.

Penna. R. R. Co. *v.* Weber, 76 Pa. 157.
Railroad Co. *v.* Hall, 61 Id. 361.

The defendant seems to lay much stress upon the noise of the train being sufficient warning of its approach, as though that was the "other device" spoken of by the Court in Pittsburgh, Ft. Wayne & Chicago Co. *v.* Dunn, 56 Pa. 280.

May 15, 1899. STERRETT, C. J. This action of trespass was brought by the plaintiff to recover damages for the loss he sustained by the untimely death of his two sons—five and seven years of age respectively—who were killed in September, 1897, by a collision at the "Frush Valley crossing," a minor station on East Penn branch of defendant's railroad. At the time of the accident, the children were in a covered wagon accompanied by Hiester, who, as plaintiff's employé and with his team, was then engaged in delivering flour and feed to customers of his employer's mill, etc. He had just delivered flour to one customer about ninety yards from the railroad crossing and was about to deliver feed to another south of the crossing; and, while driving across the railroad tracks, the wagon was struck by one of defendant company's stock

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trains, and Hiester and both children were instantly killed.

Without referring in detail to the evidence, tending to establish the fact of defendant company's negligence in running its stock train by which plaintiff's children were killed, it is sufficient to say that it presented questions of fact which were necessarily for the exclusive consideration and determination of the jury.

The defendant's four points for charge (in three of which binding instructions against the plaintiff are requested) were rightly refused, and the case was submitted by the learned trial Judge in a clear, accurate and fully adequate charge to which no just exception can be taken; and a verdict in plaintiff's favor was rendered by the jury subject to the question of law arising upon the following undisputed facts:

"The evidence in this case showing that Hiester, the person with whom the children killed were riding, was in plaintiff's employ and living with him; that the children's mother was absent when Hiester took them with him; that while they were at their parent's home, they were in charge of the maid-servant, another man and Hiester; that on previous occasions, Hiester had taken one or both of the children with him on his trips to deliver flour; that plaintiff knew he had done so and had not forbidden him to do so; that, in this particular instance, plaintiff did not know the children had gone with Hiester; that, in approaching the railway crossing at which the collision happened, said Hiester neither dismounted nor stopped, looked or listened; that the approach of the train was audible when the train was more than half a mile away from the crossing; that, at a distance of a few feet from the track there was an unobstructed view of the same, in the direction of the approaching train, of over 1000 feet; that said Hiester was familiar with the crossing; and it being undisputed that there was a caution-board on the road approaching the crossing 68 feet from the same,—the question is reserved, whether, under these circumstances, there can be a recovery by the plaintiff."

After duly considering the question of law thus reserved, and subject to which the verdict in plaintiff's favor was rendered, and also the questions arising under the rule for a new trial, the learned trial Judge, in an opinion filed and sent up with the record, discharged the rules for a new trial and for judgment non obstante veredicto; and afterwards judgment was entered on the verdict, in favor of the plaintiff, for the amount found by the jury with interest from the date of the verdict. Hence this appeal by the defendant company. The errors assigned are, the refusal of the Court below to affirm either of defendant's four points for charge, and also its refusal to enter judgment, in favor of defendant, on the question of law reserved, non obstante veredicto.

As already remarked, in three of defendant's points (first, third and fourth), binding instructions in its favor were requested. In the second point, for reasons therein stated, the Court was requested to "confine the investigation of the jury to the simple question whether sufficient notice of the approach of the train was given to enable a traveler on the highway to hear it coming in time to avoid danger, if such traveler had performed his duty to stop, look and listen." For reasons given at length, in the opinion referred to, the second specification cannot be sustained. Nothing can be profitably added to those reasons.

It would have been manifest error to have affirmed the points recited in the first and fourth specifications of error. There is nothing in either of them that requires discussion.

As to the point, recited in the third specification, wherein, for reasons therein stated, the Court was requested to charge that the contributory negligence of Hiester, the driver, must be imputed to the plaintiff and hence the latter cannot recover, we are clearly of opinion that the learned trial Judge rightly refused to affirm it. Under the instructions contained in the learned trial Judge's charge, a verdict, in plaintiff's favor, depended upon a finding, not only that the defendant company was guilty of negligence, but also that Hiester, the person with whom the plaintiff's children were riding, was not in charge of them with his consent, express or implied. By necessary implication, both of these facts must have been found by the jury.

The correctness of the learned trial Judge's decision on the question of law reserved is so completely vindicated, in his opinion, that little, if anything, can be added to what he has so well said therein.

Further comment, on either of the questions presented by the assignments of error, is wholly unnecessary.

The judgment is affirmed on the opinion of the Court below discharging the rules for a new trial and for judgment in defendant's favor, non obstante veredicto.

W. C. S.

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Jan. '99, 33. Supreme Court. March 23, 1899.

Carey v. Buckley.

Mortgage — Scire facias— Affidavit of defence— Charge of court— Points of charge—Practice.

Where the defence to a scire facias sur mortgage is that the defendant received but a part of the face of the mortgage and that the balance of the fund was, without defendant's authority or knowledge, applied to the liquidation of the debt of another to the plaintiff, the question whether information was imparted to the defendant to the effect as above described at the time of the execution of the mortgage or prior thereto, is a question of fact to be determined, under proper submission, by the jury.

If the charge of the Court contain nothing erroneous and omit nothing favorable to a party which the points call for, it is entirely within the discretion of the Court to decline to answer the points for charge as offered.

Appeal of Thomas G. Carey, from the judgment of the Common Pleas No. 1, for Philadelphia County, in an action on a scire facias sur mortgage wherein Bridget A. Buckley was defendant.

The facts of the case are set forth in the opinion of the Supreme Court.

On the trial of the case the plaintiff asked the Court, BREGY, J., to charge the jury as follows:

"1. That if the jury believe from the evidence that no fraud was practiced upon the defendant, then the verdict should be for the plaintiff.

"2. That if the jury believe from the evidence that the defendant could read the mortgage in suit, and did not read it or ask to have it read, then unless the jury believe a fraud was practiced upon the defendant by the plaintiff, the verdict should be for the plaintiff in the full amount of the mortgage and the interest claimed.

"3. If the jury believe from the evidence that the mortgage was read to the defendant by any one at the time of its execution, then the verdict should be for the plaintiff in the full amount of the mortgage and the interest claimed.

"4. If the jury believe from the evidence that the defendant's brother owed the plaintiff at the time of the execution of the mortgage more than the difference between the full amount of the mortgage and the amount admitted by defendant to be due on said mortgage, and that the plaintiff accepted said mortgage in payment of such difference, then the verdict should be for the plaintiff for the full amount of the mortgage and the interest claimed.

"5. If the jury believe from the evidence that the defendant's brother was indebted to the plaintiff at the time of the execution of the mortgage more than the difference between the sum of the encumbrances on the mortgaged properties and the expenses incurred by plaintiff in paying off the said encumbrances and for the conveyancing in connection with the mortgage in suit, on the one hand, and the full amount of the mortgage on the other, and that the plaintiff took the mortgage in suit as payment of such difference, then the verdict should be for the plaintiff in the full amount of the mortgage and the interest claimed.

"6. If the jury believe that the indebtedness of Patrick J. Buckley to the plaintiff, intended to be secured by the mortgage in suit, or any part of said indebtedness, was due and owing at the time of the conveyance of the mortgaged premises from Patrick J. Buckley to the plaintiff, and the jury also believe that the said conveyance was without consideration, the defendant cannot defend against the plaintiff for so much of said indebtedness as was due at the time of said conveyance.

"7. The jury cannot find that there was any fraud on the part of the plaintiff unless the evidence thereof is clear, precise, preponderating, and indubitable." All of the foregoing points the Court declined to affirm.

The defendant asked the Court to charge the jury as follows:

"5. Plaintiff is not entitled to recover from defendant any sum paid to or on the account, or for the benefit of any other person than the defendant, unless such sum was paid for or on account of defendant, or for her benefit, or with her knowledge and consent." Answer—"That I affirm."

"6. If the jury find that no payment of the amount of the mortgage in suit was made by plaintiff with either the defendant or a person or persons acting for and on behalf of defendant, or with her consent or knowledge, then plaintiff is entitled to recover only such sum as he has paid for or on account of defendant's benefit, or with her knowledge or consent." Answer—"That I affirm."

The Court charged:

"If that was not read to her because nobody else pretends that anything else was said to her to indicate that she agreed to pay this $1500—all that Mr. Carey says on the subject is that her brother told him—well, that does not bind her, what her brother told him—neither side have called the brother—but the question comes down to the fact, was that paper read to her? If it was not, she is not bound by it; if it was, she is bound for $2500, with interest."

Verdict for defendant and judgment thereon. Plaintiff appealed and assigned as error the refusal of his points for charge, the affirmation of the fifth and sixth points of defendant, and the portion of the charge above quoted.

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Samuel Gustine Thompson, (*R. D. Maxwell* with him), for appellant.

Where the defence in an action upon a written instrument is directly contradictory to the effect of the instrument the jury cannot find that there was any fraud on the part of the plaintiff unless the evidence thereon is "clear, precise, preponderating and indubitable."

Hoffman *v.* R. R., 157 Pa. 195.
Phillips *v.* Meily, 106 Id. 536.
Thorne *v.* Warfflein, 100 Id. 519.
Martin *v.* Berens, 67 Id. 459.
Railway Co. *v.* Swank, 105 Id. 561.

There was a direct conflict of testimony as to whether the instrument in suit was read to the defendant, she testifying that it was not and the plaintiff that it was. The test of the case as established by the Court below was not reached by the evidence. In fact the defendant was in this respect her only witness. This testimony to upset a written instrument is not sufficient.

Brawdy *v.* Brawdy, 7 Barr, 157.
Phillips *v.* Meily, 106 Pa. 536.
Jackson *v.* Payne, 114 Id. 67.
Jones *v.* Backus, 114 Id. 132.
North *v.* Williams, 120 Id. 109.

It is no answer for appellee to say that she did not read the mortgage, in which statement she is contradicted by appellant.

Reilly *v.* Daly, 159 Pa. 611.

J. W. Logue, for appellee.

It was within the discretion of the Court below to present or to withhold the points offered him for charge to the jury.

Patterson *v.* Kountz, 63 Pa. 246.

It is well settled by many decisions of this Court that it is not necessary for a Judge to answer every point which may be presented to him separately, but that if they are substantially answered in the charge, the judgment will not be reversed on that account.

Geiger *v.* Welsh, 1 Rawle, 349.
Stewart *v.* Shoenfelt, 13 S. & R. 368.
Coates *v.* Roberts, 4 Rawle, 100.
Lynch *v.* Welsh, 3 Barr, 297.
McCoy *v.* Hance, 4 Casey, 149.
Groft *v.* Weakland, 10 Id. 304.
Deakers *v.* Temple, 5 Wright, 234.

The execution of the mortgage is not conclusive against appellee as establishing a binding obligation upon her for that amount, being but prima facie evidence of an indebtedness for the amount named in the mortgage, which is capable of being overcome by proof.

Nichols *v.* Nichols, 25 WEEKLY NOTES, 506.

In the procuring of this mortgage, as the appellant was the beneficiary thereunder, it is not unreasonable to contend that the brother, if he acted, was acting on plaintiff's behalf, and was an interested agent on his own behalf.

Where an agent acts contrary to his instructions, his principal will be bound by his acts, which are within the scope of the authority which the agent was held out to the world as possessing.

MacNeille *v.* Cridland, 168 Pa. 17.
Penn. R. R. Co. Appeal, 86 Pa. 80.

July 19, 1899. MITCHELL, J. The plaintiff presented seven points for charge, but the Judge without reading them to the jury declined to affirm them, preferring to state the law to the jury in his own terms. This was entirely within his discretion, and appellant "has no cause of complaint if the charge contained nothing erroneous, and omitted nothing favorable to him which the points properly called for": Kroegher *v.* McConway Co., 149 Pa. 444.

To determine these questions we must look at the issue and the course of the trial. Appellant sued on a mortgage for $2500, put the mortgage in evidence and rested. Defendant admitted signing the mortgage, but denied having read it or knowing how much it was for, and asserted that its sole purpose was to take up a prior mortgage for $1000 bearing a higher rate of interest, and that that amount was all that she had ever received upon it. Plaintiff then being called by defendant as upon cross-examination, admitted that $1000 to take up the prior mortgage, was all the money he had advanced, and claimed that the additional $1500 in the mortgage was to pay a debt due him by Patrick Buckley, defendant's brother. Defendant denied any authorization or knowledge that any such debt was included in the mortgage, and this was the issue in the case. The plaintiff treated it as solely an issue of fraud in the making of the mortgage and framed his points accordingly, but the Judge regarded it as mainly a question of partial failure of consideration, though incidentally involving the question of fraud or imposition by Patrick Buckley on his sister or on the plaintiff, or perhaps both. No witnesses were examined except the parties, neither the brother nor the conveyancer or notary at whose office the mortgage was executed, being called. There was no proof that defendant had authorized the debt to be included in the mortgage, plaintiff admitting that he had never had any conversation with her on the subject, but had relied on what the brother had told him. He, however, testified that the mortgage and bond were read by the notary to defendant and himself and also a written statement which was put in evidence, showing the disposition of the $2500 in the mortgage, i. e., $1000 to pay off prior mortgage and fifteen hundred to be a credit on Patrick Buckley's debt to plaintiff. Defendant denied having heard the bond or mortgage read, and all knowledge of the statement

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either by hearing or seeing it. This was really the only disputed point on which the case would turn.

The Judge charged the jury in emphatic terms that the defendant being able to read, and having signed the mortgage for $2500 could not now reduce it to $1000 on her own testimony alone. Then referring to the admission that only $1000 was paid by plaintiff, he continued, "Now, did Mr. Carey give her $2500 for it? He gave her $1000, and he gave her the other $1500 if she acquiesced in that payment of her brother's account. If she did not acquiesce in it, why, then it is not chargeable to her. In other words, if she chose to give a mortgage of $2500, which was to pay for a prior mortgage of $900 or $1000, leaving $1500, and agreed that that should go towards paying her brother's debt, she must be held by it. She cannot get out of it now, and as it is admitted she did not get the money, the question then turns upon the fact, did she know and did she acquiesce in the agreement that the remaining $1500 should go to pay the debt due by her brother? If she did, the mortgage is good for the whole $2500, and if she did not, it is not good for the balance." He then called the jury's attention to the only evidence that she knew of the brother's debt being included was the reading of the statement in her presence, and said, "The question comes down to the fact was the paper read to her? If it was not she is not bound by it, if it was she is bound for $2500 with interest." This was practically bringing the minds of the jurors to the only disputed question that they were to settle. The law had been correctly stated to them, and the admitted facts brought to their attention in their proper connection. The case as it stood on the evidence was correctly presented to the jury and the appellant has no just cause of complaint. The points which were not covered by the general charge were so exclusively based on the technical rule as to proof of fraud to avoid a written instrument, that they could not have been affirmed as applicable to the case as it had to go to the jury.

Judgment affirmed.

W. D. N.

Jan. '99, 399. Supreme Court. January 16, 1899.

Commonwealth v. Shew.

Criminal law— Murder— Confessions, voluntary and involuntary.

Where statements of both defendants in one indictment for murder have been admitted in evidence upon affirmative testimony that they were voluntarily made, the testimony of one of the defendants that the confessions with statements were extorted by promises and threats, has merely the effect of raising a question for the jury; such confessions or statements are properly admitted, but instructions should be given to disregard them if the jury find they were not voluntarily made.

Appeal of Cornelius W. Shew, from the judgment of the Court of Oyer and Terminer of Susquehanna County on an indictment for murder.

The facts of this case are the same as those in Com'th *v.* Eagan, 43 WEEKLY NOTES, 565.

The defendant had made a statement to one Munger, a newspaper man, to the effect that he and Eagan in an attempt to take some money from Pepper had committed the assault on him, which resulted in his death. Subsequently Shew made another statement or confession to the district attorney.

At the trial he testified that the confession was obtained by threats and promises and was not voluntary on his part.

Verdict of murder in the first degree and sentence accordingly. Defendant appealed.

B. O. Camp, (*George P. Little* with him), for appellant.

W. D. B. Ainey, district attorney, (with him *A. H. McCollum* and *Searle McCollum*), for appellee.

February 13, 1899. MITCHELL, J. The appellant was indicted jointly with James Eagan but severed in the trial. Both were convicted of murder of the first degree. The questions raised upon their appeals are substantially the same, and have been disposed of in the opinion in Eagan's case, filed herewith.

Each prisoner made two statements or confessions in which he admitted participation in the crime but sought to put the actual killing upon his confederate. In Eagan's case no contradiction of the confessions was made by the prisoner or by any witness in his behalf, though his counsel argued that the circumstances showed duress. In the present case, however, Shew went on the stand and testified that the confessions were extorted from him by promises and threats of the district attorney. The confessions had already been admitted in evidence upon affirmative testimony that they were voluntarily made, and the only effect of Shew's testimony to the contrary was to raise a question for the jury. It was properly submitted to them with instructions to disregard the confessions if they found they were not voluntarily made. In this there was no error.

Judgment affirmed and record remitted for purpose of execution according to law.

W. D. N.

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WEEKLY NOTES OF CASES.

VOL. XLIV.] *FRIDAY, SEPT. 8, 1899.* [NO. 23.

Supreme Court.

Jan. '98, 380. Supreme Court. January 21, 1899.

In re Melon Street.

Roads and highways — Vacation of streets — Act April 21, 1858, P. L. 385 — Practice — Judgment of original Court entered in accordance with decree of appellate Court.

After the record has been remitted to the Court of original jurisdiction by that of final resort, the judgment entered in the original court by direction of the decree of the appellate Court, is the judgment of the appellate Court and is final; an appeal taken therefrom will not lie and must be quashed.

When a street has been stricken from the confirmed plans of the city of Philadelphia, by the revision of the plan embracing such street, under authority of an ordinance of councils, and thereafter the portion of such street so stricken from such plan is occupied by the abutting property owners with the knowledge and acquiescence of the city, and expensive and permanent improvements are thereon erected whereby the general public and the owners of property having a special property right in such portion of such street are deprived of the use of such portion, it is too late for the city to suggest that such a street has never been legally vacated; and it will be estopped from asserting that such a vacation was unauthorized and illegal.

The method to be pursued for the collection of damages by reason of such a vacation is by proceedings in the Court of Quarter Sessions under the Act of April 21, 1858, P. L. 385.

Appeal of the City of Philadelphia, from the decree of the Quarter Sessions of Philadelphia, county, in entering a judgment in accordance with the order of the Supreme Court in the several appeals of Jacob Stadelman et al. See In re Melon St., 182 Pa. 397; 41 WEEKLY NOTES, 153.

The facts of the case appearing from the record were as follows:

By an ordinance of the city of Philadelphia, approved July 14, 1891, the department of public works of the city of Philadelphia was authorized to revise that portion of the city plan comprised between Ninth, Tenth, Wallace streets, and Fairmount avenue, in the Thirteenth ward of the said city, by striking therefrom that portion of Melon street extending from the west line of Ninth street to a point 132 feet 1½ inches west thereof, and in pursuance of the provisions of the said ordinance the said Melon street was stricken from the confirmed city plan.

The Philadelphia & Reading Terminal Railroad Company after the confirmation of the revised plan entered upon that portion of Melon street so as above stricken from the confirmed plan and constructed upon the bed of the said street certain structures which closed the eastern end of Melon street to public travel. No further action was taken by the said city of Philadelphia looking to the vacation of the said street than the striking of the street from the city plan as above indicated.

On August 11, 1893, a petition was filed praying for the appointment of a jury of view to assess benefits and damages. A report was filed assessing the benefits upon the Philadelphia & Reading Railroad Company and giving damages to several property owners on the portion of the street west of that which, by the ordinance, was stricken from the plan. Exceptions were filed by the Philadelphia & Reading Terminal R. R. Co., which were dismissed and the report confirmed.

The Philadelphia & Reading Terminal R. R. Co. then appealed to the Superior Court. The Superior Court set aside the report of the jury: 1 Pa. Super. Ct. 63.

An appeal to the Supreme Court was then taken which affirmed the judgment of the Court of Quarter Sessions and reversed the decree of the Superior Court (In re Melon St., 182 Pa. 397) and entered a decree as follows: "The judgments are reversed and the records are remitted to the Court of Quarter Sessions of Philadelphia with directions to enter judgments for the appellants upon the filing of proper releases."

Releases were properly filed. Rules on the city of Philadelphia were taken at the instance of George Nass et al. to show cause why an order in the nature of a mandamus should not be made to pay the award of the jury of view, which rules were discharged. The city of Philadelphia then appealed to the Superior Court, assigning as error the discharging of the rules.

In the Superior Court a motion to quash the appeal was made on the ground that the Court of Quarter Sessions, in entering the judgments obeyed the mandate of the Supreme Court in Melon Street, 182 Pa. 397, and that the proper tribunal to review any error in entering those judgments must be the Supreme Court and not the Superior Court. The Superior Court certified the case to the Supreme Court under the authority of the Act of June 24, 1895, P. L. 212. sec. 10.

Error was assigned (first and fourth) in the entering of judgment by the Court of Quarter

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Sessions in favor of certain of the claimants and (second, third, fifth and sixth) in granting a rule and making the same absolute for mandamus against the city of Philadelphia to pay the award.

A motion to quash the appeal was made for the same reason that was given in the Superior Court.

Francis L. Wayland, assistant city solicitor, (*John L. Kinsey*, city solicitor, with him), for appellant.

The record does not show any claim or assessment against the city but shows distinctly an assessment and apportionment against the Philadelphia & Reading Terminal Railroad Company.

In re Melon St., 182 Pa. 397.
In re Sedgeley Ave., 88 Id. 509.

The record does not show a legal vacation of the street, but it established conclusively that no legal vacation thereof has ever been had.

In re Plan No. 166, 143 Pa. 423.
Whitaker *v.* Phoenixville Bor., 141 Id. 327.
Volkmar St., 124 Id. 320.
Brower *v.* Phila., 142 Id. 350.

Under the Act of April 21, 1858, P. L. 385, there can be no judgment or recovery against the city even though an actual vacation of Melon street had been legally effected.

Paul *v.* Carver, 24 Pa. 207.
McGee's Appeal, 114 Id. 470.
In re Melon St., 182 Id. 402.
Large *v.* City, 35 Id. 231 (note).
In re Vacation of Howard St., 142 Id. 601.

M. Hampton Todd, (with him *F. M. Cody* and *W. H. Staake*), for appellees.

It was the duty of the city to have procured the vacation of this portion of Melon street, and although it was not done, for the purpose of this case, it is submitted that equity is considering that done which ought to have been done.

McGee's Appeal, 114 Pa. 470.

The failure of the city to file exceptions to the proceedings deprives it of a standing upon this question.

Act of April 13, 1854, P. L. 360, sec. 1.
Supplement of May 3, 1869, P. L. 1247.

When a street is stricken from the city plan by a revision thereof under direction of city councils it is then vacated and there is no necessity for a decree of Court to complete a vacation of it.

In re Williams Street, 7 Dist. Rep. 1.

The city of Philadelphia has a system for vacating streets, assessing damages and charging benefits thereunder.

Act May 8, 1854, P. L. 645, sec. 1.
Act April 21, 1858, P. L. 385, sec. 6.

The act of the city in the vacation of Melon street is an act of sovereign power for which the city in the first place is responsible to the property owners who have been injured by such action.

Paul *v.* Carver, 24 Pa. 207.

The Court of Quarter Sessions has exclusive jurisdiction to appoint a jury of view to assess damages and benefits caused by narrowing of streets, alleys or highways within the county limits.

Donohue's Appeal, 169 Pa. 210.
In re Vacation of Centre St., 115 Id. 247.
In re Vacation of Howard St., 142 Id. 601.
In re Sedgeley Avenue, 88 Id. 509.
In re Kensington & Oxford Tpk. Co., 97 Id. 260.
Spring St. in Reading, 112 Id. 258, 262.

July 19, 1899. STERRETT, C. J. While this is nominally an appeal from the Court of Quarter Sessions of Philadelphia to the Superior Court, and thence certified here, it is in reality an appeal from the final judgments of this Court, In re Melon Street, Appeals of Stadelman and others, 182 Pa. 397, 406, entered in that Court in obedience to our mandate. In that regard, as the records will show, the case is certainly sui generis.

In its inception, the last mentioned case was a proceeding in the Court of Quarter Sessions of Philadelphia by the owners of certain properties on Melon street in said city for the assessment of damages alleged to have been sustained by them, respectively, in consequence of the vacation of a part of said Melon street, between Ninth and Tenth streets. The matter was there so proceeded in that the viewers duly appointed by the Court found and reported that said claimants had sustained damages to the extent of the several sums awarded to them, respectively, as specified in the schedule annexed to and made part of their report, amounting in the aggregate to $9750. They further found that the Philadelphia & Reading Terminal Railroad Company was specially benefitted by said vacation "to an amount not less than $9750"; and they therefore reported "that in their opinion the said claimants are entitled to the sum of $9750, above awarded as damages; and they assess and apportion the whole of said sum of $9750 against the said the Philadelphia & Reading Terminal Railroad Company."

Exceptions were duly considered and dismissed, and thereupon the report of the viewers was confirmed by the Court. According to the practice in this and other districts, an absolute confirmation such as that has all the force and effect of a definitive decree or judgment of the trial Court that the claimants are entitled to recover from the city, as their damages, etc., the several sums found and awarded to them, respectively by the viewers, and that the said railroad company pay the amount assessed against it as benefits, etc. The company, evidently treating the confirmation as a definitive decree or judgment, appealed therefrom to the Superior Court; and

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on December 18, 1895, said Court reversed the judgment of the Court below and set aside the report of the viewers at the costs of the appellees: In re Melon Street, Philadelphia & Reading Terminal Railroad Co.'s Appeal, 1 Pa. Super. Ct., 63, 86. From that judgment of reversal, Jacob L. Stadelman and others, to whom damages were awarded by the viewers and Court of Quarter Sessions, forthwith appealed to this Court; and on October 11, 1897, in an opinion by our brother FELL, the judgment of the Superior Court, in each of said appeals by the claimants was reversed, but instead of remitting the records, in the usual way, to the Court below, a special order was made, the purpose of which sufficiently appears, in the last paragraph of the opinion, as follows: "It was error on the part of the jury to include in their awards damages caused by the vacation of a part of Ninth street. As suggested in the opinion of the Superior Court, this error may now be corrected by the filing of releases. The judgments are reversed and the records are remitted to the Court of Quarter Sessions of Philadelphia with directions to enter judgments for the appellants upon the filing of proper releases." It will thus be seen that the only object in requiring releases (of damages caused by vacation of a part of Ninth street), to be filed by those in whose favor our judgments of reversal, etc., were directed to be entered on the record of the trial Court, was to ensure the correction of the above mentioned error. To that end, the filing of releases was made a condition precedent to the entry of our judgments in favor of the respective appellants. The same purpose might have been accomplished by entering our judgments here in favor of each with stay of execution until release was filed in the Court below, and then remitting the record, in that form, to said Court; but the form adopted was deemed the better and should have occasioned no trouble.

The contemplated releases appear to have been filed. and judgments were then entered for the proper amounts; but, the form in which the latter entries are made is inappropriate. They should have been so worded as to distinctly show upon their face that they are respectively the judgments of this Court, entered in the trial Court, not of its own motion, but upon the express mandate of this Court. That, however, is merely a clerical error and should be corrected. The records were obviously remitted by this Court for no other purpose than the correction of said error and then the entry of our final judgments for the purposes of execution, etc. The Court of Quarter Sessions had no other authority, in the premises, than to see that proper releases were filed, and then enter the judgments as directed by us. When thus entered, those judgments were in that Court for the purposes of execution in appropriate form and under its direction. Manifestly they were not and could not have been intended to be judgments of the Court of Quarter Sessions, from which an appeal would lie to the Superior Court. As we have already seen, the final judgment of that Court had theretofore been entered by dismissing the exceptions and confirming absolutely the report of the viewers. Then, on appeal to the Superior Court by the railroad company, that judgment was reversed and the report of the viewers was set aside; and, subsequently, on appeal to this Court, the judgment of the Superior Court was reversed and set aside, and the records "remitted to the Court of Quarter Sessions with directions to enter judgments for the appellants upon the filing of proper releases." That direction was practically complied with by the Court below; but, the informal manner in which our judgments were there entered appears to have had the effect of leading the appellant in the present case into the grave mistake of supposing that the final judgments thus entered, pursuant to our mandate, were judgments of the Court below, and accordingly the present appeal was taken therefrom to the Superior Court. With the unimportant exception of correcting (in the interest of the present appellant) the error above mentioned by requiring releases to be filed, the final judgments of this Court are practically an affirmance of the judgment or decree of the Court of Quarter Sessions from which the first appeal was taken.

When the present appeal came on to be heard in the Superior Court, the appellees' motion to quash was considered, and the Court in its opinion reported in 9 Pa. Super. Ct. 18, 22, rightly held, "that the motion to quash should prevail"; but, in view of the novelty of the proceeding, and for reasons given in its said opinion, the Court very properly determined that its duty was to certify the case to us under section 10 of the Act of June 24, 1895, P. L. 212, which provides:

"If any four of the Judges of the Superior Court, whose duty it is to decide any matter before that Court, shall certify that, in their judgment, the questions involved in any case are so difficult or important as to make it expedient that the case should be decided by the Supreme Court, the case containing such questions shall be certified to the Supreme Court for full consideration and decision, though otherwise within the exclusive jurisdiction of the Superior Court, but such certification shall not be made until after the case shall have been heard and decided, and the opinion of the Court and any dissents therefrom shall have been duly filed."

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The case was accordingly certified in due form, together with a copy of the opinion, etc.: 9 Pa. Super. Ct. 18.

From what has been heretofore said it necessarily follows that the Superior Court was right in holding, as we must do, that the motion to quash the appeal should prevail; and, as already intimated, we have no doubt that, in the circumstances, the certification of the case to this Court was entirely proper.

It is not our purpose, nor is it at all necessary, to reconsider any of the questions involved in the first appeal to the Superior Court, and thence to this Court. For reasons given in the opinion of our brother FELL, we are fully satisfied as to the correctness of our conclusions in those cases. All matters pertaining to the rights of the respective claimants to recover the damages found by the viewers and adjudged by the trial Court to have been sustained by them respectively, and also all matters pertaining to benefits and the assessment thereof against the Philadelphia & Reading Terminal Railroad Company were considered and finally passed upon by us in the appeals to this Court. These matters, together with any other relevant matters which the parties or either of them may have waived, by omission to present them at the proper time, must now be regarded as res adjudicata. It is now too late to even suggest, as has been done by the present appellant that the part of Melon street, referred to, has never been legally vacated. It is not only too late, in point of time, to interpose any such technical defence, but the acquiescence of the city in the expensive and permanent improvement made by the railroad company, and its demanding and receiving from said company a stipulation against claims for damages, etc., are quite sufficient to forever estop it from asserting that the said vacation was unauthorized and illegal. Neither individuals nor municipal corporations can ever be permitted to thus play "fast and loose." Having been definitely adjudged that the appellees in this case are entitled to recover from the city the sums legally awarded to them, respectively, as damages, etc., if payment thereof is longer withheld from them unnecessarily, it will be the duty of the Court below to award and enforce appropriate execution process for the collection thereof.

Owing to the peculiarities of this appeal, we have been induced to digress somewhat from the motion to quash and refer to some matters which relate more particularly to the merits of the cases upon which we have heretofore finally acted, and which are no longer open for discussion. This has been done with the view of avoiding, if possible, any further misunderstanding as to the status of our judgments, in the appeals of Stadelman and others, 182 Pa. 397.

It is ordered that the appeal in this case be and the same is hereby quashed at the costs of the city of Philadelphia, appellant; and it is further ordered that the record be remitted to the Court of Quarter Sessions of Philadelphia with instructions: (1) to so amend its record entries of the judgments in favor of the present appellees that they may more clearly appear to be the judgments of this Court, entered in pursuance of our mandate, of October 11, 1897, to do so "upon the filing of proper releases," and (2) to take such further appropriate legal proceedings as may be necessary and proper to enforce payment of said judgments.

W. D. N.

Jan. '98, 216. Supreme Court. January 10, 1899.

McCullough v. Willey.

Sale and lease of personal property — Change of possession — When want of, is or is not fraudulent—Debtor and creditor—Fraud as to existing and subsequent creditors.

In a sale of personal property, regard must be had, not only to the character of the property, but to the nature of the transaction, the position of the parties and the intended use of the property. No such change of possession as will defeat the fair and honest object of the parties is required. A transfer of personal property void as to existing creditors is not necessarily void as to subsequent creditors. It is fraudulent only as to those it was intended to defraud.

B. executed, on October 12, 1895, a bill of sale for certain machinery to M., for the purpose of securing him in regard to notes endorsed by M. for B., amounting to $1500. On the same day, M. leased the machinery to B., with the ordinary conditions of a lease and a stipulation that if the lessees should pay to the lessor a sum equal to $1500 with the payments of rent included, the lessor should execute and deliver a bill of sale of the property to the lessees. There was no provision in the lease that such a bill of sale should be made to the lessees, in the event that they should pay the notes endorsed for them by the lessor, and in point of fact they never did pay any of them. Subsequently W. entered judgment against B. on a single bill dated February 16, 1896, and levied on the machinery. The sheriff, having sold the same, paid the money into Court, and a feigned issue was framed between M. and W. to test the ownership of the fund:

Held, that the bill of sale being an absolute one, the entire title to the machinery was transferred to the grantee. The fact that the consideration was the protection of the grantee from loss will not convert an absolute sale into a conditional or qualified one.

Held, also, that the defendant being a subsequent creditor, it was not a fraud in law as to him, and if a fraud in fact, the question was one for the jury.

The Court having directed a verdict for the defendant:

Held, to be error.

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Appeal of James A. McCullough, plaintiff, from the judgment of the Common Pleas No. 1, of Philadelphia County, in a feigned issue, framed under the sheriff's interpleader Act, wherein James A. McCullough was plaintiff and John Henry Willey was defendant, to try the title to certain goods levied on by John Henry Willey as the property of Josiah Crowther.

Upon the trial, before BREGY, J., the following facts appeared:

The plaintiff was the owner of the Ripka Mills, Manayunk, and rented them to Beswick & Crowther. On October 12, 1895, the firm of Beswick & Crowther transferred to him by bill of sale the machinery in dispute: 2 sets of double cards, 1 floor grinder, 1 traverse grinder, 2 mules, 375 spindles, 2 reels. And on the same day the appellant, James A. McCullough, bailed to David Beswick and Josiah Crowther, trading as Beswick & Crowther, all this machinery for the period of one year from October 12, 1895, at $90 per annum payable in three instalments, on February 15, 1896, June 15, 1896, and October 15, 1896. This lease contained the usual clauses as to the duty of the lessee to keep the machinery in repair, and the right of the lessor to determine the lease and retake possession, in case the lessee should fail to perform the conditions of the lease, or allow the property to be levied on. The lease further provided, that upon payment by the lessee to the lessor at any time during the term of a sum of money equal with the rentals already paid to $1500, the lease should be determined, and the lessor should execute a bill of sale for the property to the lessee. The machinery remained in the Ripka mills under this bailment in the possession of Beswick & Crowther until judgment was entered by the appellee, John Henry Willey, against Josiah Crowther, one of the defendants, on a judgment note dated February 18, 1896, judgment entered and execution issued same day. Under this execution against Josiah Crowther, the sheriff levied upon this machinery held by Beswick & Crowther under this bailment. The plaintiff claimed the machinery. The sheriff asked for a rule of interpleader which was granted and issue joined. On the trial of the case on February 24, 1898, the plaintiff offered in evidence the bill of sale and bailment, had the machinery identified, and the testimony of the plaintiff showed the consideration of the bill of sale to be the endorsement of James A. McCullough for Beswick & Crowther of $1500 of notes, every one of which he, McCullough, had to pay. After the plaintiff had closed, the Court, upon motion of the defendant, directed the jury to find a verdict for the defendant. Whereupon the plaintiff took this appeal, assigning for error this action of the Court.

John G. Johnson, (with him *John Sparhawk, Jr.*, and *John Weaver*), for appellant.

A sale of personal chattels that is not accompanied by delivery may be good between the parties. While such a sale is a legal fraud as to persons standing in a position to be defrauded by it, as to all other persons it may be valid if it is free from fraud in fact.

Buckley *v.* Duff, 19 WEEKLY NOTES, 166.
Ditman *v.* Raule, 23 WEEKLY NOTES, 301.
Renninger *v.* Spatz, 128 Pa. 524.
Pressel *v.* Bice, 142 Id. 263.
Bell *v.* McCloskey, 155 Id. 319.
Evans *v.* Scott, 89 Id. 136.
Pearson *v.* Carter, 94 Id. 156.
Crawford *v.* Davis, 99 Id. 576.

It is, therefore, a well-settled doctrine that while a sale of personal property may be fraud in law as to existing creditors, it is not so as to subsequent creditors, and fraud in fact must be shown as to them.

The ownership arising under the bill of sale was an absolute one, and was not changed to a qualified ownership by any of the provisions of the lease.

At the time the levy was made the lessor had paid some, if not all of the notes, the endorsement of which by him was the consideration of the bill of sale.

Charles L. Lockwood, for appellee.

The plaintiff having claimed an absolute ownership can not set up at the trial a qualified ownership.

Meyers *v.* Prentzell, 33 Pa. 482.
Stewart *v.* Wilson, 42 Id. 450.
Vandike *v.* Rosskam, 67 Id. 330.
Bissell *v.* Steel, 67 Id. 443.
Dale *v.* Pierce, 85 Id. 474.

The evidence shows that the bill of sale was given only as a security for the notes endorsed. At the time it was made there was no indebtedness of the defendant to the plaintiff. There was only a contingent liability on the part of the plaintiff. The case of Pressel *v.* Bice, 142 Pa. 263, is, therefore, not in point.

While no change of possession is required as will defeat the honest and lawful purpose of the parties, in this case the purpose of the parties was unlawful, namely, to create a secret pledge of personal property.

Clow *v.* Woods, 5 S. & R. 275.

July 19, 1899. GREEN, J. We think the learned Court below was in error in holding that the plaintiff's claim of title was qualified and not absolute. The bill of sale made by Beswick & Crowther to McCullough was absolute, and transferred the entire title of the grantors in the articles mentioned, to the plaintiff, without any

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condition or qualification whatever. On the same day the plaintiff executed a lease to Beswick & Crowther of the same articles, with the ordinary conditions of a lease, and an added stipulation that if the lessees should subsequently pay to the lessor, a sum equal to fifteen hundred dollars with the payments of rent included, the lessor would execute and deliver a bill of sale of the property to the lessees. There was no provision in the lease that such a bill of sale should be made to the lessees, in the event that they should pay the notes which were endorsed for them by the lessee, and in point of fact they never did pay any of them. There was nothing said upon this subject in either the bill of sale or in the subsequent lease.

It is, of course, true, that the arrangement was made in order to secure McCullough against loss by reason of his endorsements for Beswick & Crowther, but that consideration will not convert an otherwise absolute sale into a conditional or qualified one.

On the subject of change of possession, which seems to have been the principal matter of contention on the trial, the authorities are clear that an absolute change is not in all cases essential to the validity of the transaction. In Buckley *v.* Duff, 114 Pa. 596, we held that in the sale of personal property regard must be had, not only to the character of the property, but to the nature of the transaction, the position of the parties and the intended use of the property. No such change of possession as will defeat the fair and honest object of the parties is required. A transfer of personal property void as to existing creditors, is not necessarily void as to subsequent creditors. It is fraudulent only as to those it was intended to defraud. The facts were that Greaves & Marland being indebted to Buckley, gave him a bill of sale for certain paper box machines, and took from Buckley a lease for the machines at a fixed rental. The lease was for an indefinite time at a rental of fifty cents per week. They remained in possession for some years and upon a judgment subsequently recovered against them, the machines were seized in execution. The Court below, on the trial between Buckley claiming under his bill of sale and lease, and the subsequent execution creditor, directed a verdict for the defendant, but this Court reversed the judgment, holding that it required proof of actual fraud to vitiate the plaintiff's title. The same rule was held in Renninger *v.* Spatz, 128 Pa. 524, our brother McCollum, saying in the opinion: "It was for the jury to find from the evidence whether the sale was in good faith or colorable, and whether the change of possession was all that could reasonably be expected of the vendor, taking into view the character and situation of the property and the relations of the parties."

In Pressel *v.* Bice, 142 Pa. 263, the rule as stated in Buckley *v.* Duff, supra, was repeated in the same words, and we affirmed the action of the lower Court in leaving the question of actual fraud to the jury. In Ditman *v.* Raule, 124 Pa. 225, we enforced the same doctrine, saying, "That a sale of personal chattels that is not accompanied by delivery may be good between the parties. While such a sale is a legal fraud, as to persons standing in a position to be defrauded by it, as to all other persons it may be valid if it is free from fraud in fact." In Bell *v.* McCloskey, 155 Pa. 319, we held that a purchaser of a lease of a dairy farm with the cattle and farm implements belonging to it, who retains the vendor in possession as a tenant under a written lease, assumes sufficient possession of the property to entitle him to retain it as against the vendor's creditors. In the opinion of this Court we said, "In the circumstances of the case it would have been error to have held that the transaction was a fraud in law. The law does not require such an absolute change of possession as would defeat the fair and honest purpose of the parties."

In the present case the defendant recovered a judgment against Crowther in February, 1896, and appears, therefore, to be a subsequent creditor. As to him it does not follow as a matter of law that the transaction between Beswick & Crowther and the plaintiff was a fraud in law, and it was therefore error to direct a verdict for the defendant. The question of fraud in fact should have been submitted to the jury. The assignments of error are sustained.

Judgment reversed and new venire awarded.

S. H. T.

May, '99, 26. Supreme Court. May 30, 1899.

Ensminger v. Hess.

Charge of court— Points for charge — Duty of counsel to except.

Where the trial Judge at the close of the general charge returns points submitted by counsel, stating he believes that he has answered them in his general charge, it is the privilege as well as the duty of counsel to except thereto and have them made part of the record, if the points were not covered by the general charge, or were insufficiently answered.

Where the charge of the trial Judge is not unfair, inaccurate or inadequate, the verdict will not be disturbed.

Appeal of John T. Ensminger, plaintiff, from the judgment of the Common Pleas of Dauphin County, in an action against Eleanor L. Hess, to determine the validity of a judgment confessed

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by Frank J. Hess in favor of his wife, the said defendant.

The question raised is stated in the opinion of the Supreme Court.

Robert Snodgrass, (with him *F. P. Snodgrass* and *James I. Chamberlin*), for appellant.

John A. Herman and *William M. Hain*, for appellee.

July 19, 1899. STERRETT, C. J. In this feigned issue to determine the validity of a judgment confessed by Frank J. Hess in favor of his wife, who is the defendant in the issue, the only subject of complaint is the manner in which the learned trial Judge submitted the case to the jury.

In their brief, the learned counsel for plaintiff state: "We do not say that the case should have been taken from the jury. It was no doubt the duty of the Court to submit it to their determination, but, at the same time such submission . . . . should have been accompanied by such instructions as would have directed the jury's attention to the general and unreliable character of the evidence adduced."

It nowhere appears in the record that the learned trial Judge's attention was called to the alleged insufficiency of his presentation of the case to the jury; but it is stated—doubtless correctly—that points for charge were presented, and "the learned trial Judge, at the close of the general charge, returned the points, so submitted, to counsel, stating that he believed he had answered the points in his general charge; consequently no points appear upon the record."

We are not warranted in drawing from this statement the inference that any of the matters now complained of were distinctly embodied in any of said points, nor do we understand that we are expected to do so. If any of said points were not covered by the general charge, or were insufficiently answered therein, it was the privilege as well as the duty of counsel to except thereto and thus have them made part of the record. We must therefore dispose of this case as though no prayers for instructions, etc., had been presented.

It is frankly conceded that upon the evidence properly before the jury the case was one that the Court was bound to submit to them for their determination. The only question therefore is whether it was fairly and adequately submitted. On that subject, the language of our brother MITCHELL, in Borham *v.* Davis, 146 Pa. 72, 77, is appropriate. Referring to the alleged unfairness and inadequacy of the charge in that case, he said: "In the review of the evidence, it must not be inaccurate on matters of substance, and it must not omit or slur over strong points on either side. But how much detail shall be entered into; how minute the reference to the testimony shall be, and how extended the discussion of it; how far arguments shall be noticed, their true bearing and relevancy pointed out, and the extent to which they are supported by the evidence, etc., must be left largely to the discretion of the presiding Judge. He is generally in a better position to estimate the requirements of the case with the jury in hand than we can possibly be; and unless we can see clearly that the jury may have been misled or turned aside from the true issue, general exceptions, of the nature of the present, are not to be sustained."

A careful consideration of the charge as a whole, and in all its bearings, has satisfied us that it is neither unfair, inaccurate or inadequate. There was no controversy as to the law applicable to the facts which the evidence tended to prove, and it was clearly and accurately stated to the jury. The disputed questions were of fact, which it was the duty of the Court to submit to the jury for their determination, and they were accordingly submitted on sufficient evidence, and with instructions of which the plaintiff has no just reason to complain. His view of the case was fairly and adequately presented, and his rights carefully guarded.

If the evidence of the defendant was believed, she had given an adequate consideration for the judgment in controversy, and the jury being the exclusive judges of the credibility of witnesses were warranted in finding as they did.

It is unnecessary to consider the specifications of error in detail. We find nothing in the record to justify us in sustaining either of them. They are therefore dismissed and the judgment is affirmed.

W. C. S.

May, '99, 4. Supreme Court. May 29, 1899.

Wolff Dryer Co. v. Bigler et al.

Contract—Modification of—Foreign corporation.

By the original contract between the parties the plaintiff granted to the defendants the right to construct and use a machine for drying bricks, and agreed to sell them the parts of the machine and numerous appliances necessary for its use at a stated price. After the machine was set up it was to be tested, and then accepted or rejected. If accepted, it was to remain the propery of the plaintiff until paid for, with the right to remove it if payments were not made as provided by the agreement. If rejected, it was to be removed by the plaintiff at its expense, and all moneys which had been paid or notes which had been given were to be returned, the contract was to be cancelled, and neither party was to have any claim against the other. Before the machine was delivered, defendants inquired of plaintiff whether the machine would dry bricks made by

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the stiff-mud process without cracking them, and the correspondence relating thereto, the defendants claimed, so modified the original agreement as to abrogate the agreement entirely, and they refused to retain the machine or to pay for it, alleging a breach of warranty. The lower Court charged the jury that the correspondence read in connection with the agreement did not indicate an intention to change the original contract sufficiently to vary its terms:

***Held*, not to be error.**

The fact that the agent of a foreign corporation comes into this State and makes contracts for the delivery of machinery here, does not constitute a doing of business within this State within the inhibition of the Act of 1874.

Appeal of Casper S. Bigler, trustee of the estate of Sarah L. Bigler, deceased, Casper S. Bigler and James M. Rhoads, doing business as Samuel L. Bigler & Co., defendants, from the judgment of the Common Pleas of Dauphin County.

The trial judge, SIMONTON, P. J., charged the jury as follows:

"This action is what is called an action of replevin, in which the plaintiff seeks to establish the fact that it had the right to take possession, as it did take possession, of certain property—the dryer—that has been mentioned frequently in the course of this case.

"The beginning of this case was a contract in writing, entered into on the 31st day of January, 1895, between the plaintiff, the Wolff Dryer Company, and the defendants, S. L. Bigler & Co. This contract I say is in writing, that is to say, partly printed and partly written, and it sets forth that the plaintiff sells to the defendant certain articles, describing them, amounting altogether to what is called this 'Iron Clad Dryer' for the purpose of drying bricks, and in the first instance the rights of the parties are to be determined by this writing, subject to whatever modification there may have been made in the writing by subsequent negotiations or agreements. The writing in the first place goes on to describe what makes up the dryer, and then it states how payment is to be made; that the price, $3950, is to be paid in negotiable notes bearing 6 per cent. interest, or cash, at the option of said S. L. Bigler & Co., that is at the option of the defendants; as they choose. It provides that within thirty days after the arrival of the cars and the rails, which are part of the necessary apparatus to constitute the dryer, there is to be a test made, and that before the superintendent—who in another part of the contract it is agreed shall come to superintend the putting up of the dryer, the work for which is to be done by the defendants—before the superintendent leaves he shall be given a letter of acceptance, or if the test is unsatisfactory a written statement to that effect, and, it provides further that on failure to comply with this clause of the contract it is agreed that it will be construed as an acceptance of the dryer. There is a provision in the contract that the storage capacity of the dryer shall be so much, giving a drying capacity for 40,000 standard size soft-mud brick, and then a further provision that if the dryer fails to dry the quantity of brick stated above, it is agreed between the parties that the Wolff Dryer Company will and shall remove the materials at their own expense and refund all moneys which may have been paid them, or notes given them, and this contract will then be cancelled and neither party will have any claim on the other. And it is further provided—agreed—that there is no verbal agreement existing between the parties outside of the written conditions stipulated in this agreement that the plaintiff claims the right to ment that the title and possession of the dryer shall remain in the Wolff Dryer Company until all notes and claims shall have been paid, and they shall have the right at all times on failure of the other party to make all payments as provided, to remove the dryer and retain possession of it, and also retain all payments that have been made as liquidated damages for non-fulfillment of contract. Now, it is under that clause of the agreement that the plaintiff claims the right to take this dryer, take possession of it, as it has done by this proceeding through the writ of replevin, and it has the right to do that, if it can maintain this action: that clause in the agreement was one that it had a right to make, and that clause taken by itself gives it the right to retake possession if the agreement is not complied with and if the payments are not made. But before that clause would come in operation, the first thing would be the question whether the defendants accepted the dryer. There has been provision here in the agreement, as I have stated to you, for making a test, and that test I think it is conceded was not made finally, and no letter of acceptance or written statement that it was unsatisfactory was made or given within the thirty days; that I think there is no controversy about. But the defendants claim that that time was extended, and there is evidence tending to show that fact, that the time was extended. There is evidence to show that for more than thirty days from the time when the materials were furnished the representatives of the plaintiff were still here superintending trials and things of that kind; and so we think there is evidence tending to show that that time was extended, and if we thought that there was reasonable dispute on that question we would leave it for you to determine, but we assume that the testimony does show that

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that time was extended, that a longer time than thirty days, after the materials were furnished, was accepted at least by the plaintiff, that it did not at the end of that time leave the thing and have no more to do with it, but that after that time its representative was here, and still supervising, to some extent, the tests.

"Another thing occurred: On the 6th day of March the defendants wrote to the plaintiff stating when you ship our cars make them with standards for stiff-mud bricks to be made on a Raymond & Co machine and repressed. 'Your agent, Mr. Barron, has convinced us that the stiff-mud is the brick.' And, in answer to that there has been put in evidence a letter stating that they would do so, and that the price would be fixed by their agent. Then there is another letter written by the Wolff Dryer Company, the plaintiff, to the defendants, on March 8, in answer to the letter of the 6th, saying, 'Yours of the 6th inst., ordering cars for your dryer with standards for stiff-mud brick received and the same will have our attention.' No, it is the other letter. Before the letter of the 6th, which I have read, ordering the change of the standards about the cars, the plaintiff had written on March 2 to the defendants as follows in part: 'Your favor of the 1st inst. received and contents noted. You mention that should you conclude to put in an Augur machine if we will guarantee to dry brick made on this machine without cracking. Our answer to this question is, yes.' They said they would guarantee brick made on the Augur machine to dry without cracking. Now the defendants contend that these two letters taken together change the agreement. The original agreement provides that the dryer shall be of capacity to dry 40,000 soft-mud brick in twenty-four hours. Here is a statement that they will guarantee to dry stiff-mud brick, and the defendants contend that that changed the contract. And then, as you heard, they gave a great deal of testimony to show that it did not dry stiff-mud brick, but that the bricks cracked, and they say, therefore, that this agreement by that means—and by another matter that they claim—that this agreement was practically abrogated, done away with, and when the plaintiffs came claiming the machine or the dryer and said either you must pay when the notes become due, either you must pay or deliver up the machine, they declined to do either, but said if you make good your guarantee we will pay you for the machine.

"Now, gentlemen, our construction of this agreement in connection with those letters is this: that it so far changed or modified the original agreement, that is substituted stiff mud for soft mud, where they say in this agreement the storage capacity of this dryer will be 136 cars holding 476 bricks, total 64,736 bricks, which gives a drying capacity of 40,000 standard size soft-mud bricks per twenty-four hours, provided the necessary steam is provided and furnished. Now our construction is that these letters make that read as if it was 'stiff-mud' brick, and that the guarantee goes to that extent, in connection with this other clause in the agreement that if the dryer fails to dry the quantity of brick stated, it is agreed that the plaintiffs will take it away and give up the notes and everything else, and that there shall be no claim by the one against the other. And we do not think that those letters had the effect claimed by the defendants, that it did away entirely or practically with this agreement, except so far as the price was concerned perhaps, etc. But we say that it did not do away or abrogate the provision in this agreement as to making tests, and as to the right of the plaintiffs, if the machine was once accepted, as to their right to retake it if it was not paid for. The notes were given, and there was some controversy in the course of the trial as to whether the giving of the notes amounted to an acceptance of the machine, amounted to a declaration equivalent to saying that the machine is satisfactory. We do not think the giving of the notes necessarily means that; we said so at the time and we say so still. The contract itself seems to provide for the giving of the notes, and there is a letter here that seems to imply the same thing, that the notes may be given before the tests are made, or even that the money may be paid. The notes were given and they went on testing the machine—the dryer—from time to time, making the bricks as you have heard with the Raymond machine, at least, and afterwards getting a 'Big Wonder' machine, as it is called, both of which were the kind of machines mentioned in this letter, to wit: Augur machines. There was never any notice given in writing that the machine was accepted; there was no notice given in writing that it was unsatisfactory. They went on testing it, however, and there is some testimony to show that after some time the agent of the plaintiffs was here when they were testing it, and the defendants claim that in connection with those tests and at the request or under agreement with the plaintiff's representative—and they claim that was the same as the plaintiff—this second machine was bought, this Wonder machine, that they still went on to make tests and that they were not satisfactory, that, as you heard the testimony, the bricks cracked, and that the result of all was, good merchantable bricks were not produced and did not come out of the dryer. And then they claim that during the course of these tests Mr. Barron, who has

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been a witness here, and who was the agent who sold this property, agreed with the defendants that if the machine did not work right, wasn't satisfactory, that they should keep it. Now there has been no testimony, no evidence given in this case to show that this agent who sold this machine, and who, according to the testimony for the defendants, was here while they were trying it—there has been no evidence given—I mean positive evidence, to show that he had any authority to make such a contract as that. He denies that he did make any such contract. And in the absence of evidence to show that he had authority to make such a contract, practically to give away this machine, we decline—and we put that upon the record—we decline to submit that question to you. We say that there is no evidence here sufficient to submit to the jury the question whether there was a valid contract made that if the defendants did not like the machine, and if it did not suit them, and if it ruined their brick, that then they were to keep it. We say that, except as to the modifications made in this agreement by those letters substituting stiff mud for soft mud that if during the time that the tests were made it wasn't satisfactory to the defendants, they would have a right to say to the plaintiffs, you must take it away, it is not satisfactory; they had the same right to do it when they were experimenting with stiff mud that they would have if they were experimenting with soft mud if those letters had not been written, and that the writing of those letters and whatever guarantee or agreement is made in those letters gave them that right, and that, except that, the agreement between the parties was as is stated in this writing. The evidence that has been given to change that is all, as you understand, except this with respect to this change, is oral evidence, and solemn written agreements are not to be changed lightly; and when parties have put their agreements carefully in writing, the rights of the parties on the one side and on the other are not to be lightly given away by alleged agreements made by agents contradicting or differing from the writings.

"Now I think I have said all that is necessary to say to you, gentlemen of the jury, to explain to you—and that is really all for which there was any necessity of my saying anything to you—to explain to you why it is that I do not leave any question to you to decide, to explain to you the fact that the decisive questions in this case are questions of law, and for that reason I have said what I have that you may understand why it is that I do not leave any questions to you to be determined. I dispose of the case in connection with what I have said to you by answering the propositions that have been presented by counsel on either side."

Certain points of defendants relating to the question of the invalidity of the contract because the plaintiff had not complied with the Constitution and the Act of Assembly were reserved.

A verdict was directed for plaintiff for six cents and costs; and, a motion for judgment non obstante veredicto having been overruled, this appeal was taken, the errors assigned being the answers to points presented, the charge, and the overruling of the motion for judgment.

Lyman D. Gilbert, (with him *M. W. Jacobs* and *Frederick M. Ott*), for appellant.

The trial Judge proceeded upon the theory that the dryer had been accepted by the defendants, and the plaintiff therefore had the right to proceed, under the forfeiture clause of the contract, to retake its property, without returning the notes given or the cash paid. But it was not stated upon what this assumption of the acceptance was based; and, if the defendants' witnesses are to be believed, and that was for the jury, there is abundant evidence that there never was any such acceptance, express or implied.

Bigley v. Jones, 114 Pa. 510.

The original contract contained no warranty.

Dushane v. Benedict, 120 U. S. 630.
Carroll-Porter Co. v. Columbus Co., 55 Fed. Rep. 451.
Passinger v. Thorburn, 34 N. Y. 634.
Milburn v. Belloni, 39 Id. 53.
Mears v. Nichols, 51 Ill. 207.
McHose v. Fulmer, 73 Pa. 365.

As to the question whether the plaintiff was doing business in this State in violation of Art. XVI., sec. 5, of the Constitution of Pennsylvania, and of the Act of April 22, 1874, and was therefore unable to maintain this action, see—

Cooper Mfg. Co. v. Ferguson, 113 U. S. 727.
Farrior v. N. E. Mortgage Co., 88 Ala. 275.
Pembina Mining Co. v. Pennsylvania, 125 U. S. 181.
Lasher v. Stimson, 145 Pa. 30.
Thorne v. Ins. Co., 80 Id. 15.
Johnson v. Hulings, 103 Id. 498.
Cooper Mfg. Co. v. Ferguson, 113 U. S. 727.

C. L. Bailey, (*Wolfe* with him), for appellee.

The contract between the parties in this case, whereby the plaintiff was to retain title to the materials sold to the defendants to equip the dry house in the yards of the latter, until they had been fully paid for, was the usual one of conditional sale, and valid as between the parties.

Haak v. Linderman, 64 Pa. 501.
Krause v. Com'th, 93 Id. 421.
Brunswick & Balke Co. v. Hoover, 95 Id. 508.
Hineman v. Matthews, 138 Id. 204.
32 L. R. A., note d., pp. 459-464.

In the absence of any exceptional circumstances, the plaintiff had a right to retake its

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goods by replevin, upon non-payment of the notes given it.

Hineman v. Matthews, 138 Pa. 204.
Collins v. Houston, 138 Id. 481.
Ferguson v. Rafferty, 128 Id. 338.
Cobbey on Replevin, secs. 246-249, pp. 123, 124.

In thus bringing its action, the plaintiff was not, as stated in the appellant's argument, seeking at the same time to retake its property and to confiscate the entire price therefor in the notes given and the money paid by the defendants. On the contrary, with the exception of $125, the entire price of the materials furnished by the plaintiff to the defendants was represented by the defendants' own notes, not negotiated, and which were produced at the trial of the case and placed unreservedly under the control of the Court, where they now are. This was all that was necessary.

32 L. R. A., note p. 459 et seq.
Bush v. Bender, 113 Pa. 94.
Thurston v. Blanchard, 22 Pick. 18.
Poor v. Woodburn, 25 Vermont, 234.
Durr v. Replogle, 167 Pa. 347.
21 L. R. A., note p. 206.
Tufts v. Arcambal, (Mich.), 12 L. R. A. 446.

If the dryer was actually unsatisfactory, as stated by the defendants in this case, they could not be allowed, by a continued use of it, to enhance the damages, and then seek to recoup or defalk them against the plaintiff's claim for its property.

28 Am. & Eng. Encyc. of Law, p. 850.

Thus, where a party ascertains that a machine purchased by him is defective, it is his duty to abandon the use of it at once, and not enhance the damages by continuing to use it.

Gale Sulky & Harrow Mfg. Co. v. Moore, 46 Kan. 325.
Sedgwick on Damages, 8th ed., vol. 2, sec. 764.

The Wolff Dryer Company had no office in the State of Pennsylvania; had no agent resident therein; nor any stock of goods within the State, and there is no evidence that it entered it other than by its salesman as occasion required.

This was certainly not doing business in the State, within the meaning of the statute.

Standard Oil Co. v. Com'th, 101 Pa. 119.
Wile & Brickner Co. v. Ousel, 10 C. C. Rep. 659.
Cooper Mfg. Co. v. Ferguson, 113 U. S. 727.
Com'th v. Bell Telephone Co., 129 Pa. 217.
Kilgore v. Smith, 122 Id. 48.
Blakeslee Mfg. Co. v. Hilton, 5 Pa. Super. Ct. 184.
Caesar v. Capell, 83 Fed. Rep. 403.
Southern Cotton Oil Co. v. Wemple, 44 Id. 24, p. 26, 27.
Mearshon v. Lumber Co., 187 Pa. 12.
Com'th v. Simons, 3 Dist. Rep. 792.
Com'th v. Mooney, 12 Lanc. L. R. 209.
Com'th v. Walker, 12 Id. 210.
Brennan v. Titusville, 153 U. S. 289.

July 19, 1899. FELL, J. By the original contract between the parties the plaintiff granted to the defendants the right to construct and use a machine for drying bricks, and agreed to sell them the parts of the machine and numerous appliances necessary for its use at a stated price. The buildings required were to be constructed by the defendants. After the machine was set up it was to be tested, and then accepted or rejected. If accepted it was to remain the property of the plaintiff until paid for, with the right to remove it if payments were not made as provided by the agreement. If rejected it was to be removed by the plaintiff at its expense, and all moneys which had been paid or notes which had been given were to be returned, the contract to be cancelled, and neither party was to have any claim against the other.

Before the machine was delivered the agreement was modified in this way: The defendants wrote to the plaintiff inquiring whether the machine would dry bricks made by the stiff-mud process without cracking them. In the correspondence which followed the plaintiff wrote: "You mention that should you conclude to put in an Augur machine, if we will guarantee to dry bricks made on this machine without cracking—our answer to this question is, yes." The use of the Augur machine did not require a change in the dryer, but it required cars of a different kind, and increased the price $456. The defendants contended that the subsequent correspondence between the parties so modified the original agreement as to abrogate entirely the provisions for acceptance or rejection after test, and as to the right of the plaintiff to remove the machine if payment was not made as agreed, and that the plaintiff became a warrantor that the machine would dry bricks without cracking them. Alleging a breach of warranty, they refused either to return the machine or to pay for it.

We see no reason to doubt the correctness of the construction given by the Court to the original contract and the correspondence by which it was modified. The change made by the parties went only to the extent of substituting stiff mud for soft mud in the original contract, and left all the other provisions of the contract in full force and effect. It is apparent from the contract that both parties entertained a doubt as to whether the machine would dry bricks satisfactorily. Provision was made for a test and for the removal of the machine if unsatisfactory, and each party was to bear its share of the expense of the experiment, and neither was to have a claim against the other. The correspondence read in connection with the agreement does not indicate an

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intention to change the original contract except by the substitution of stiff mud.

The contention that the plaintiff could not maintain an action in this State because it was a foreign corporation and had not complied with the provisions of the Act of April 22, 1874, P. L. 108, is without merit. It had no office nor place of business in Pennsylvania, and no part of its capital was here. The machinery sold was shipped either directly from its factory in Chicago, or upon its orders given to other manufacturers. The fact that its agent came into this State and made contracts for machinery to be delivered here did not bring it within the inhibition of the Act of 1874: Mearshon & Co. *v.* Lumber Co., 187 Pa. 12.

The judgment is affirmed.

W. C. S.

Superior Court.

April, '97, 119. Superior Court. May 7, 1897.

Hookey v. Oakdale Borough.

Negligence—Highway—Boroughs—Independent contractor—Points—Practice.

The right of the public to the use of a highway is subordinate to the right of the public authorities to make repairs for public benefit.

When a person has been put in sudden peril by the negligent act of another, and, in an instinctive effort to escape from that peril, falls upon another peril, it is immaterial whether, under different circumstances, he might and ought to have seen and avoided the latter danger.

A municipal corporation is not responsible for an injury occasioned by the neglect of a contractor who has in charge the repair of a street, the reason being that the principle of respondeat superior applies to the contractor alone, and in such case there cannot be two superiors severally responsible.

When at the trial of the cause, a point is put as a matter of law and is refused by the Judge without reason therefor being given, it will be presumed that it was refused because as a matter of law it was not good, and not because there was no evidence to support it.

Appeal of the Borough of Oakdale, from the judgment of the Common Pleas No. 3, for Allegheny County, in an action of trespass wherein C. H. Hookey and Ella Hookey were plaintiffs.

The facts of the case case are set forth in the opinion of the Superior Court.

The defendant requested the Court to charge:

"1. That the plaintiff having testified in substance that on the night of the accident he was driving along the street at a trot; that for some distance before he came to the place where the accident occurred, he saw that the street was encumbered by a pile of stones; that he saw these stones for a considerable distance before the accident by reason of the white character of the stones; that he did not slacken the pace of his horse, but drove at a trot up to the place of the accident, and further that he did not look to the right, the side on which he struck the water plug, at all to the time of the accident; that this is such want of care under the particular circumstances of the case as will prohibit the plaintiff from recovering, and the verdict of the jury should be for the defendant." Refused. (First assignment of error.)

"2. That the uncontradicted evidence in the case shows that the obstruction in the road consisted of certain stones which drove the plaintiffs to the right, as they complain, which were placed there by a contractor who had an independent contract to construct the retaining wall at the place of the accident; that the said contractor was doing the work at a compensation per perch, finding the materials and doing the work; that the borough had or retained no supervision over the work or its management, and under this condition of affairs the defendant is not liable for any injury the plaintiffs may have suffered." Refused. (Second assignment of error.)

The defendant also asked for binding instructions in its favor, which were refused. (Third assignment of error.)

Verdict and judgment for plaintiff. The defendant appealed and filed assignments of error as above indicated.

E. E. Fulmer, (*J. R. McQuaide* with him), for appellant.

The legal principle contained in the well-established rule requiring a person approaching a railroad crossing to "stop, look and listen" may well be applied in this case. The reason for the rule is evidently the knowledge that a person has, or should have, that there may be danger at a crossing, which requires extra vigilance. So the knowledge that this street was narrow; that it was obstructed by a long pile of stones and that it was too dark to see possible dangers ahead, required extra vigilance and care which were not exercised in this case.

Hentz *v.* Somerset Borough, 2 Pa. Super. Ct. 225.

It is well settled in Pennsylvania that a person who knows of a defect in a highway and voluntarily undertakes to test it, where it could be avoided cannot recover against the municipal authorities for loss incurred through such defect.

Hotchkin *v.* Philipsburg, 6 Cent. Rep. 898.

The plaintiff had abundant knowledge that the street was being repaired because he saw the pile of stones, and this should have put him on his guard.

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Robb *v.* Connellsville, 137 Pa. 42.
Haven *v.* Bridge Co., 151 Pa. 629.
Fruh *v.* Philadelphia, 11 C. C. 473.

The general principle is undoubtedly that when a contractor takes entire control of a work, the employer having no right of supervision or of interference, the employer, if he is not negligent in his selection, is not liable to third parties for the contractor's want of care in the performance of it

Wray *v.* Evans, 80 Pa. 102.
Painter *v.* Pittsburgh, 46 Id. 220.

E. P. Sproul, (*T. M. Marshall, Jr.*, with him), for appellee.

July 23, 1897. WILLARD, J. The injury sustained by the appellee was occasioned by the overturning of a wagon in which she and her husband were riding on Clinton avenue, in the borough of Oakdale, on October 21, 1895. At the point where the accident happened the road follows the valley of the north branch of Robinson's run, and by the action of the water of the stream upon the road its width had been reduced from thirty-three feet to less than twenty-five. It became necessary to erect a retaining wall of stone along the bank in order to widen and protect the street. In the curve of the street near the footway, a water plug was located for the use of the borough. There was evidence that the building of the retaining wall was let by contract to Samuel Gamble, and at the time of the accident was being constructed by him. On the day of the accident C. H. Hookey and his wife, according to Mr. Hookey's testimony, left home between two and three o'clock in the afternoon for a drive. They went out to the north branch by the Pittsburgh and Steubenville pike and returned by the North Branch road or Clinton avenue, reaching the place of the accident between seven and eight o'clock in the evening. According to the testimony of Mrs. Hookey it was so dark she could not see her hand before her face. In making the repairs, stone had been placed along the side of the street opposite the fire plug, extending along the side of the road about 150 feet. The space left between the stone pile and the fire plug was about eight feet; no light or other warning of danger had been provided at the place where the stones were piled. The testimony of Hookey discloses the fact that he had been up and down the road a great many times for four years prior to the accident. He also testified that he was along the road when they were grading it up, but not after they commenced putting in the stone. In describing the accident Hookey's testimony is as follows:

"Q. Tell the jury how the accident occurred. A. Well, I was coming down that road and my horse was traveling at the usual trot. I seen the stones—I suppose they were scattered along the road for probably one hundred or one hundred and fifty feet. I never measured the distance, that is what I estimate it at. I saw the upper edge of the stone. I kept off the stone along there and I was just clearing the stone and when I come along the first thing I knowed there was a crash, and the buggy went end over end, and I released myself, I don't know how I got out, but I was on my feet. I felt a little sore in one knee the next day. I suppose I struck on one knee, but it did not hurt me. I had the reins of the horse in my hand and looked around and heard my wife moaning. She was laying on the stone and the buggy on top of her. It struck the box on the right-hand side of the road, and was thrown to the left end over end, like that. Q. What was the first thing you saw when you came to the place of the accident? A. The first I saw was some of these stones up along the road. Q. How far along could you see the stones? A. A person could not see very far. They were kind of white quarried-out stones, and you could naturally see them a little. Q. You turned to the right after striking the stones? A. Yes, sir; I kept off the stone and ran into this box on the street. Q. How far out toward the middle of the road from the edge of it did this stone pile extend? A. As near as I could get at it, I should judge there was over eight feet there. I never put a tape line on it, but there was over eight feet of the road open over which you could have driven. That was the amount of road, I think, for traffic."

On cross-examination the witness said:

"Q. When did you first notice the pile of stones? A. When I was coming driving in there. Q. Driving at a trot? A. Yes, sir; my horse was trotting. Q. Were you driving at a trot when you hit the box? A. I was. Q. And did you consider that place dangerous when you were driving along there? A. I didn't consider it dangerous, very dangerous. As long as I wasn't onto anything I didn't and everybody else drives there. I didn't suppose the road was closed up that close. Q. You saw the pile of stone out in the middle of the street? A. I saw it when I started in above. Q. And you saw them all along the side? A. Yes, sir; I wouldn't have touched the stone if it hadn't been for the obstruction on the other side of the street."

Mrs. Hookey testified as follows:

"Q. When you came to the place where the accident occurred, what time in the evening was it? A. It was dark. Q. It was after dark? A. Yes, sir; you couldn't see your hand in front of you."

On cross-examination:

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"Q. You said you were driving at the ordinary rate? A. Yes, sir. Q. Going at a trot? A. Yes, sir; just as our horse always goes."

In a space but eight feet wide between a stone pile and a water plug projecting two feet above the ground, there is evident danger in driving at night in the absence of a light placed at the point of danger. It was negligence on the part of the person in charge of the work of repairing the street to obstruct the street with a pile of stone without a signal light to warn travelers of the danger.

It is true that the right of the public to the use of the highway is subordinate to the right of the public authorities to make repairs for the public benefit: Township *v.* Anderson, 114 Pa. 643. It is also the rule that the road should have been closed by the authorities or sufficient warning of the danger given: Humphreys *v.* Armstrong Co., 56 Pa. 204; Born *v.* Allegheny Plank Road Co., 101 Pa. 334.

The road was open and used by the public and under the evidence it cannot be said that it was a case of using a road known by the plaintiff to be dangerous. The evidence shows that the plaintiff did not know of the stone pile till suddenly confronted with the obstacle at the time of the accident. The question presented, therefore, is whether under the evidence the conduct of the plaintiff, who was driving the horse, was such as to make it the duty of the Court to declare his conduct negligence as matter of law, or whether it was the duty of the Court to submit that question to the jury under proper instructions. Could the Court declare that it was negligence per se for the plaintiff to drive his horse at a trot at the time of the accident, or was it for the jury under proper instructions to determine whether the plaintiff's conduct, under all the circumstances, was that of an ordinarily prudent man and that he exercised ordinary care?

Suddenly in the darkness while driving his horse at a trot on a public highway, where he had a right to be, he was confronted with a pile of stone along the road extending to the centre thereof. From their color he could and did distinguish them, and, in guiding his horse so as to clear them, his wagon wheel struck the fire plug and the wagon was upset. In avoiding the danger on the left-hand side of the road, he encountered another obstacle upon the right. The water plug was not dangerous under ordinary conditions, but it became so on account of the narrowing of the roadway by the projecting stone pile. "When a person has been put in sudden peril by the negligent act of another and, in an instinctive effort to escape from that peril, falls upon another peril, it is immaterial whether, under different circumstances, he might and ought to have seen and avoided the latter danger": Vallo *v.* Express Co., 147 Pa. 404.

Should he have stopped his horse when he first saw the pile of stones? Was he negligent in trotting his horse till he struck the fire plug? Under the circumstances of the case these were questions for the jury to determine and not for the Court.

"If a man has got himself, without negligence, into a position of danger, he is not responsible if he makes a mistake of judgment in getting out. A man placed under such circumstances, if he uses his judgment honestly, is not responsible, although he might have done better, if he had acted differently": Pa. R. R. Co. *v.* Werner, 89 Pa. 59.

"A plaintiff placed in sudden peril by defendant's negligence is not to be held liable for a mistake of judgment in not using the best possible means of escape": Baker *v.* North East Borough, 151 Pa. 234.

"The plaintiff, while driving along a plank road abreast with another wagon, at the rate of about twelve miles an hour, between nine and ten o'clock on a dark night, was injured by running into a pile of stones lying in the track of the road. The stones were to be used in erecting a building and had been lying there several days; there was no light or signal to warn travelers. The stones were about a quarter of a mile from a toll house, but there was no evidence that the company's officers had actual knowledge of their being there. In an action against the plank road company to recover damages, the Court entered a non-suit on the grounds that there was no evidence of negligence on the part of the defendant and that the plaintiff was guilty of contributory negligence: held, to be error. The questions of negligence and contributory negligence should both have been submitted to the jury."

"To drive at the rate of twelve or fifteen miles an hour is not negligence per se. To determine whether such speed is within or without the measure of reasonable care, the width of the road, its condition, the number of persons and vehicles thereon at the time, and all other circumstances, must be considered. The road may be inside the limits of a city corporation, and in fact a country road. It may be known as a much-used thoroughfare, in good repair, or as one that is rough and perilous. The degree of care shifts with the ever-shifting circumstances, and whether driving at a certain rate of speed is negligence can alone be determined by the jury": Born *v.* Allegheny Plank Road Co., 101 Pa. 334.

We are of the opinion that under the evidence it would have been error to instruct the jury that

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the plaintiffs were guilty of contributory negligence and therefore not entitled to recover. It was emphatically a case of sudden emergency, where in attempting to escape one danger another presented itself calling for the quick exercise of judgment, and whether Mr. Hookey, in driving his horse on the occasion, exercised the ordinary judgment of a prudent man confronted with a danger that he had no right to expect, or whether he was negligent, was for the jury to decide. To declare him guilty of negligence because he drove his horse at a trot after dark or even at a gait of twelve miles an hour would be error, and whether he brought his horse from a trot to a walk as quickly as he should have done after he first saw the stone pile, was properly submitted to the jury.

In Ginther *v.* The Borough of Yorkville, 3 Pa. Super. Ct. 403, in an opinion by our brother SMITH, this Court held that, "A municipality is not liable for the negligent performance of a contract by an independent contractor resulting in injury to the property of a citizen, even if the work is done under the direction of an official authorized to inspect it, who is vested with all the power necessary to secure compliance with the contract, payment being conditioned on his approval of the work."

Under this authority the very important question is presented in this case, whether in view of the uncontradicted testimony, the appellant was liable for the injury sustained by the appellees.

By the testimony of Mr. Gamble, the contractor, it appears that he had the contract for the excavation and building the retaining wall, which the borough awarded to him as the lowest bidder; that he was to be paid for the work and material a stated price per perch; that the stones were hauled and placed upon the road by him or under his instructions and were put there by him in carrying out the contract; that he completed the work in pursuance of the contract and that the borough never exercised or attempted to exercise any authority over him or his employés in the matter of carrying out the contract, except to see that the work was done in accordance with the specifications.

This testimony was not questioned and when the case was submitted it stood uncontradicted. In the second point of the defendant the Court was asked to charge the jury as follows: "That the uncontradicted evidence in the case shows that the obstruction in the road consisted of certain stones which drove the plaintiffs to the right, as they complained, which were placed there by a contractor who had an independent contract to construct the retaining wall at the place of the accident; that the said contractor was doing the work at a compensation per perch, finding the materials and doing the work; that the borough had or retained no supervision over the work or its management, and under this condition of affairs the defendant is not liable for any injury the plaintiffs may have suffered." The Court answered, "This point is refused." The answer of the Court was of vital importance to the defendant's case. If the negligent act of blocking one-half of the roadway with stones and leaving them without a light or other means to warn travelers at night was the work of this contractor, over whose acts the borough retained and had no control, why should it be called upon to answer for the contractor's negligence? The question was not called to the attention of the jury by the trial Judge in his charge, except in his unexplained answer to the point. What construction the jury placed upon the answer is unknown. If he meant to have them understand that the credibility of the witness was for them, it was his duty to so instruct them. We understand that he meant by his unqualified answer that although it is true and uncontradicted that Samuel Gamble had an independent contract for doing the work by the perch, did the work, placed the stones in the road which caused the injury, and, although the borough had and retained no control over his actions, yet as matter of law the borough is liable for the injury; with this understanding, which is a fair inference to be drawn from the point and answer, we must hold it to be error. We think the importance of the question presented demanded more explanation from the Judge to the jury than his unexplained answer afforded. If the facts were found as stated in the point, the law was correctly stated and should have been affirmed: Eby *v.* Lebanon Co., 166 Pa. 632; Heidenwag *v.* Phila., 168 Pa. 72. In Thompson on Trials, par. 1030, it is said: "When the facts are undisputed or clear, the Court should apply the law and determine the case. Thus the facts being conceded, whether a given act is within the scope of a servant's employment has been held a question of law for the Court." In Short *v.* Messenger, 126 Pa. 641, it appears that the point for charge was "that if the jury believed that the plaintiff abandoned the job, the defendant was justified in taking off the timber, and would not be liable in damages therefor." The Court refused the point without explanation, and in reversing the judgment the Chief Justice said: "When a point is put as matter of law and it is refused by the trial Judge without the reason therefor being given, it will be presumed that it was refused because, as matter of law, it was not good, and not because there was no evidence to support it."

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The burden was upon the plaintiff to prove negligence on the part of the defendant. It was negligence, as before stated, to leave the stone piled in the roadway without something to warn travelers at night of the danger. But the uncontradicted testimony shows that they were placed there by the contractor.

In a long line of cases involving the question of negligence, the rule is established in Pennsylvania that where the facts are undisputed it is the duty of the Court to pass upon the question of the defendant's negligence. There is not a scintilla of evidence to rebut the plain statement of the contractor, and he who caused the injury should be held liable for the damages resulting from his act, for which he alone, according to his own testimony, was responsible. There is no good reason why the appellant should be made to respond in damages for the negligent act of another over whom it had no control.

It may be said that this is an obstruction in a street, and a municipality cannot escape liability by showing that the obstruction was placed there by an independent contractor. It is said by Elliott in his work on roads and streets, at page 467: "If a municipality knowingly permits a dangerous excavation to negligently remain open and unguarded so as to constitute a defect in the street, rendering it unsafe for travel, the municipality cannot escape liability to one injured thereby, on the ground that the work had been let to an independent contractor." The learned author cites numerous authorities in support of the text, but cites Painter *v.* The Mayor, 46 Pa. 213, as holding a different doctrine. The rule laid down by Justice STRONG in Painter *v.* The Mayor, etc., of Pittsburgh, supra, has been followed by our Supreme Court in an unbroken line of decisions. In that case the excavation had been made in the street by one who had an independent contract with the city to do the work, and it was held that, "A municipal corporation is not responsible for an injury occasioned by the neglect of contractors with it, or of their agents and servants; the remedy for the injury is against the contractors alone." The reason for the rule is that the principle of respondeat superior applies to the contractor alone and in such case there cannot be two superiors severally responsible. To the same effect are Reed *v.* Allegheny City, 79 Pa. 300; City of Erie *v.* Caulkins, 85 Pa. 247; Susquehanna Depot *v.* Simmons, 112 Pa. 384; Improvement Co. *v.* Rhoads, 116 Pa. 382; Trego *v.* Honeybrook Borough, 160 Pa. 76; Eby *v.* Lebanon Co., 166 Pa. 632. In the above cases the actions were for injuries caused by obstructions in the highway. And in each case it was held that if the obstruction was placed in the highway by an independent contractor, over whom the municipality had no control, no action could be maintained against the latter. Notwithstanding respectable authorities to the contrary, such are the decisions of our Supreme Court, which we are bound to follow. In the Borough of Susquehanna Depot *v.* Simmons, supra, it was held: "1. A municipal corporation granting to one a license for a purpose proper and lawful, in this case to lay and provide water pipe in the street, is not liable to one injured by reason of the misuse or abuse of that license, whether the same be by an independent contractor for the work from the licensee, or by the licensee himself. 2. That the street commissioner, or other authorities of the municipality had knowledge that the said license was being misused or abused by the independent contractor of the licensee or by the licensee himself, in that the excavations for water pipes in the streets were left in an unguarded and dangerous condition, will not render the municipality liable for damages resulting from such misuse or abuse of the license."

In Improvement Co. *v.* Rhoads, supra, it was said by Mr. Justice CLARK: "The rule that in actions for negligence, municipal corporations may in certain cases cast the responsibility upon an independent contractor whose negligence caused the injury, has never been extended to corporations for profit." In Trego *v.* Honeybrook Borough, supra, it is said: "It is a mistake to assume, as appears to have been done by defendant in this case, that property owners, who—by direction of the borough authorities and in obedience to the requirements of an ordinance for that purpose—are engaged in paving and curbing the sidewalk in front of their respective properties, are, in any proper sense, contractors exercising an independent employment over which said authorities have no control. The well-recognized principle of Painter *v.* Pittsburgh, 46 Pa. 213; Reed *v.* Allegheny City, 79 Pa. 300; and that line of authorities, has no application in such cases."

The burden was upon the defendant to establish the fact that the injury was caused by the act of an independent contractor, and it may be justly claimed that the credibility of the defendant's witness was for the jury. Therefore this case must go back for another trial in order that the jury may be fully instructed on this important question. We do not think the unexplained answer to the point a sufficient exposition of this important feature of the case.

The second assignment of error is sustained, the third is overruled, the judgment is reversed and a venire facias de novo awarded.

W. D. N.

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WEEKLY NOTES OF CASES.

VOL. XLIV.] *FRIDAY, SEPT. 15, 1899.* [No. 24.

Supreme Court.

May, '99, 27. Supreme Court. May 30, 1899.

Commonwealth ex rel. Busch v. Jones.

Act May 1, 1876, P. L. 68 — Public printing — Notice — Mandamus.

The public printer is a contractor, subject to the direction of the superintendent of printing and bound to obey the legal orders of that office; and, on receipt of an order from the superintendent, the printer is not bound to inquire whether that officer was duly authorized to issue the said order.

The superintendent is not authorized to issue an order for printing, unless the same shall be directed in writing by the executive or head of the proper department; but the printer receiving an order from the superintendent has a right to assume that the superintendent has been duly authorized to issue it, and this right is not destroyed by the facts that a few days before receiving such an order, the printer received a direction to do the same work from subordinates in an executive department, with which order he did not comply.

Appeal of Clarence M. Busch, from the judgment of the Common Pleas for Dauphin County, refusing a mandamus commanding Thomas M. Jones, superintendent of public printing and binding to audit and certify a certain bill for publishing a pamphlet ordered by the General Assembly.

Clarence M. Busch, the relator, filed a petition setting forth that he has been the public printer for the Commonwealth of Pennsylvania for the term of four years, from July 1, 1893; that the houses of Legislature passed an Act, March 1, 1897, providing for the printing of 15,000 extra copies of a pamphlet, entitled, "The Diseases and Enemies of Poultry," which had been prepared by the department of agriculture with such additions and changes as the auditor saw fit; that in accordance with said Act the relator was directed by Thomas Robinson, then superintendent of public printing to print said 15,000 copies; that relator executed the order, and presented his bill on July 19, 1898, to Thomas M. Jones, then superintendent of public printing and binding and requested that it be audited and certified; that Jones refused to so audit and certify whereupon the auditor-general refused to draw a warrant for the amount of the bill or any part thereof. The petition prayed "that an alternative mandamus may be issued, directed to the said Thomas M. Jones, superintendent of public printing and binding, directing and commanding him to audit said bill and to certify the same, if the amount of the same is found to be correct and in accordance with the contract of your petitioner with the Commonwealth of Pennsylvania, to the auditor-general of the State of Pennsylvania, to the end that the money due the said contractor, your petitioner, for executing said public printing and binding, in conformity with the resolution of March 9, 1897, may be paid by the State treasurer on a warrant drawn on him by the auditor-general of the Commonwealth of Pennsylvania, or to show cause why he, the said Thomas M. Jones, superintendent of public printing and binding, should not audit said account and issue said certificate for the purpose aforesaid."

An alternative mandamus was issued to which Jones made return, inter alia, denying personal knowledge of the circumstances attending the ordering and printing the pamphlet in question and praying that strict proof be made and that he believed the bill to be fraudulent. The relator replied similiter and issue to part of the answer and demurred to part. The case came up for hearing, before SIMONTON, P. J., and MCPHERSON, J., by whom the facts were found as set forth in the following opinion delivered by MCPHERSON, J.:

"This proceeding comes before us upon petition, answer and testimony. The facts, which are not in dispute, are as follws:

"1. Clarence M. Busch, the relator, was the public printer during the four years from July 1, 1893, to July 1, 1897. His contract was awarded under the Act of 1876, P. L. 68, which contains the rules under which the printer is chosen and the details of his work are governed. The terms of this statute are controlling in the present controversy.

"2. Two of the officers in the department of agriculture are the economic zoologist and the State veterinarian, provided for by section 4 of the Act of 1895, P. L. 17. In 1896 and 1897, Leonard Pearson was the State veterinarian and B. H. Warren was the economic zoologist. Neither was the head of a department, but both occupied positions subordinate to the secretary of agriculture. During the period named, the secretary was Thomas J. Edge.

"In 1896, Messrs. Pearson and Warren prepared a pamphlet, called Bulletin No. 17, relating to 'The Diseases and Enemies of Poultry,' which was issued by the department of agriculture and printed at the expense of the State. Thirty-five hundred copies were printed, and the publication seems to have been well received. The edition was soon exhausted, and there were many demands for additional copies. Instead of reprint-

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ing the pamphlet by an order from the secretary, it was decided to ask the Legislature to authorize the reprint; and this request was accordingly made. The Legislature consented, and in March, 1897, the following joint resolution was duly passed and approved by the governor:

"'March 1, 1897.

"'Resolved (if the Senate concur), That there shall be printed at the earliest possible date, in pamphlet form, fifteen thousand copies of Bulletin No. 17, of the department of agriculture, entitled, 'The Diseases and Enemies of Poultry,' with such additional matter and changes as the authors may deem necessary to more fully explain this important subject; five thousand for the use of the Senate and ten thousand for the use of the present members of the House of Representatives: Provided, That the authors shall receive no extra compensation for preparing, writing, editing, proof reading, revising and indexing this pamphlet.

"'A. D. FETTEROLF,

"'Resident clerk of the House of Representatives.

"'The foregoing resolution concurred in:

"'In the Senate, March 2, 1897.

"'E. W. SMILEY,

"'Chief Clerk of the Senate.

"'Approved the ninth day of March, A. D. 1897.

"'DANIEL H. HASTINGS.'

"4. No order was issued by the chief clerks of the two houses to the superintendent of public printing, as is required by sections 4 and 20 of the Act of 1876, when printing is to be done for the Senate or House of Representatives; neither was an order for the reprint signed by the secretary of agriculture, as is required by the same sections when printing is to be done for that department. [The machinery was set in motion by two unauthorized persons.] (Assignment of error 1½). On April 6, the following paper was prepared:

"'Harrisburg, Pa., April 6, 1897.

"'Superintendent of Public Printing and Binding:

"'Furnish the following as per resolution approved March 9, 1897, relative to Bulletin No. 17, on Diseases and Enemies of Poultry, etc. Make type pages smaller and double leaded as directed; special paper cover, uncut edges, and illustrated as directed by the authors.

"'LEONARD PEARSON,

"'State Veterinarian.

"'B. H. WARREN,

"'Economic Zoologist.'

"This paper was delivered by Dr. Warren to Mr. Busch, and by Mr. Busch to the superintendent of public printing, who afterwards signed the following order:

"'Clarence M. Busch, State Printer:

"'Harrisburg, Pa., April 12, 1897.

"'You will furnish the following for the use of the agricultural department, and charge the same to the Commonwealth in the general account for public printing and binding.

"'THOMAS ROBINSON,

"'Superintendent Public Printing and Binding.

"'As per resolution approved March 9, 1897, relating to Bulletin No. 17, on Diseases and Enemies of Poultry, etc. Make type page smaller and double lead as directed; special paper cover, uncut edges, and illustrated as directed by the authors.'

"5. No manuscript or other material for the reprint was furnished by Messrs. Warren and Pearson to the superintendent, but all material went directly into the hands of Mr. Busch, and the proof was returned for correction to the authors, and not to the superintendent. The only new material furnished by Dr. Pearson was two water colors, of which plates were prepared and used; the rest of the voluminous additions to the original pamphlet were prepared or compiled by Dr. Warren. He ordered the numerous illustrations, and bestowed much labor and attention upon this feature of the volume. The illustrations are mainly colored lithographs, prepared and printed by a firm in Rochester, New York. The stones upon which the work was done were not delivered to the Commonwealth, but remained with the firm and have probably been ground off and used for other printing. The impressions were made by machine, not by hand-press work. The size of the printed page does not correspond with the size prescribed in section 19 of the Act to 1876. The page there prescribed contains about nineteen hundred ems, while the page in the reprint contains only about twelve hundred ems. The relator contends that the superintendent was empowered to make this change, but no provision of the statute was pointed out that sustains the contention. Section 20 permits the executive and heads of departments to exercise a reasonable discretion as to the style of execution, but the superintendent is not named in this grant of power.

"6. The number of pages in the original pamphlet is one hundred and twenty-eight, and it contains thirty-five black and white illustrations, most of them being small. The reprint contains eight hundred and sixty-six printed pages, and has one hundred and three additional illustrations, of which ninety-five are full-page colored lithographs. The cost of thirty-five hundred copies of the original pamphlet was $488.24. The bill now presented is for the sum of $55,662.85, of which $2325.46 is for composition, press-work, stitching, etc., while $53,337.39 is for the work done upon the illustrations.

"A considerable part of the letter-press, and a good many of the illustrations, in the additional matter, are not relevant to the subject, and should not have been allowed to appear in a book on the Diseases and Enemies of Poultry.

"DISCUSSION.

"The writ of mandamus can only be used to

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enforce a clear legal right, for which there is no other adequate remedy. We hesitate to say, that the relator has shown such a right, and upon this ground alone we might refuse relief. If one considers the positive commands of the Act of 1876 concerning the method of ordering the work to be done by the State printer, and also concerning the method of doing the work, and if it is then observed that these commands were either disregarded or disobeyed by the relator in several particulars, his right to mandamus can hardly be described as clear. [He violated the letter of the statute in several respects.] Second assignment of error.) And while it is only fair to add, that the excuses for some of these violations may perhaps be equitably sufficient, nevertheless the excuses appeal rather to one's sense of fairness than to the relator's legal right under the strict terms of the law.

"We pass this point, however, for there is another position that seems to us to be decisive of the controversy; and, if we are correct in the view we take of the matter, the relator has no legal right, doubtful or otherwise, to the money now claimed. Section 20 of the Act of 1876 expressly provides: 'That the superintendent of public printing and binding shall receive no order for the printing and binding of any papers, documents, blanks or miscellaneous work, unless the same be in writing, signed by the executive or head of the proper department; the order shall contain a particular description of the work and material, and the provisions of this Act shall embrace the chief clerks of the Senate and House of Representatives.' [It is clear from the foregoing findings, that the so-called order to the superintendent of public printing, upon which this work was done, is drawn in distinct violation of this provision.] (Third assignment of error.) The paper is not signed by the executive or by the head of any department, but by two subordinates; and it does not contain a particular, but an obviously inadequate description of the work and material. It simply refers to the pamphlet that is to be reprinted with additions and changes, but does not specify what is to be added or changed. No addition or change is particularly described. The pages are to be 'smaller,' but the new size is not stated; it is to be 'as directed' by some person not named. The cover is to be 'special,' whatever that may mean; and something (the grammatical connection is obscure), is to be 'illustrated as directed by the authors.' The changes and additions permitted by the Legislature were in the matter of the pamphlet, but of these there is no indication whatever, except so far as the word 'illustrated' may be taken to suggest, that prints of some kind are to be used. Not a page of manuscript, not a copy or a description, vague or precise, of a single proposed illustration, accompanied the paper; and there is no particularity otherwise in describing the work that the authors had in view. It may not be necessary that the manuscript of a proposed change or addition should in all cases be prepared, or that the illustrations should be indicated by sketches or drawings, before the superintendent issues his order to the public printer; but, in the absence of the manuscript or of the drawings, it is more imperative that 'a particular description of the work and material' should be furnished to the superintendent. He must have it before he can lawfully proceed. It is impossible to lay down rules for his guidance in determining when a description is sufficiently particular. It must be conceded that the situation may sometimes be delicate, requiring tact and good judgment; but he must obey the law, and must guard the interests committed to his care, even if friction and difficulty do occasionally arise. [It is a violation of the statute to dispense with the positive command that a particular description shall be contained in the order; and in this instance the law was violated.] (Fourth assignment of error.)

"There is force in the relator's contention that he was not bound to inquire what kind of order came into the hands of the superintendent of public printing, and that the public printer's concern is simply with the orders that he may receive from the superintendent. It was no part of his duty, he avers, to see that the law was complied with by the persons that gave orders to the superintendent; neither was he bound to exercise a censorship over the manuscript that came into his own hands, and to decide whether it contained irrelevant matter, or was too profusely or too expensively illustrated. We are disposed to agree with this position. If the printer does not know the contents of an order lodged with the superintendent, he is not bound to inquire; the difficulty here is, that the relator had knowledge of the particular paper now being considered. It was delivered to him, and he knew that it was signed, not by the head of a department, as required by the act, but by two subordinates, who had no legal power to bind the State by such a paper. He must have known also that it contained no particular description of additions and changes, and he cannot escape the consequences of his knowledge upon these two points. He was bound to take note of the commands of the statute; and, so far as he knew that these commands were being disobeyed, it was his duty to refuse compliance. This is the fundamental defect in his case, and it is not cured by the fact that he received afterwards a formal order from

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the superintendent, based upon the illegal paper and merely repeating its contents.

"It may be seriously questioned also whether the formal order to the relator, signed by the superintendent, did not, upon its face, show that it, too, was not in compliance with the law. The order was not accompanied by the material which the printer was to reproduce, and while (as has been already said), this may not be always necessary, and may sometimes be impossible, it is certainly a desirable practice. Here there was not a line of manuscript, and no indication whatever of the number and character of the illustrations that were to appear in the reprint; but the whole matter was turned over by the superintendent to the authors—mainly to Dr. Warren, who was allowed to do exactly as he pleased. Whatever may be meant by 'a particular description of the work and material,' which the Act requires the order to contain, it certainly does not mean that the superintendent may abdicate his functions entirely, and give unchecked discretion to another person. The superintendent must contain control of the transaction, and to this end both manuscript and proof should at least pass through his hands, so that he may know what is being done. Evidence was offered at the trial—and we find the fact to be—that in numerous instances no such practice was followed, but important and expensive books were printed without the slightest supervision by the very officer appointed to exercise control. If this has grown to be a custom, it is an evil custom, contrary to the statute, and should be abolished. It cannot justify one more illegal act.

"The result of such surrender of the superintendent's right of control is vividly illustrated in the case before us. Here is a book, beginning in a small pamphlet on 'The Disease and Enemies of Poultry,' but now enlarged into a portly volume, profusely illustrated and full of irrelevant matter. No doubt the Legislature used a loose phrase when they authorized such additions and changes 'as the authors may deem necessary'; but they made their meaning sufficiently clear by adding immediately, 'in order to more fully explain this important subject.' It is difficult to understand how the 'enemies of poultry' in Pennsylvania can be made to include the buzzard, which Dr. Warren assures us 'does not, as some persons affirm, disturb domestic fowls, and rarely . . . . destroys the eggs of poultry'; or the Mississippi kite, of which only one specimen has ever been found in the State, and which "does not visit the poultry yard'; or the swallow-tailed kite, which 'feeds principally on grasshoppers, beetles, caterpillars, small snakes, lizards and frogs,' and 'never was known to disturb poultry.' The fish-hawk finds a place also, although the author's opinion is, that 'these birds never touch other food unless they are unable to catch fish . . . . (and) do not, as some farmers believe, disturb, domestic fowls'; and room, too, is made for the barn-owl, although it 'never commits depredations in the poultry yard,' and for the long-eared owl, although it 'never disturbs domestic fowls.' These are only samples. The curious will find superfluous information about the blue-jay, the shrike, the blackbird and several aquatic birds of the heron family. There are paragraphs about the objectionable habits of the English sparrow, the increase of rabbits in Australia, and the fashion of wearing the plumage of song birds in the head-dress of women. The hibernation of certain mammals receives some attention, while several pages are devoted to the extermination of the bison, the elk, the beaver and the wolf, and the disappearance of the wild pigeon. Rabbits are not usually classed among the enemies of poultry, but they take up two pages of this volume, sandwiched between the squirrel and the fox. There is a vivacious description of a coon hunt, and this part of the volume closes with twenty-six pages of what may be called a sportsman's guide to various sections of the State, describing the various haunts of game birds and fishes, and containing some reference to the hotel and railroad accommodations that may be expected. Some of the illustrations exhibit a like irrelevancy, although the examples are not so numerous. One print is a typical example of the scenery along the Susquehanna river, followed by an excellent impression showing the Lewistown Narrows on the Pennsylvania Railroad. A scene along an unnamed stream in the mountains probably finds the reason for its existence in the title —'Where Foxes Rove,'—but one is at a loss to imagine why the picture of a trout fisher, absorbed in the possibilities of an inviting rapid on Penn's creek, should have adorned the pages of a book on the Diseases and Enemies of Poultry.

"There is other desultory and inappropriate matter in the book, but enough has been cited to show that the surrender of the superintendent's power of control led to a flagrant abuse. The instance is conspicuous enough to exhibit with clearness the possible consequences of relaxing the statutory supervision, and it is for this reason alone that we have referred to some parts of the book. But we do not put the decision in any measure upon the contents of the volume. We rest it wholly upon the facts, that the original paper signed by Messrs. Warren and Pearson did not comply with the Act of 1876, and that the relator knew (or must be held to have known), that the paper was thus defective. [If he has any

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claim to be paid for this work, he must address himself to the Legislature and not to the Courts. Of legal right, we think the case is barren.] (Fifth assignment of error.) Whether he has a moral or equitable claim to the consideration of the Commonwealth, is not within our province to decide.

"Without prolonging the discussion, we conclude that [the relator has no legal claim to be paid the account in question]; (Sixth assignment of error,) and we therefore direct the prothonotary to enter a decree refusing the mandamus, and awarding costs to the defendant.

"Exception to the relator."

The relator took this appeal, assigning as error, inter alia, the portions of the decision above enclosed in brackets and the refusal to issue the mandamus.

Henry F. Walton and *W. U. Hensel*, for appellant.

What is the notation of law upon which the Court below laid stress?

It is admitted that:

(1) The Legislature ordered the work and 15,000 copies of it.

(2) The Legislature also directed that it should contain such additional matter as the authors may deem necessary to more fully explain this important subject.

(3) The authors had previously notified the Legislature that the enlarged work "will show the true life histories of the birds and mammals of which, at the present time, so many diverse opinions are entertained."

(4) The authors had also notified the Legislature that the work would be illustrated.

(5) The joint resolution authorizing the publication was adopted by both houses and approved by the governor.

(6) The resolution was then certified by both legislative clerks.

(7) The authors of the work, to whom the Legislature committed the work of enlarging and changing it, then made their requisition upon the superintendent of public printing.

(8) The superintendent sent the original document to the contractor for public printing with certain specific instructions as to style of printing which, it is admitted, he followed.

(9) If the contractor had not proceeded at once to print it as directed by the superintendent, the Commonwealth's officers could have sent the work elsewhere and charged the excess of costs against him and his bondsmen.

The Act and order were sufficient authority for the printer's action.

It is true the book was enlarged from 128 to 866 pages; while the original was not illustrated, the reprint was ornamented with "a very large number of expensive colored plates." But, as we have shown, these changes were made, first, by the authority of the Legislature; second, by the act of the authors, to whom the subject was committed by the Legislature; and, third, by the order of the superintendent of public printing, who commanded the State printer not only to execute the work in accordance with the resolution of the Legislature, "with such additional matter and changes as the authors may deem necessary to more fully explain this important subject," but to furnish it in smaller pages, "double-leaded with special paper cover, uncut edges, and illustrated as directed by the authors."

Considerable stress is laid by the learned Judge on the fact that the order, or requisition, by Drs. Pearson and Warren upon the superintendent of public printing, passed through the hands of Mr. Busch. It will be noticed, however, from the testimony, that Mr. Busch, instead of acting upon this order, submitted it to the superintendent of public printing, Robinson.

Because the responsibility of issuing orders for printing lay with him, he, in all cases, was the medium through which orders from the departments passed to the contractor; so that the fact that the order originally was submitted to Busch has no significance whatever, in view of his subsequent conduct in referring the matter to Superintendent Robinson.

"The presumption always is, the Legislature does not intend to violate the Constitution, and this presumption controls the construction in doubtful cases."

McPherson, J., in Hartman *v.* Weltmeyer, 8 Dist. Rep. 224.

It seems that an extension of the same principle to the Act of the Legislature, the executive and the superintendent of public printing in this case must resolve all doubts in favor of the petitioner's position.

John P. Elkin, attorney-general, (*Frederic W. Fleitz*, deputy attorney-general, with him), for appellee.

The contention of the Commonwealth is that the claim of the appellant cannot be sustained under the authority of law for the following reasons:

1. The concurrent resolution authorizing the republication of Bulletin No. 17 on "The Diseases and Enemies of Poultry," did not warrant or authorize the State printer in the publication of an exhaustive and illustrated treatise on the several species of birds, insects and animals found in our State, such as is contained in the new volume for which he now seeks to recover so large an amount from the Commonwealth. The publication was

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therefore made without authority of law and appellant cannot recover.

2. The secretary of agriculture, or anyone acting for or representing him, did not issue an order of any kind to the superintendent of public printing and binding, authorizing the State printer to publish such a book, and the work was done without legal warrant, and therefore a writ of mandamus will not lie to enforce claim of appellant.

3. The superintendent, when he signed the order presented to him by the State printer for the republication of Bulletin No. 17, as authorized by the concurrent resolution, did not authorize or warrant the State printer in the printing and publication of an exhaustive treatise containing upwards of 1000 pages, and illustrated by expensive engravings and lithographic work.

4. The appellant cannot rely upon the order issued to him by the superintendent of public printing and binding, under the circumstances, for the reason that it was defective and insufficient, inasmuch as it did not contain any particular description of the scope and character of the work to be done and material furnished for the new publication.

5. The appellant having received this order from the economic zoologist, and having delivered the same to the superintendent of public printing and binding, he is therefore affected with notice of the irregularity and illegality thereof, and having proceeded under such defective authority, is bound thereby.

6. The appellant was bound to take notice of the concurrent resolution authorizing the republication of Bulletin No. 17, and was therefore affected with notice that the order issued to him by the economic zoologist, and afterward approved by the superintendent of public printing and binding, did not authorize or warrant the publication of an exhaustive treatise on the subject of "Diseases and Enemies of Poultry," for which he now presents a claim against the Commonwealth.

7. The Act of 1876 prescribes the size of the pages for which the State printer may make a claim for public printing done for the heads of departments, and, inasmuch as the size of the pages and the number of ems contained in each page of the new publication are very much smaller than the law requires, there is a clear violation of the law in this respect, and hence appellant is not in position to assert his claim against the Commonwealth.

8. The evidence shows that the appellant did no lithograph work, no engraving of any kind upon stone or other material, no designing, no lithographic printing; that he performed none of the processes for preparing and completing the illustrations used in the work, and he cannot charge for such various processes according to the rates contained in the schedule of the Act of 1876. The rates for furnishing such complete plates, not being embraced in the schedule of the Act of 1876, it was the duty of the public printer, under the provisions of the said Act, to agree with the superintendent of public printing and binding upon a rate to be charged thereior. This was not done and the amount he claims for such work is unreasonable, excessive and not warranted by law.

The evidence shows that the petitioner proceeded in entire disregard of almost all the provisions of the Act of Assembly relating to public printing and binding; that he acted without legal authority; that he ignored the plain mandate of the resolution which authorized the republication of Bulletin No. 17; that while he had printed the original pamphlet at a cost of $488.24, he prepared the new book without consultation with the head of the department, whose duty it was to issue the order for the republication of the original pamphlet, and added many hundred pages of new matter and almost a hundred illustrations without notice to the superintendent of public printing and binding, and now seeks to charge the State with a total cost of $57,666.85 without legal warrant for so doing. The Court below has refused to aid the appellant in his effort to secure this large sum of money from the Commonwealth, and it is respectfully submitted that this Court should sustain the position so ably stated by the Court below.

July 19, 1899. FELL, J. The Act of May 1, 1876, P. L. 68, was passed to carry into effect the provisions of sec. 12 of Art. 3 of the Constitution in relation to public printing. The method provided by the Act, so far as it need be considered in this case, is briefly this: Every four years the secretary of the Commonwealth receives proposals for executing the public printing, and allots the printing to the lowest bidder; the governor appoints a superintendent of public printing, whose duty it is to receive and take charge of all reports made by heads of departments to the governor, and to have them printed, and to arrange and supervise the printing of all matter ordered by the Legislature to be printed. The superintendent of public printing is the head of a department, and he has the entire supervision of the work done by the public printer, who is a contractor merely. He is given the power, if the public printer fails in any respect to comply with the terms of his contract, to employ another printer to do the work, and to charge the excess of cost to the contractor.

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The 20th section of the Act provides that no printing, except laws, journals of the houses, the volumes of legislative and executive departments and the reports of the heads of executive departments, shall be printed by the public printer unless previously ordered or authorized in writing by the superintendent of public printing, and that no book shall be published at the expense of the State or additional copies of any book be furnished by the public printer unless by virtue of express authority of law. The executive and the heads of departments are permitted to exercise a reasonable discretion as to the style of printing ordered, and the superintendent of public printing is directed to receive no order for printing "unless the same shall be in writing and signed by the executive or the head of the proper department; the order shall contain a particular description of the work and material, and the provisions of this Act shall embrace the chief clerk of the Senate and House of Representatives."

In 1896 two officers of the department of agriculture, Dr. Pearson, State veterinarian, and Dr. Warren, economic zoologist, prepared a pamphlet known as Bulletin No. 17, relating to "The Diseases and Enemies of Poultry." Thirty-five hundred copies of this pamphlet were printed at the expense of the State and issued by the department of agriculture. The edition was soon exhausted, and there were numerous demands for additional copies. In transmitting the bulletin it was stated that the State zoologist had in the course of preparation additional matter, and in a few months would be able to prepare a report which would "show the true life history of the birds and mammals, of which, at the present time, so many diverse opinions are entertained." Attention was called to the fact that the value of poultry and eggs annually produced in the State amounts to $20,000,000, and that the loss to the industry by disease and predatory animals amount to $2,500,000 annually, and that there was a widespread demand for information on the subjects treated of in the bulletin; and it was stated that if authority were given to prepare documents on different topics of natural history they would be "embellished with numerous illustrations."

With this knowledge and these recommendations before it, the Legislature, with the approval of the governor, directed the printing of 15,000 copies of Bulletin No. 17, with such additional matter and changes as the author might deem necessary, the form of the resolution being: "Resolved (if the Senate concur) that there shall be printed at the earliest possible date, in pamphlet form, 15,000 copies of Bulletin No. 17 of the department of agriculture, entitled, 'The Diseases and Enemies of Poultry," with such additional matter and changes as the authors may deem necessary to more fully explain this important subject," etc.

On the 12th of April, 1897, the State printer received from the superintendent of public printing the following order:

"You will furnish the following for the use of the agricultural department, and charge the same to the Commonwealth in the general account for public printing and binding.

"THOMAS ROBINSON,
"Supt. Pub. Printing and Binding.

"As per resolution approved March 9, 1897, relating to Bulletin No. 17 on Diseases and Enemies of Poultry, etc. Make type page smaller and double lead as directed; special cover, and illustrated as directed by the authors."

In pursuance of this order 15,000 copies of the bulletin were printed. The changes and additional matter enlarged the original publication form 126 to 866 pages, and the reprint contains 103 additional illustrations. It is not disputed that the work was properly done, or that the prices charged are in strict conformity with the contract. The mandamus was refused on the ground that no order for the printing had been given to the superintendent of public printing, either by the chief clerks of the two houses, as required when printing is done for the Senate or the House of Representatives, or by the secretary of agriculture, as required when printing is done by that department, and that of this fact the printer had knowledge. The ground for imputing knowledge to the public printer that the superintendent of public printing had not been properly authorized to issue the order of April 12 is that on April 6, six days before the date of that order, an order for the printing of the bulletin, signed by Dr. Pearson and Dr. Warren, had been sent him. He did not act on this order, but took or sent it to the department of public printing and received the proper order, on which he did act, from the head of that department. The decision is based wholly upon the facts that the order of April 6, signed by Drs. Pearson and Warren, did not comply with the Act of 1876, and that the relator knew, or must be held to have known, that the paper was thus defective.

There is no evidence that the relator knew on what order the superintendent of printing acted in directing him to print the bulletin. We have the bare facts that the relator received the order signed by Drs. Pearson and Warren; that as it was an order from a department with which he had no relation, and which was not authorized to order him to do any printing, he declined to act upon it; that he sent the order to the department of public printing, and in the regular course of business received from that department an order which was in all respects regular and complete,

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and under which he did the work. In these facts we find no ground for the conclusion that the relator knew, or must be held to have known, that the order which he received from the department of printing was founded on a defective order from another department. As before stated, the public printer is a contractor, subject to the direction of the superintendent of printing, and bound by his contract to obey the orders of that officer. He cannot be held to the knowledge that a State officer, the head of a department authorized to order him to do certain work, has himself been properly authorized by another department to issue the order, and he is under no duty to inquire. In such matters there must be a beginning and an end to responsibility. His duty is that of obedience to the orders of the superintendent of public printing in all matters provided for by his contract. The fact that he received the order from Drs. Pearson and Warren, and sent it to the department of printing, is not ground for the assumption that he knew that that department had acted on a defective order in issuing an order to him. The presumption is in favor of the regularity of official conduct, and he might well have assumed that the superintendent of public printing had procured, as he should have done, an order signed by the superintendent of agriculture before directing the work to be done.

If there had been fraud or collusion the case would be different, but there is not the slightest evidence or even suggestion of either. The only irregularity was that the order to the department of printing was not signed by the chief of the department of agriculture, but by his subordinates. Of this fact we do not find that the relator had actual knowledge, or that there is ground for imputing knowledge to him. The Legislature ordered the printing to be done. It was done in a satisfactory manner, and apparently, as far as the relator was concerned, in the regular and orderly course of business. The Commonwealth got what it had ordered. If the cost was unduly increased, it was because unlimited discretion was given to the authors to make changes and additions. The consequences of such loose and inconsiderate legislation should rest where they belong, and not be visited upon a contractor who appears to have acted faithfully.

The decree is reversed, with costs; and it is ordered that a peremptory mandamus be issued.

H. B.

Oct. '98, 62, 75. Supreme Court. November 1, 1898.

Heasley v. Heasley.

Beneficial associations—Certificate of membership—Illinois law—By-law—Act June 5, 1883, P. L. 80.

A member of a beneficial association has a right to change the beneficiary named in the certificate at his will upon surrender of certificate. The provisions in the by-laws of the association in case of loss or destruction of the certificate are for the protection of the association itself and do not create any right in the beneficiary or any other person by the mere possession of the certificate.

Appeal of Jeremiah H. Heasley, Jr., from the decree of the Common Pleas No. 2, for Allegheny County.

In the Court below a bill for an interpleader was filed by the Northwestern Masonic Aid Association against the parties to this appeal, and issue directed thereupon between the said Jessie A. Heasley and Jeremiah H. Heasley, Jr., to ascertain the title or right to the benefit under a certificate of membership in the said association, in which issue the said Jessie A. Heasley was directed to be plaintiff and Jeremiah H. Heasley, Jr., defendant; the answer of the said Jessie A. Heasley to the bill of interpleader to stand as plaintiff's bill in the issue, and the answer of Jeremiah H. Heasley, Jr., to the bill of interpleader to stand as his answer in the issue.

The bill of interpleader averred, inter alia, that Jeremiah H. Heasley became a member in the Northwestern Masonic Aid Association in February, 1879, and his certificate made the benefit payable after his death to his son Pitt O. Heasley, or the legal representatives of the said Jeremiah H. Heasley.

The by-laws of said association, Art. IV., sec. 5, provide: "That any member may secure a change of the beneficiaries named in his certificate upon surrendering said certificate to the secretary for cancellation, and stating to him in writing to whom of said classes of beneficiaries, mentioned in articles of incorporation, he desires such benefits paid."

November 29, 1879, Jeremiah H. Heasley applied for change of beneficiary, making the benefit payable to his son Pitt O. Heasley, if living; if not, to the devisees of said son, or if no will to said son's legal heirs; and issue of new certificate accordingly dated December 20, 1879.

The by-laws of the association provided for the steps to be taken in case of the loss or destruction of a certificate before a new one could be issued. Heasley made affidavit of March 18, 1890, that he had lost his certificate and made application for a new one, making the benefit payable to

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his son Jeremiah H. Heasley, plaintiff in the bill or to the heirs at law of the said Jeremiah H. Heasley, the beneficiary. Jeremiah H. Heasley, the elder, died January 10, 1896.

Jessie A. Heasley, widow of Pitt O. Heasley, made claim as beneficiary under certificate of December 20, 1879, and that she is the owner of and holds possession of said certificate and that Pitt O. Heasley died on February 10, 1889, having devised and bequeathed his whole estate to her.

Jeremiah H. Heasley, Jr., has made claim as beneficiary under certificate of March 22, 1890.

Under the certificate in question the beneficiary is entitled to $5000, and the association has in its posession said sum of $5000 and is a mere stakeholder, etc., etc.

The answer of Jessie A. Heasley to the bill alleged that the association was a life insurance association, not a beneficial society and that the certificate, in which her husband, Pitt O. Heasley, was the beneficiary, was his property and at his death passed under a devise of all his property to the respondent and that the respondent and her husband before his death had made payments as required by the certificate on account.

The Court found as facts, that the assessment on the policy had been paid, first, by the beneficiary, Pitt O. Heasley, and subsequently by the widow for eleven years and afterwards by Jeremiah H. Heasley, Jr., for six years and the fund was divided as follows: 11-17 to the defendant in the bill and 6-17 to the plaintiff in the bill. This was the subject of the fourth assignment of error.

The Court found that "the by-laws and certificates place the contract between the association and the members on the footing of a life insurance. . . . . The association was really doing business as an insurance company on the assessment plan under cover as a beneficial association." (Second assignment of error.)

Appeals were taken from the decree of the Court by both plaintiff and defendant.

Assignments of error by Jessie A. Heasley, respondent, were to the decree of the Court dividing the fund as above stated. (First, second and third assignments of error.)

C. Heydrick, (*C. I. Heydrick* with him), for Jeremiah H. Heasley, appellant.

This association being purely beneficial, the beneficiary named in one of its certificates has no vested rights thereunder while the member upon whose death the benefit is payable lives.

Masonic Mut. Ben. Soc. *v.* Burkhart, 110 Ind. 189.
Thomas *v.* Grand Lodge, 12 Wash. 500.

And the fact that the member may have delivered the certificate to the beneficiary does not affect the right of the member to make a new appointment as often as he may desire.

Beatty's Appeal, 154 Pa. 484.

Nor is it material that the beneficiary may have paid the assessments.

Fisk *v.* Equitable Aid Union, 20 WEEKLY NOTES, 290.
Byrne *v.* Casey, 70 Tex. 247.
Masonic Ben. Asso. *v.* Bunch, 109 Mo. 560.

The provision of the by-law for surrender of certificates in cases of change of beneficiary is designed for the protection of the association and may be waived by the association.

Nat. Mut. Aid Soc. *v.* Lupold, 101 Pa. 111.
Manning *v.* A. O. U. W., 86 Ky. 136.
Splain *v.* Chew, 60 Tex. 532.

If it be beyond the power of the insured to comply literally with the regulations a Court of equity will treat the change as having been legally made.

Grand Lodge *v.* Child, 70 Mich. 163.

The original beneficiary will not be heard to complain that change of beneficiary has not been made according to the rules of the insurer.

Martin *v.* Stubbings, 126 Ill. 387.

And this where first beneficiary has possession of certificate, and society makes change without compliance with its rules.

Grand Lodge *v.* Noll, 90 Mich. 37.
Grand Lodge *v.* Child, 70 Mo. 163.

The "devisees of said son" must be intended to be such persons, as under the law of the association, could be designated as beneficiaries. The appellee, not being within any of the prescribed classes, is not entitled to the benefit.

Palmer *v.* Welch, 132 Ill. 141.
Alexander *v.* Parker, 144 Id. 355.

A. L. Weil, (*C. M. Thorp* with him), for appellee.

In a policy of life insurance, the rights of the person to whom the insurance is to be paid become at once vested when the policy is delivered, and cannot be altered or affected except by his consent.

1 Bacon on Benefit Societies and Life Insurance, sec. 289.
3 Am. & Eng. Ency. of Law, (N. S.) 980.
Central Bank *v.* Hume, 128 U. S. 195.
Waltz *v.* Mutual Aid Soc., 5 Pa. C. C. R., 208.
Vollman's Appeal, 92 Pa. 50.
Brown's Appeal, 125 Id. 303.
Malone's Estate, 9 Ins. L. J., 767.

"A change of beneficiaries is necessarily forbidden by the foregoing rule, and an attempted substitution of a new for the original beneficiary will neither divest the latter's interest, nor confer any right upon the former."

3 Am. & Eng. Ency. Law, 935.

The Northwestern Masonic Aid Association was not a beneficial society and the certificate was a contract of insurance.

Sec. 6, Act of June 5, 1883, 1st Purdon, 1055.

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Berry *v.* Knight Templars' & Masons' Life Indemnity Co., 46 Fed Rep. 439.
Com'th *v.* Wetherbee, 105 Mass. 149.

The beneficiary in a membership certificate in a beneficial society acquires a vested interest if he so arranges with the insured and accordingly pays the assessments.

Maynard *v.* Vanderwerker, 30 Abb. N. Cas. 134 (N. Y.).
Smith *v.* National Benefit Society, 123 N. Y. 85.
Jory *v.* Supreme Council, 105 Cal. 20.

The association alone can raise the question whether the beneficiary designated is from the class specified in the charter of the company.

Johnson *v.* Knights of Honor, 53 Ark. 255.
Knights of Honor *v.* Watson, 64 N. H. 517.

May 23, 1899. MITCHELL, J. This is an interpleader between claimants to a fund brought into Court by the Northwestern Masonic Aid Association in discharge of its liability on a certificate of membership issued to Jeremiah H. Heasley, Sr.

The association is an Illinois corporation, chartered as a beneficial association, and it issued its certificate of membership in that capacity. By the law of Illinois such associations are not insurance companies. Prima facie this association therefore was a beneficial association, and it was so held in Northwestern Masonic Aid Association *v.* Jones, 154 Pa. 99, where it was said by THOMPSON, J., in delivering the opinion of the Court, "the purpose of the association was to secure pecuniary aid to the widow, orphans, heirs and devisees of deceased members. . . . . It is not an insurance company nor are these certificates, issued by it in the State of Illinois, contracts of insurance." The undertaking of insurance companies and of beneficial associations being alike to pay money after death their business inevitably runs upon closely allied lines, but the distinctive marks are pointed out with great clearness by our late brother CLARK, in Com'th *v.* Association, 137 Pa. 412. We have examined the evidence in the present case and are of opinion that it was not sufficient to overcome the presumptions from the charter of the association and the law of Illinois, nor to justify a disregard of the prior decision of this Court on the status of this association.

Heasley, Sr., as a member had a right to change the beneficiary named in his certificate at his will, upon the surrender of the certificate, or in case of its loss or destruction upon an affidavit setting forth the circumstances. These latter provisions were clearly for the protection of the association itself, and did not create any right in the beneficiary or any other person by the mere possession of the certificate. In 1890 after the death of his son Pitt, the first beneficiary, Heasley, Sr., procured a new certificate naming his son J. H. Heasley, Jr., as beneficiary, upon an affidavit that the first certificate was lost or destroyed and that he was unable to obtain it. It appears that in fact it was at that time in possession of the plaintiff, the widow of the first beneficiary, Pitt, but she had refused to give it up, and it was therefore true that Heasley, Sr., was unable to obtain it for purpose of surrender. The plaintiff's husband being a mere voluntary beneficiary had no vested right in the certificate or the money to become due upon it, which he could transmit to her by will or by possession of the instrument. When Heasley, Sr., exercised his privilege as a member to change the beneficiary and the association accepted his affidavit as a compliance with its by-law and issued the new certificate payable to J. H. Heasley, Jr., the latter's right attached and the widow of the former beneficiary had no standing to question it.

The learned Judge below divided the fund by an equitable proportion based on the payments of assessments by the parties respectively. But there was no basis for such division. So far as appears all the payments, during the life of Heasley, Sr., were voluntary, and could not interfere with his rights as a member. Had they been made under a contract with him, the case might have been different and an equity made out, but such contract is neither averred nor proved.

Decree reversed, and fund directed to be paid to appellant, J. H. Heasley, Jr. Costs to be paid by appellee.

APPEAL OF JESSIE A. HEASLEY.

Eo die. MITCHELL, J. This is a cross appeal from the same decree as No. 62, of October term, 1898, and is governed by the opinion in that case, filed herewith.

Appeal dismissed with costs.

W. D. N.

Feb. '98, 32. Supreme Court. March 13, 1899.

Wheeland v. Atwood, Defendant, Fessler, Garnishee.

Life insurance—Assignment of policy—Husband's interest in life of wife sustaining assignment to creditors.

A husband has an insurable interest in the life of his wife and may assign a policy thereon to a creditor.

C., wife of A., took out a policy on her own life, in the sum of $5000; she was then 43 years of age, with an expectancy of almost twenty-six years of life; she assigned the policy to her husband, who assigned to F., to whom he was indebted in the sum

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of $1900. F. had paid two premiums on the policy when C. died:

***Held*, that the circumstances did not show a mere speculation on C.'s life, and that F. was entitled to the proceeds of the policy.**

Appeal of Daniel A. Fessler, from the judgment of the Common Pleas for Lycoming County, in an attachment execution wherein Harrison Wheeland was plaintiff and Clarence Atwood defendant and the Mutual Life Insurance Company of New York and Daniel A. Fessler garnishees.

The plaintiff obtained a judgment January 22, 1896, against the defendant Atwood, and issued an attachment execution, summoning Fessler and the Mutual Life Insurance Company as garnishees.

On the trial of the issue arising out of the answers, the facts appeared as follows: On May 1, 1894, Mrs. Atwood took out a policy on her life in the sum of $5000, payable to her executors, administrators or assigns; she was then forty-three years of age and had an expectancy of life of about twenty-six years; on May 19, 1894, she assigned the policy to her husband, who on August 1 assigned the policy absolutely to Fessler, to whom he owned some $1900. Fessler paid two premiums on the policy, amounting to $218. On January 29, 1897, Mrs. Atwood died and the insurance company shortly afterwards paid the net amount of the policy, $4946, to Fessler. MAYER, P. J., directed a verdict for plaintiff, reserving the question of the right of the plaintiff to recover. Judgment was subsequently entered for the defendants non obstante veredicto. The plaintiff took an appeal to the Superior Court, which reversed the judgment of the Common Pleas and entered judgment for plaintiff, holding that Fessler was entitled only to the amount of his debt, and the premiums paid by him, with interest. See 42 WEEKLY NOTES, 178. The garnishee, Fessler, having obtained a special allocatur, took this appeal.

John J. Reardon, for appellant.

C. La Rue Munson, (with him *Otto G. Kaupp* and *Addison Candor*), for appellee.

July 19, 1899. GREEN, J. Under the assignment of the policy in question by Mrs. Atwood to her husband, Clarence Atwood, he became the absolute owner of the policy. In 1896 he was indebted to Samuel A. Fessler in the sum of about $1900. Being unable to continue the payment of the premiums, according to the testimony, and desiring to pay all the debt he owed to Fessler, he made an absolute assignment of the policy to Fessler, who paid the subsequent premiums accruing on the policy. There was nothing whatever in the testimony impugning the integrity of the transaction, or showing or tending to show, that it was a speculative transaction upon the life of Mrs. Atwood; on the contrary, it was the undisputed evidence that it was an assignment of the policy made for the purpose of paying the debt as far as it could, which the assignor owed to the assignee, and the policy itself in its original inception, was a good faith policy made for a legitimate and not a speculative purpose, and for that reason was assignable to anybody for a proper and lawful consideration. The interest of the husband in the life of his wife validated the policy, and her assignment of it to him gave him a good absolute title to it which he might dispose of for a lawful consideration, especially when he was no longer able to pay the premiums and could pay an honest debt with it. It was shown by the testimony of the agent of the life insurance company that Mrs. Atwood's expectancy of life at the time the policy was issued was 25 99-100 years, and that the amount of premiums that Fessler would have been obliged to pay if she had lived out her expectancy would have been about $4500. As the policy was for $5000, Fessler would have been a considerable loser in money if Mrs. Atwood had lived the full period of her expectancy. These facts bring the case within the ordinary class of cases of insurances by creditors upon the lives of their debtors, which are constantly sustained by the Courts.

In Grant's Admrs. *v.* Kline, 115 Pa. 618, such a policy was sustained. A debtor owed his creditor $743 and a policy was issued to the creditor at the instance of the debtor upon the life of the debtor for $3000. The debtor died within a year after the policy was issued and the insurance company paid the amount of the policy to the creditor as assignee of the policy. The administrators of the assured brought an action to recover all the money after the debt due the creditor and the premiums paid by him with interest had been deducted. It was contended there as here that the policy was a wagering policy and that the creditor had no insurable interest in the life of the debtor, but the Court below, and this Court, held otherwise, and decided that it was not a wagering policy, that it was a perfectly valid transaction, and that the discrepancy between $743, the amount of the debt, and $3000, the amount of the policy, was not so great as to invalidate it as a wagering policy.

In Corson's Appeal, 113 Pa. 438, a policy was obtained by a creditor upon the life of his debtor, who was his aunt. The debt was about $500 and the policy was for $2000. We held that the relationship was not close enough to sustain the policy on that ground, but that as creditor there was an insurable interest which was sufficient for that purpose. CLARK, J., delivering the opinion, said:

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"So also a creditor has an insurable interest in the life of his debtor," citing a number of cases. "In the case at bar the policy was $2000, the amount of the indebtedness was at that time undetermined, and therefore uncertain; it is since ascertained to have been between $500 and $750. Considering the character of their business relations, the unsettled condition of their affairs, the age of the subject of insurance, the probable amount of premiums which might accrue, the accumulation from interest, we could not say the transaction carries with it any inherent evidence of bad faith. The essential thing is, as stated by the learned Judge of the Court below, that the policy should be obtained in good faith, and not for purposes of speculation upon the hazard of a life, in which the insured has no interest. The case is materially different from Gilbert *v.* Moose, 13 WEEKLY NOTES, 489; the principles involved in that case are not drawn in question here."

But a still more emphatic illustration of this doctrine occurred in the case of Ulrich *v.* Reinoehl, 143 Pa. 238. There the debt was $99.51, and the policy was for $3000. The policy was taken out by the debtor in his own name and was immediately transferred absolutely to the creditor. The creditor paid all the premiums until the death of the debtor, which occurred in 1881, about four years after the date of the policy. An action was brought by the executor of the will of the deceased debtor against the creditor, who had received the whole of the insurance money, to recover the difference between the amount of the debt, and premiums with interest and the amount of insurance. The Court below submitted to the jury the question whether the transaction was speculative and wagering, or done with an honest intent to obtain payment of the debt. The jury found that it was done with an honest and not a speculative intent. The Court charged that all the circumstances should be considered, the age of the insured, his condition of health, the probable amount required to be paid by the creditor, and then that the jury should inquire, "whether considering all those matters the amount of insurance taken out to protect that debt was so disproportionate as to make the policy a wagering or speculative policy. If the jury find that it was not, that it was properly proportionate, fairly calculated to protect the debt, and no more, then the verdict must be in favor of the defendants." It had been testified on the trial that if the insured had lived out his expectancy the total amount of assessments which the creditors would have paid would be $2436.13, which with interest would have amounted to $4336.31. Upon appeal to this Court we sustained the ruling and after an elaborate discussion of the whole subject, in which the matter was considered in all its aspects, and the necessity for adopting a fixed and uniform rule for all cases was stated, we said: "We are of opinion that a creditor may lawfully take out a policy on the life of his debtor in an amount sufficient to cover the debt with interest, and the cost of such insurance with interest thereon, during the period of the expectancy of life of the assured according to the Carlisle tables."

In the present case the assured was forty-three years of age at the date of the policy and had an expectancy of almost twenty-six years. The amount of premiums to be paid with interest thereon would be at the end of the expectancy about $4500, which being added to the debt, $1900, and interest thereon, would result in a large loss to the creditor. In the case of McHale *v.* McDonnell* this rule was again asserted and followed. The debt was $700 and the policy was $2000. Our brother McCOLLUM, delivering the opinion, said: "In this case there was no evidence showing what the assured's expectancy of life was when the policy was issued or when it was assigned. There was nothing, therefore, in the disproportion between the amount of the policy and the alleged consideration for the assignment of it which would have warranted the Court or jury in denying to the plaintiff a recovery in accordance with his intention. Grant's Adm'r *v.* Kline was not overruled by Ulrich *v.* Reinoehl, 143 Pa. 238, or by Shaffer *v.* Spangler, 144 Pa. 223."

The foregoing decisions entirely dispose of the present contention. Gilbert *v.* Moose and its following cases are not applicable. They do not raise the same question. The case of Wegman *v.* Smith, 16 WEEKLY NOTES, 186, has no analogy to this. That was a mere speculative policy on the life of Mrs. Smith and was immediately turned over to Smyser, who paid five dollars for it. There was no bona fides whatever in it. It was a mere wagering policy which was made in the name of the husband to give it a seemingly lawful character, and it was transferred at once to one who had no interest in the life of either the husband or the wife.

For the reasons stated we are of opinion that the Common Pleas was correct in its judgment in this case, and the decision of the Superior Court was erroneous.

The judgment of the Superior Court is reversed and the judgment of the Common Pleas affirmed.

H. B.

(*) 38 WEEKLY NOTES, 348.

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Jan. '97, 45. Supreme Court. May 20, 1897.

Van Baman et al v. Leithiser, et al.

County commissioners—Erection of monument—Acts April 20, 1874, P. L. 65, April 19, 1895, P. L. 38 and May 22, 1895, P. L. 96—Constitution, Art. IX., secs. 8 and 10.

In proceedings for the erection of a monument to soldiers and sailors of the war of the rebellion, if the record show that the provisions of the Act of May 22, 1895, P. L. 96, have been strictly complied with, the mere averment in a bill in equity to restrain the execution of the contract for the erection of the monument by the county commissioners, that extravagance will be committed and that favoritism was shown in the selection of a particular artist, is insufficient to sustain the injunction.

A monument is not such a building as is contemplated by the provisions of the Act of April 19, 1895, P. L. 38. It may take the shape of a memorial hall or other architectural construction, but that is not the general use of the word and will not be presumed.

Art. IX., secs. 8 and 10, of the Constitution, and the Act of April 20, 1874, P. L. 65, are not violated where it is shown that the annual taxes levied by the commissioners for the year, together with the cash on hand in the county treasury, are in excess of the county's liability including the price of the monument.

Appeal of Edward Gallagher, from the decree of the Common Pleas of York County, in a proceeding in equity in which M. L. Van Baman et al., were plaintiffs, and Jacob Leithiser et al., commissioners of York County, together with appellant, were defendants.

A bill was filed by E. W. Spangler, Jere Carl, M. L. Van Baman and G. D. Lutman. By amendments allowed E. W. Spangler and Jere Carl withdrew as plaintiffs and Frank Geise, E. A. Hawkins, E. D. Bentzel and W. F. Ramsey were added to the record as plaintiffs.

The bill alleged that the plaintiffs were citizens and tax payers of the county of York; that the county commissioners had determined to erect a monument in memory of soldiers and sailors of the war of the rebellion under the Act of May 22, 1895, P. L. 96; that two of the defendants, Cunningham and Lutman, entered into a contract with another defendant, Gallagher, for the erection, by said Gallagher, of the monument for the contract price of $18,300; that the plaintiffs were informed and believe that said monument, according to said plan and specifications, could have been constructed for the sum of $13,000 by responsible contractors, who were ready and willing to contract therefor, and requested of the commissioners an opportunity to bid thereon; that subsequently the defendants adopted other plans for the monument which increased the cost to $23,500; that the plaintiffs, upon information and belief, averred that the said monument, according to the plans and specifications, could have been constructed for from $19,000 to $22,000; that the county commissioners, defendants, entirely disregarded the provisions of the Act of April 19, 1895, P. L. 38, which requires whenever county buildings are to be erected that the plans and specifications be submitted to the judges of the Court for their approval, nor did they "let the work by contract to the highest and best bidder and did not give the public notice required by the said Act of Assembly"; and that the said soldiers' and sailors' monument is a county building within the said Act of Assembly above referred to; and prayed for an injunction against the consummation of any contract by the county commissioners and the said Gallagher, defendants.

Upon hearing, the Court, BITTENGER, P. J., delivering an opinion, made perpetual the temporary injunction granted on the filing of the bill. This appeal was then taken, and assignments of error filed, inter alia, that the Court erred in not finding that the contract for the erection of this monument was made under and in pursuance to and after a full compliance with the provisions of the Act of Assembly of May 22, 1895, P. L. 97, (fifth assignment); in ruling that the commissioners were bound in contracting for the erection of the monument to comply with the provisions and requirements of the Act of the Assembly of April 19, 1895, P. L. 38. (Sixth assignment of error.)

The fourth and seventh assignments of error were that the contract was in violation of Art. IX., sec. 10 of the Constitution, and the Act of April 20, 1874, P. L. 65.

J. S. Black and *B. F. Fisher*, (*J. W. Heller* with them), for appellant.

The county commissioners acted in conformity with the Act of May 22, 1895.

When public officials have authority to act, the Court will not control them by an injunction in the exercise of their discretion as to the necessity of the act or the mode of doing it.

Beach, Modern Equity Jurisprudence, sec. 673.
Warfel *v.* Cochran, 34 Pa. 381.
City of Erie *v.* Reed's Ex'rs, 113 Id. 468.
Clinton School District's App., 56 Id. 315.

The Act of Assembly of April 19, 1895, entitled, "An Act to regulate the erection of county buildings," is not applicable in the case of a monument.

A monument is not a county building. Webster defines a building to be "a fabric or edifice constructed for use or convenience: as a house, a church, a shop."

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This definition has been adopted by the Supreme Court of Pennsylvania, in—

Church *v.* Allison, 10 Pa. 413.

A building "must be permanent, and designed for the habitation of men or animals, or the shelter of property."

Am. & Eng. Ency. of Law, Vol. 2, p. 601.

Bouvier, in his definition, describes a building as "an edifice, etc., designed for use in the position in which it is so fixed."

The action upon the part of the commissioners did not violate the requirements of the Constitution, Art. IX., or the Act of April 20, 1874.

Linn *v.* Chambersburg, 160 Pa. 511.
L. C. & N. Co.'s Appeal, 112 Id. 360.

This contract is entirely within the ruling of the following cases:

City of Erie's Appeal, 91 Pa. 398.
Rainsburg Borough *v.* Fyan, 127 Id. 74.
Wade *v.* Oakmont, 165 Id. 479.
Reuting *v.* Titusville, 175 Id. 512.

Henry C. Niles, (*James W. Latimer* with him), for appellees.

The agreement to pay the contractor was an increase of the indebtedness of the county and no provision was made for the payment thereof in accordance with the direction of the Constitution, Art. IX., sec. 10. or the Act of April 20, 1874.

When a contract made by a municipal corporation pertains to its ordinary expenses and is together with other like expenses within the limit of its current revenues and such special taxes as it may legally and in good faith intend to levy therefor, such contract does not constitute the incurring of indebtedness within the meaning of the constitutional provision limiting the power of municipal corporations to contract debts.

City of Erie's Appeal, 91 Pa. 403.
Brown *v.* Corry, 175 Id. 528.
Reuting *v.* Titusville, 175 Id. 512.

The commissioners were acting in a fiduciary character. They were trustees of the money and credit of the county. If they recklessly, improvidently or fraudulently undertook to give away the trust funds in their care, the Court had the power and it was its duty to strike down such a contract.

Chester County *v.* Barber, 97 Pa. 455.
Lancaster County *v.* Fulton, 128 Id. 48.

The mere fact that an architectural construction is not practical for use as such does not prevent it being actually a building.

July 15, 1897. STERRETT, C. J. This tax-payer's bill was brought to restrain the execution of a contract between appellant and the county commissioners for the erection of a monument under the Act of May 22, 1895, which provides, "that upon the petition of at least fifty citizens to the Court of Quarter Sessions of any county, ... for the erection or completion of a monument in memory of the soldiers and sailors of the late war, it shall be the duty of said Court to lay the petition before the grand jury, and, if approved by two successive grand juries and said Court, the county commissioners shall be authorized to erect, or complete any monument now partly erected, but not completed, and maintain at the county seat a suitable monument in memory of the soldiers and sailors of the late war of the rebellion from said county": P. L. 96.

All the conditions precedent to official action of the county commissioners, such as presentation of the petition, approval thereof by two successive grand juries and the Court, etc., were fully complied with before the contract was made. For reasons which sufficiently appear in the opinion of the learned president of the Court below a preliminary injunction was granted and by subsequent decree continued until final hearing. From that decree this appeal was taken by one of the defendants, Edward Gallagher, whose contention is that no sufficient ground for such injunction was shown.

One of the reasons assigned by the Court below in support of its decree is that the contract in question is invalid for want of compliance with the Act of April 19, 1895, P. L. 38, requiring county commissioners in the erection of "a Court house, jail or other county building," to let the work to the lowest and best bidder. This conclusion was made possible only by the learned Judge's assumption that the proposed monument is or will be a "county building" within the Act. In that he was clearly mistaken. The provisions of the Act have no application to structures such as that under consideration. In the Society of Cincinnati's Appeal, 154 Pa. 621, the meaning of the word "building,"—in clause of the Act of March 11, 1816, prohibiting the erection "of any sort of buildings" on part of Independence Square,—was considered by this Court, and in an opinion by our brother MITCHELL, it was held that the Washington monument, finally located in Fairmount park and recently dedicated with imposing ceremonies, was not a building within the meaning of said prohibitory clause. It was there said, "the proposed monument is not a building within the prohibited condition. A monument may take the shape of a memorial hall or other building, but that is not the general use of the word and will not be presumed. A statue on a pedestal even though the latter be large, is not a building in the proper meaning of the term." This construction of the word "building" is not only reasonable but in full accord with the general understanding; and, in the absence of a clearly

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defined intention to the contrary, it should be given controlling effect in the interpretation of the legislative will. No such contrary intent is apparent here and we therefore think the Court below erred in holding that the Act of April 19, 1895, has any application to the facts of this case.

Another reason given by the learned Judge of the Common Pleas is that the contract was made in violation of sections 8 and 10 of Art. IX. of the Constitution and of the law regluating the mode of increasing municipal indebtedness. We find nothing in the record that warrants any such conclusion as this. The undisputed evidence shows that the total aggregate valuation of property taxable for county purposes for the years 1896 and 1897 was $42,865,430. On December 21, 1896, when the contract was signed, there was in the county treasury, approximately, $12,000 cash, $30,000 due from the State treasurer and $13,000 overdue taxes. As against this there were outstanding bonds $76,000, a bridge contract balance about $40,000, and for office furnishings $3000. The contract price of the monument was $23,550. These items in the aggregate are very much less than the percentum authorized by the Constitution. Two percentum on the assessed valuation would be $857,308.62. The evidence further shows that the annual revenues of the county from assessments made for county purposes, together with the sum received annually from the State treasurer as the county's proportion of taxes collected, etc., would aggregate at least $200,000 for the year 1897. The taxes levied by the commissioners for that year together with the cash on hand and amounts due were very largely in excess of the county's liabilities including the contract price of the monument. The only conclusion that can be fairly drawn from the evidence before us is that the contract in question does not in any manner come in conflict with the constitutional provisions, above referred to, or those of the Act of 1874: Reuting et al. *v.* Titusville, 175 Pa. 512; Wade et al. *v.* Oakmont Borough, 165 Pa. 479; City of Erie's Appeal, 91 Pa. 398.

Further elaboration of the questions suggested by the Court below is neither necessary nor desirable. It is sufficient to say that the case, as presented to us, discloses no sufficient ground either for granting or continuing the injunction. It is virtually admitted by the Court below that the allegations of fraud were not proved. It is scarcely necessary to say that proof of suspicious circumstances,—if any there be,—is not enough.

The decree continuing the injunction is reversed and set aside and the preliminary injunction is dissolved; and it is ordered, adjudged and decreed that the costs including the costs of this appeal be paid by the plaintiffs. W. D. N.

Jan. '99, 44, 45. Supreme Court. March 23, 1899.

Wistar's Estate.

Decedent's estate — Administrator's commissions

The amount of the estate administered is not necessarily a criterion in measuring the compensation of the administrator or executor; the true test is the amount of care and trouble involved in the proper exercise of his duties, and where the compensation has been fixed by the lower Court, which, in the adjudication of the account, has the opportunity to ascertain all the facts in the case, it will not be disturbed by the appellate Court.

Appeals of G. Washington Powell and William Gorman, executors of Richard Wistar, deceased, and individually, from the decrees of the Orphans' Court of Philadelphia County, sur account of J. Bayard Henry, administrator pendente lite of the estate of Richard Wistar, and upon his account as administrator d. b. n. c. t. a. of William Lewis Wistar, deceased.

The facts of the case appearing from the adjudications were, that on February 21, 1894, William Lewis Wistar died, leaving a will giving his property to his brother, Richard Wistar. The will was proved on March 27, 1894, and letters testamentary were granted to Richard Wistar. On April 7, 1894, Richard Wistar died leaving a will dated April 5, 1894, of which the executors were G. Washington Powell and William Gorman. This will was contested and a precept was issued to the Court of Common Pleas. Pending the contest the register of wills appointed J. Bayard Henry administrator pendente lite. On September 28, 1897, by agreement of the parties in interest J. Bayard Henry was appointed administrator d. b. n. c. t. a. of William Lewis Wistar's estate. The property of the decedent was largely real estate which was heavily encumbered by mortgages and municipal liens. The administrator on October 19, 1894, by order of Court, sold sufficient of the real estate to meet all the indebtedness of the estate. The amount of the estate coming into the hands of the administrator in gross was nearly a million and a half dollars. This sum comprised both the estates. The administrator asked for commissions in both estates aggregating $43,993.18, or 3 per cent. of their amount, and $10,000 for counsel fees. Objection was made and the sum of $20,000, to include counsel fees, suggested as proper compensation.

At the adjudication of the account the Court, FERGUSON, J., reduced the claim of the administrator and allowed $35,000 as compensation for accountant, and allowed the counsel fees asked for. Exceptions were filed to the adjudication which were dismissed by the Court in banc and from this G. Washington Powell and William

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Gorman, executors of the estate of Richard Wistar, and also in their individual capacity as devisees of Richard Wistar, appealed, assigning as error the dismissal of their exceptions and the allowance of the commissions as stated.

E. Cooper Shapley, for appellants.

An administrator pendente lite is a receiver and is not entitled to be paid by percentage, but only in the way of compensation.

Lamb *v.* Helm, 56 Mo. 433.

In determining the proper compensation, the controlling considerations should be are the time and labor needed, not the time and labor expended, in the performance of the duties imposed.

Schwartz *v.* Keystone Oil Co., 153 Pa. 283.

If the administrator pendente lite is allowed the commission the estate is liable to another commission if the will is sustained, as the executors are entitled to compensation.

In any view the amount of commission claimed and compensation allowed is too large. He is only entitled to a commission upon the amount actually received on the equity of redemption on the property and cannot charge commissions upon the amount of the encumbrances on the property.

Baucus *v.* Stover, 24 Hun, 109.
Hill *v.* Nelson, 1 Dem. (N. Y.) 357.
Bedell's Appeal, 85 Pa. 398.

George Wharton Pepper, for J. Bayard Henry, administrator, etc., cited—

Miller's Estate, 1 Ashmead, 335 (O. C. Phila.)
Stevenson's Estate, 4 Wharton, 98.
Heckert's Appeal, 24 Pa. 482.
Whelen's Appeal, 70 Id. 410.
Eyre's Trust Estate, 1 WEEKLY NOTES, 184
Wharton's Estate, 11 Phila. 39.
O'Donnell's Estate, 5 WEEKLY NOTES, 534.
Rogers's Estate, 17 WEEKLY NOTES, 29.
Oliver's Estate, 18 Phila. 226.
Bosler's Estate, 161 Pa. 467.

July 19, 1899. MITCHELL, J. William Lewis Wistar died in February, 1894, and his brother, who was his executor and sole devisee, died in the following April. They owned a large amount of property in common, and naturally the administration of the two estates ran very much together. The Court below, therefor, for convenience and apparently with general consent, treated them as one and they have been argued here together.

The only question necessary for us to notice, and that briefly, is the compensation to the accountant and his counsel. This is objected to as excessive.

The amount is large, but it is unquestionable that the trouble and responsibility were great. The auditing Judge states that there were upwards of fifty pieces of real estate, located all over the city of Philadelphia, in almost every instance encumbered with mortgages, arrears of taxes and municipal claims. We have only to look at our own records to be reminded what persistent litigants the two decedents were, especially in resistance to claims for taxes and municipal improvements. By direction of the Court the properties were sold clear of encumbrances, and this involved settlements not only with purchasers but with mortgagees, lien creditors and particularly the city of Philadelphia. This general outline is sufficient to indicate the exceptional nature of the accountant's labor.

There is no set rule as to percentage on the estate in such cases. The rule is fair compensation for the amount and character of the labor. The responsibility involved in large estates is also an element to be compensated, though not a controlling one. The learned Court having all the facts and circumstances before it, fixed what it deemed a fair compensation, and we see no reason to differ with its conclusions.

Appeal dismissed with costs.

W. D. N.

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WEEKLY NOTES OF CASES.

VOL. XLIV.] *FRIDAY, SEPT. 22, 1899.* [NO. 25.

Supreme Court.

May, '99, 12. Supreme Court. May 29, 1899.

Williams Valley Railroad Co. v. Lykens & Williams Valley Street Railway Co.

Railroad—Grade crossings—Duty of Court with reference thereto—Fee—Eminent domain—Act June 19, 1871, P. L. 1361; May 14, 1889, P. L. 211.

The ownership in fee by a corporation of land upon which its superstructure rests gives it no right to exclude subsequent grantees of the Commonwealth from the use of the highway which crosses it.

The purpose of the Act of 1871, which is not altered by the Act of 1889, is to discourage grade crossings and to absolutely prohibit them where it is reasonably practicable to avoid them; and reasonable practicability is to be determined largely by what is physically practicable, and not by what is practicable to the treasury of the road seeking to cross.

It is error to hold that it lies with the party objecting to a grade crossing to show that another crossing is practicable and that in the absence of such evidence the Court should allow the crossing; it is the duty of the Court to inquire into the matter in the interest of the public, which is not directly a party to the issue, and ascertain whether it is reasonably practicable to avoid a grade crossing.

Appeal by the Williams Valley Railroad Company, plaintiff, from the decree of the Common Pleas for Dauphin County, permitting the Lykens & Williams Valley Street Railway Company to cross plaintiff's railroad at grade.

The plaintiff filed a bill averring that it was a corporation of the State of Pennsylvania and the owner of a steam railway running from the borough of Lykens, Dauphin county, to Brookside, on the line of the Philadelphia & Reading Railway, in Schuylkill county, over which about twelve passenger and freight trains passed daily; that it passed through the township of Williams, Dauphin county, and crossed at grade the only direct public highway in said township between Williamstown, Dauphin county, and Tower City, Schuylkill county; that it was the owner in fee of its right of way at the point where it crossed said public highway; that the defendant was a corporation chartered under the provision of the Act of May 14, 1889, P. L. 211, for the purpose of constructing, maintaining and operating a street railway for public use upon certain streets in the boroughs of Tower City and Lykens and Williamstown, and upon a certain public road in the townships of Williams and Wiconisco, in Dauphin county, and the township of Porter, in Schuylkill county; that the route of said proposed railway passed over the said public road which was crossed by plaintiff's railroad at grade at a point where the grade of said railroad is about 3 per cent., and that owing to certain obstructions the view of the plaintiff's railway from the public highway at certain points is obstructed; that the proposed crossing of plaintiff's railroad at grade by defendant's railway would be diagonally at an angle of about twenty-five degrees, which would make a crossing dangerous to plaintiff's trains, because of the danger of throwing the engine off the track, and that plaintiff believed there was no imperious necessity of crossing at grade, but that it would be reasonable, practical and convenient to cross above grade by an elevated bridge or overhead crossing, and that a crossing at grade would increase the danger of accident at plaintiff's railroad crossing to private conveyances passing over and along said highway.

Plaintiff in an amendment to its bill, averred that it was informed and believed that the defendant has not obtained the valid legal consent of the municipalities and local authorities of the boroughs and townships through which said highway passed over and upon which it proposes to construct its railway.

Defendant in its answer admitted that the route of its proposed railway passed over the public highway mentioned in plaintiff's bill, but denies that it passed over the land of plaintiff, and that the fee to the soil covered by the said highway is in the plaintiff, and denied that the plaintiff had the right to the use of the land covered by said highway for its own purposes in any way that is not consistent with the public easement. Defendant further denied that there was any obscuration of the plaintiff's railroad or difficulty in seeing it by those traveling over the public highway, and alleged that the grade of plaintiff's railroad was not so great as alleged in the bill; that the railroad crosses the public road almost in a straight line; that the grade of the public road on both sides rises towards the crossing, and that it was not reasonably practicable to build an overhead crossing, which, if constructed on the public highway, would be a greater inconvenience to the traveling public and more dangerous by reason of the grade necessary to be made on both sides than a grade crossing under proper regulations; that plaintiff has no right in said public

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highway for which it should be compensated, and that in respect to a mere crossing a railroad company is not an abutting land owner to a passenger railway, and denied that plaintiff had a fee in said public highway at said crossing.

In answer to the amended bill the defendant alleged that it had obtained all necessary consent of the municipalities through which its road passed for the location and construction thereof, and the consent of all the abutting property owners on the roads whereon it was proposed to locate the road.

The case came on for a hearing, before SIMONTON, P. J., and MCPHERSON, J., when the facts appeared as stated in the opinion of SIMONTON, P. J., as follows:

"These are, substantially, the averments of the bill:

"From the evidence produced at the trial we find the facts, so far as we consider them in issue, to be as follows, taking for granted what is not disputed, that plaintiff and defendant are each duly incorporated:

"Defendant has procured the consent of the several municipalities and local authorities of the boroughs and townships through which the highway extends over which it proposes to construct its railway, and it has accepted the provisions of the several ordinances adopted by these municipalities, except that no formal acceptance of the ordinance of the borough of Lykens has been made, and the time within which this ordinance, according to its terms, may be accepted, will not expire until July 23. Plaintiff has failed to prove that defendant has not obtained the consent of all the owners whose land abuts upon the highway. One of these called as a witness refused to answer whether he would consent or not. And in any event we do not think this is a question that can be litigated by the plaintiff.

"Plaintiff is the owner in fee of its right of way where it crosses the highway, but is not the owner of any land at this point except its right of way.

"There is nothing in the topography of the territory, or the character of either of the roads, or the business done or to be done upon them, so far as shown by the evidence, from which we can find that it would be 'reasonably practicable' to avoid a grade crossing at this point. Plaintiff has not furnished us with any evidence tending to show how such crossing could be avoided.

"Plaintiff has but one locomotive engine, which passes ordinarily six times every secular day across this highway in both directions with one or two passenger trains of two cars, one or two mixed trains of two to four cars, and the others freight trains of from two to six cars each. There is no special difficulty in defendant's and plaintiff's trains seeing each other when approaching the crossing, and both the railroad and the public road are in plain view of a person at the crossing for nearly half a mile and there is no element of danger in the crossing except what may exist because of the fact that the approach to the crossing in one direction on plaintiff's road is down a grade of nearly 3 per cent.

"Plaintiff contends on the facts, which we think we have substantially stated above, that it has the right to prevent defendant from crossing its road at grade, among other reasons, because it is the owner in fee of its right of way where the highway in question crosses it. We do not so understand the situation. Plaintiff has only a right of way for the purposes of its railroad, whether fee or easement, and its crossing is upon a public highway, to all the rightful uses of which its property is subject: Penna. R. R. *v.* Railway Co., 176 Pa. 559.

"Plaintiff contends further that as the ordinance passed by the borough of Lykens, granting defendant the right to construct its railway through the borough, contains conditions and provides in section 7: 'The said company shall, before any right or privilege hereby granted shall become operative or be enjoyed by them, signify in proper writing with the secretary of council, within thirty days after approval of this ordinance, their acceptance of all the regulations, conditions and restrictions of this ordinance'; and defendant has not accepted it in the manner here provided, defendant has no right to construct its road. This ordinance was passed originally December 9, 1897. It was afterwards ratified and confirmed to defendant June 22, 1898. Therefore, if it requires an acceptance by defendant, we do not think we would be justified in enjoining it from building its road in the absence of any objection by the borough, and in assuming that it will not accept the ordinance. If it fails to do so within the time limited it will be open to the plaintiff to take such advantage of its neglect as may be legal.

"There remains the question whether the crossing should be at grade. As we have said, there is an almost total lack of evidence to show how any other crossing could be made. The Act of 1889, declares that railway companies shall have the right to cross at grade. The Supreme Court has decided that this provision of the Act of 1889 is repealed by the Act of 1871; and however difficult it may be to understand how a later Act can be repealed by an earlier, we are bound by this decision. The repeal, however, is not absolute; it applies only where it is the opinion of the Court 'reasonably practicable to avoid such crossing.' We think, therefore, that the prima facie right remains, and [that it rests upon the party objecting

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to furnish the Court with facts, if they exist, that make it reasonably practicable to avoid such crossing. As this has not been done, probably because it could not be, we are brought to the conclusion that if grade crossings are to be allowed in any case we cannot prohibit this]. (Third assignment of error.)

"One of the defendant's witnesses testified that there would be no more danger in a railway crossing at grade at the point in question than in crossing with ordinary wheeled vehicles; and we believe this to be the fact. The railway crossing can be controlled by the Court under proper regulations, so as not to interfere with the business of the plaintiff or the safety of the public, while this is not the case when a railroad crosses a public road at grade. We believe much the opposition to grade crossings that is expressed in judicial opinions, when the question is raised by controversies between railroad and railway companies, is in reality prompted by the danger felt to exist in the crossing of ordinary highways by railroads at grade. And we think it should be open to municipal and local authorities to apply to the Courts to determine the propriety of permitting projected railroads to cross public highways at grade, and either to prohibit this or make proper regulations under which it should be permitted. This, however, by the way.

"After such consideration as we have been able to give to the case, our conclusion is, that the injunction asked for must be refused. The bill, however, will not be dismissed, but in case the parties cannot agree upon the manner in which the crossing shall be made, either, upon notice to the other, or both, may apply to the Court to make such order in the premises as may be considered proper."

The Court entered a decree as follows, that:

"The defendant be and is hereby permitted to construct and maintain a crossing at an angle of not less than 45 degrees over the plaintiff's track at the point described in the bill of complaint according to the plan filed as aforesaid; at such time as to cause the least delay to the trains and traffic upon the plaintiff's road.

"It is further ordered and decreed that in using the said crossing for the passage of its cars the said defendant shall cause its cars to come to a full stop at least twenty-five (25) feet from the said crossing and shall send its conductor or other employé to the crossing requiring him to look in each direction along plaintiff's track and to signal the defendant's car to cross only when plaintiff's track is clear from an approaching train or car.

"It is further ordered that the trolley wire for the operation of the defendant's car over said crossing shall be constructed and maintained at a height of at least twenty-two (22) feet above the level of the plaintiff's track.

"It is further ordered and decreed that the said crossing be constructed and maintained at the expense of the defendant and that the same shall at all times be kept in proper order by the defendant at its own expense for the safe passage of the plaintiff's trains over the said crossing."

The plaintiff took this appeal and assigned as error, inter alia, the part of the judgment enclosed above in brackets, the decree above set forth, and the holding that ownership in fee by the plaintiff of its right of way where it crossed the highway conferred no standing upon it to prevent a crossing by defendant.

H. E. Buffington and *Robert Snodgrass*, (with them *Carroll R. Williams*), for appellant.

It has been abundantly settled by numerous decisions, that the Act of June 19, 1871, P. L. 1361, and May 14, 1889, P. L. 211, must be construed together, and that the latter Act does not take from the Court the power to prevent, or regulate grade crossings in respect of street railways. Under the decisions, as they now stand, it is the duty of the Court to prevent such crossings wherever it is reasonably practicable to avoid them.

Penna. R. R. Co. *v.* Braddock Electric Ry. Co., 152 Pa. 116.
Perry Co. R. R. Co. *v.* Newport & Sherman's Valley R. R. Co., 150 Id. 193.
Pa. R. R. Co. *v.* Warren Street Ry. Co., 188 Id. 74.

The defendant had no right to cross the railroad of the plaintiff at all without its consent.

The plaintiff is an abutting owner and at the time the bill was filed, was the owner in fee of at least one-half of the land occupied by the public road. It was, therefore, contended in the Court below that the street railway could not cross the plaintiff's railroad at all without its consent.

It is well settled that the entire line of a proposed street railway, throughout the circuit of its route, is to be considered as an entirety, and that the power to construct such road cannot be exercised, in respect of any part of it, until the proper consent for the construction of the entire line has been obtained.

Pa. R. R. Co. *v.* Montgomery County Pass. Ry. Co. 167 Pa. 62.
Pa. R. R. Co. *v.* Turtle Creek Valley Elec. Ry. Co., 179 Id. 584.

The consent required is not alone that of the municipalities and townships, through which the street railway is to pass, but also the consent of all the abutting owners, and the fact that certain abutting owners have not consented, seems, under the decisions, to be sufficient ground to prevent its construction, upon the theory that it has

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not obtained a proper legal consent throughout its entire route.

Thompson *v.* Traction Co., 181 Id. 131.
Pa. R. R. Co. *v.* Montgomery County Pass. Ry. Co., supra.
Northern Central Ry. Co. *v.* Harrisburg & Mechanicsburg Elec. Ry. Co., 177 Pa. 144.

S. J. McCarrell and *J. C. Durbin*, for appellee.

It has never been decided that a steam railroad company, whose track crosses a public highway, is such owner of property abutting upon the highway, as is required to consent to the additional servitude of an electric railway in the highway before the same can be lawfully constructed. The Legislature has expressly declared by the Act of May 14, 1889, P. L. 217, that such consent is not necessary, and has given to street railway companies the express right to cross the steam railroad track upon the highway, either diagonally or transversely, without any such consent.

In Penna. R. R. Co. *v.* Greensburg, Pittsburgh & Jeannette Railway Co., 176 Pa. 577, this Court says: "In respect to a mere crossing, a railroad is not an abutting land holder to the passenger railway."

The present is a mere crossing of a railroad on a public highway, and the local authorities having expressly consented thereto, the railroad company, not being an abutting land holder, has no standing to object thereto.

Art. XVII., sec. 1 of Constitution, providing that every railroad company shall have the right with its road to intersect, connect with or cross any other railroad, certainly guarantees the right to cross in some way, if not at grade.

When an Act of Assembly confers the right to build a railroad from one place to another, it confers the right to cross the tracks of another company by necessary implication, when absolutely necessary to carry out the grant of the franchise.

Perry County R. R. *v.* N. & S. V. R. R., 150 Pa. 193.

The plaintiff having failed to make out a case that a crossing other than one at grade is reasonably practicable, the Court below was right in refusing to enjoin the proposed crossing. The burden was on plaintiff.

Pa. R. R. *v.* Warren St. Ry. Co., 188 Pa. 76.

July 19, 1899. DEAN, J. In this case, a trolley road sought to cross at grade a steam railroad in Dauphin county. The steam railroad filed this bill for an injunction to restrain such crossing. The learned Judge of the Court below, under carefully defined conditions, by final decree, permitted the grade crossing, and we have this appeal from that decree.

While there are six assignments of error, the merits of the appeal involve but two inquiries:

1. Has the appellee the right to cross the appellant's road by any method at the point of crossing?

2. If it have such right, then, under the facts and the law, is it "reasonably practicable" to avoid a grade crossing?

As to the first question, the Court below was clearly right in holding, that the ownership of the land in fee by appellant whereon rested its superstructure, gave it no right to exclude subsequent grantees of the Commonwealth from the use of the highway or public road which crossed it.

But, as to the second question, appellant, manifestly, was entitled to an answer in its favor.

Our utterances, on the question of grade crossings, have been so frequent and emphatic, that it ought not to be necessary to repeat them. In Railroad Co. *v.* Railroad Co., 150 Pa. 193; Pa. R. R. Co. *v.* Railway Co., 152 Pa. 116, and quite a number of cases following these, we have held, in substance, that the manifest purpose of the Act of 1871 was to discourage grade crossings, and to absolutely prohibit them where it was reasonably practicable to avoid them; that, what is reasonably practicable, under such circumstances, is determined largely by what is physically practicable, and not by what is practicable to the treasury of the road seeking to cross; that the cost of avoiding a grade crossing is a matter to be considered in projecting the new road, and that then sufficient capital should be provided to avoid that which the law in effect condemned. And further, we have held, in all these cases, that neither the street railway Act of 1889, nor any subsequent legislation, repealed the crossing provision in the Act of 1871.

As said by our brother GREEN, in Railroad Co. *v.* Street Railway Co., 188 Pa. 74: "The one test imposed by the statute, is the reasonable practicability of the overhead crossing. If that is established, other considerations become unimportant. We desire to announce again that we firmly adhere to the policy and to the rules and principles expressed in the decisions to which we have referred."

The Court below held, that, prima facie, under the Act of 1889, appellee had the right to cross at grade, and the burden was upon the objecting steam railroad to establish that other than a grade crossing was reasonably practicable; that, not having established this fact, the Court must allow the crossing, and then follow, among others, these remarks in the opinion:

"We believe much of the opposition to grade crossings that is expressed in judicial opinions, when the question is raised by controversies between railroad and railway companies is in reality

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prompted by the danger felt to exist in the crossing of ordinary highways by railroads at grade. And we think it should be open to municipal and local authorities to apply to the Courts to determine the propriety of permitting projected railroads to cross public highways at grade, and either to prohibit this or make proper regulations under which it should be permitted."

We do not think the case should turn on a rule of evidence applicable to a common law action. The first and second sections of the Act of 1871, make it the duty of the Court to inquire and ascertain the facts with reference to the authority of the corporation, and especially as a basis of information for a proper decree for a crossing to ascertain whether one at grade can be avoided. The Commonwealth intended by the act to protect the lives and limbs of citizens as well as the property rights of litigating corporations; therefore, there is a duty upon the Court to inquire in the interest of the public which is not directly a party to the issue, whether it is reasonably practicable to avoid a grade grossing. The Court cannot lightly assume, as here, because the steam railroad, in the main, rested its case on the ownership of the fee of its right of way, that there was no duty of further inquiry.

And the learned Judge is wholly mistaken in assuming, that judicial opinion as to the danger of grade crossings is largely prompted by that incident to the ordinary public road crossing of a railroad. Although greatly demanded, that matter as yet has received but little legislative attention. Crossings, however, by one railroad or railway over another have been the subject of express legislation to the extent of almost absolute prohibition of the dangerous grade crossing. This legislative recognition of the duty of preventing them, concurring with judicial knowledge derived from damage suits has moved this Court to expressions of opposition and to rigid enforcement of the law; and no local sentiment favorable to increased facilities for local travel and communication should swerve a Court from its duty to carry out strictly the intent of the statute.

But the evidence before us, shows that it is reasonably practicable to avoid a grade crossing at this point. An inspection of the photographs, 1, 2, and 3, shows that the public road, for between three and four hundred feet on each side of the railroad, is almost level, and that an overhead bridge presents no engineering difficulties in construction or use. When we know by everyday observation, such bridges are built to avoid just such grade crossings as the one proposed here, why is not the avoidance of this one reasonably practicable? The appellant's engineers testify that it is, and give in detail their reasons. Appellee's, that it is not. The opinions of the latter, however, are in the main founded on a possible obstruction of the highway by a bridge and the want of authority to deflect from it. But can any one who has ridden over the Fairmount trolley railway, which is absolutely prohibited from crossing the park roads at grade, doubt the practicability of avoiding this grade crossing? Besides, the cost of an overhead crossing, seven to ten thousand dollars, when compared to the peril to the public thereby avoided, is trivial.

We think the learned Judge of the Court below was clearly mistaken in finding that it was not reasonably practicable to avoid this grade crossing. The decree is therefore reversed and set aside at costs of appellee, and it is ordered that appellee do not construct, maintain and operate its railway at grade on appellant's steam railroad tracks where the public highway crosses said steam railroad, or at any other point adjacent thereto.

H. B.

Jan. '97, 445. Supreme Court. March 29, 1898.

Uhler, Executrix v. John K. Cowen, et al., Receivers.

Eminent domain—Taking of leasehold—Defence to payment of rent.

In an action to recover rent, an affidavit of defence, which denies liability for the whole period of the lease for which rent is averred to be in arrears, on the ground that lessor's title to part of the premises demised had been divested by the exercise by the municipality of the right of eminent domain, is sufficient to prevent judgment and to permit defendants to present the evidence on which they base their defence to a jury.

Appeal of John K. Cowen and Oscar G. Murray, Receivers of the Baltimore & Ohio Railroad Company, from the judgment of the Common Pleas No. 4, of Philadelphia County, in an action of assumpsit wherein Clara E. Uhler, executrix and trustee under the will of Taylor M. Uhler was plaintiff.

The statement filed in this case set out that on April 9, 1887, Taylor M. Uhler leased to the Baltimore & Ohio Railroad certain wharf property on the east side of North Delaware avenue, 140 feet and extending to the Delaware River, for ten years from the first day of April, 1888, at $5500 per annum, payable quarterly on the first days of July, October, January and April; that the lessor died on October 18, 1890, and by his last will named the plaintiff his executrix and trustee; that the defendants were appointed receivers of the lessee on March 1, 1896; and that

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rent was in arrears to the amount of $1375, for the quarter ending April 1, 1897.

The affidavit of defence set up that on March 11, 1895, an ordinance of the Councils of the city of Philadelphia was approved empowering the department of public works "to notify the owners of property over and through which Delaware avenue to its full width as now laid down on the city plan, from Vine to South street, will pass, that at the expiration of three months from the date of said notice, said street will be required for public use, except those owning the property on the west side of Delaware avenue, between Market and Walnut streets, which is hereby exempted from the operation of this ordinance;" that at the time of the lease the street was physically not open to its entire width as laid out on the city plan; that on the 31st day of March, 1896, an ordinance was approved instructing the department of public works to notify the owners of such property as would be affected thereby "with whom satisfactory negotiations" could not be made, that the avenue would be required within three months from the date of the notice for public use; that the lessees were notified by the lessor immediately; that the lessees in accordance with the notice surrendered occupancy on that part of the street embraced in the notice and affected by the ordinance at the time stated in the notice, viz., January 26, 1897.

The affidavit of defence denied liability of the defendants for the rent for that portion of the demised premises from the time possession was taken by the city, viz, January 26, 1897.

A rule was taken for judgment for want of a sufficient affidavit of defence which on argument was made absolute. The defendants appealed, assigning as error this action of the Court.

W. H. Addicks, (*W. B. Linn* with him), for appellants.

The exercise of the power of eminent domain by the city of Philadelphia divested the liability of the defendants to the plaintiff for the rent for the whole amount of the premises leased and for the term sued on.

Dyer *v.* Wightman, 66 Pa. 425.

The tenant, remaining personally bound, but the subject of enjoyment having been taken from him, is entitled, not merely to the value of his term, subject to the rent, but also to a sum of money which will indemnify him against the loss arising from his covenant to pay in future.

Foote *v.* City of Cincinnati, 11 Ohio, 408.
Parks *v.* City of Boston, 15 Pick. 198.
Folts *v.* Huntley, 7 Wend. 210.
Lewis on Eminent Domain, sec. 483.

In this case what has happened is a dissolution of the contract by the sovereign power of the State rendering performance on either side impossible.

Taylor *v.* Caldwell, 3 B. & S. 826.
Lord *v.* Wheeler, 1 Gray, 282.
Manufacturing Co. *v.* Butler, 146 Mass. 82.
Bank *v.* Beal, 141 Id. 566, and cases there cited.
Dexter *v.* Norton, 47 N. Y. 62.
Walker *v.* Tucker, 70 Ill. 527.
People *v.* Globe Mutual Life Ins. Co., 91 N. Y. 174.

John G. Johnson, (*T. A. Fenstermaker* with him), for appellee.

Where, under the power of eminent domain, a portion only of demised premises is taken, the tenant is not absolved from his liability to pay the rent reserved for the unexpired term.

Kerr on Real Property. sec. 1259.
Pingrey on Real Property, sec. 548.
Washburn on Real Property, *p. 342.
Parks *v.* City, 32 Mass. 198.
Stubbings *v.* Evanston, 136 Ill. 37.
Gluck *v.* Mayor, etc., Baltimore, 81 Md. 315.

Nothing but a surrender, a release or an eviction can, in whole or in part, absolve the tenant from the obligation of his covenant to pay the rent.

Fisher *v.* Milliken, 8 Pa. 111.
Dyer *v.* Wightman, 66 Id. 425.

The taking by the sovereign under the right of eminent domain is not an eviction.

Dobbins *v.* Brown, 12 Pa. 75.
Dyer *v.* Wightman, supra, and cases cited.
Schuylkill, etc., Co. *v.* Schmoele, 57 Id. 271.

The tenant's surrender of possession of the premises to the city was a violation of his duty towards the landlord. To operate as a release the surrender must be made to the landlord, and accepted by him.

Breuckman *v.* Twibill, 89 Pa. 58.
Auer *v.* Penn, 99 Id. 370.
Teller *v.* Boyle, 132 Id. 56.
Ashhurst *v.* Phonograph Co., 166 Id. 357.
Lane *v.* Nelson, 167 Id. 602.

The tenant is bound by his covenant to pay the rent, and his remedy for damages, if any are sustained, is provided by statute.

Dyer *v.* Wightman, 66 Pa. 425.
Railroad Co. *v.* Getz, 113 Id. 214.

July 19, 1899. McCollum, J. This is an appeal from a judgment entered for want of a sufficient affidavit of defence. The action was brought for rent for the quarter beginning January 1, 1897, and ending April 1, 1897, on a lease, executed April 9, 1887, for Pier No. 11 on the east side of Delaware avenue, in the city of Philadelphia, for a term of ten years. The affidavit of defence admits the lease and the non-payment of the rent claimed and also the liability for the rent accrued up to the 26th of January, 1897, but seeks to escape liability for the balance, on the ground

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that the city of Philadelphia, on October 26, 1896. notified the plaintiff that at the expiration of three months from that date that portion of the plaintiff's property "lying within the bed of Delaware avenue as established between Vine and South streets," would be required for public use, and that, in addition, the plaintiff's property would be entered upon to the extent required for construction purposes. The plaintiff promptly communicated this notice to the defendants, who, in compliance with it, on the 26th of January, 1897, surrendered possession of all the demised premises to the city of Philadelphia.

If the whole of the demised premises had been taken by right of eminent domain it is conceded, under the authority of Dyer *v.* Wightman, 66 Pa. 425, that there could be no recovery. Does a different rule obtain when a part only of the premises is taken? As the precise point does not seem to be answered by our decisions, the solution must be sought by reason and analogy. The reasons advanced for the decision in Dyer *v.* Wightman, supra, are not that there was a destruction of the premises or an eviction by title paramount, but that under the equitable powers of the Court there was a complete and adequate remedy which protected all interests and prevented circuity of action. Nearly every reason advanced for the decision in that case applies with equal force in this. The appellee seeks to establish a different rule in the case in hand, but no reason is suggested that might not have been urged in Dyer *v.* Wightman. The main reliance of the appellee is on decisions of other States, several of which were apparently repudiated by Justice SHARSWOOD, in his opinion in the case above referred to. While it is stated in the opinion of the Court in Stubbings *v.* Evanston, 136 Illinois, 37, that the weight of authority is in favor of the rule urged by the appellee, neither Mills nor Lewis in their learned works on Eminent Domain adopts such distinction. The same rule for both cases is adopted by both writers: Mills, sec. 69; Lewis, sec. 483. The logic of Dyer *v.* Wightman seemingly leads to the same conclusion. See also American Law Review, vol. 29, page 351.

We do not propose at this stage of the case to enter into an elaborate discussion of this important subject. We prefer to have before us all the facts developed by the evidence on a trial of it. The notice served by the city on the plaintiff defined that portion of his property required for public use. but it did not define the boundaries of that portion of his property which it is proposed to occupy for construction purposes. Under this notice the city may have terminated the operations of the defendants under the lease. We think the affidavit was sufficient to prevent judgment, and that the defendants should have been allowed to present the evidence on which they base their defence.

Judgment reversed and procedendo awarded.

W. D. N.

Jan. '98, 300. Supreme Court. January 16, 1899.

Denning v. Midvale Steel Co.

Contributory negligence— Master and servant— Use of defective machine—Notice.

Where the plaintiff, a machinist working on a machine, leaves a place of absolute safety, and goes to one where he is struck and injured by chips thrown from the machine, which is in defective condition through the negligence of his employer, the defendant, but it does not appear that the machine has previously thrown chips to the place to which the plaintiff goes, and where he is injured, he cannot be declared guilty of contributory negligence, as a matter of law, although he has known that the machine occasionally threw chips.

Where the throwing of chips is not the result of the regular action of a machine, but only an occasional occurrence, of which the machine gives notice by an irregular action, a workman near the same is not bound, as matter of law, to anticipate and provide against the throwing, and, if injured by being struck by a chip, the question of contributory negligence is for the jury.

Where there is a conflict of testimony as to the relative danger of two positions near a machine, in one of which the plaintiff has been struck by a chip from said machine, the question whether it was negligence to be in such position is for the jury.

Appeal by the Midvale Steel Company, defendant, from the judgment of the Common Pleas No. 1, for Philadelphia County, in an action of trespass brought by Charles W. Denning.

On the trial, before BEITLER, J., the following facts appeared: On June 6, 1895, while at work in defendant's employ, in appellant's mill, the plaintiff was struck in the eye by a chip thrown from a planing machine, at which he was working, with sufficient force to cause the total loss of the organ. The proximate cause of the accident was a defective condition of the machine (a looseness of the cross-head), which condition allowed chips of the metal being planed to escape from the machine, and be thrown outward with considerable force. Two weeks before the accident, plaintiff had, in accordance with the custom of the mill and with defendant's general orders to its employés, given notice of the defective condition of the machine, and its need of repairs, by writing on a printed form provided by defendant for that purpose, a statement of the defect, and the repairs needed, and by personally delivering said notice at the place and to the person charged by the defendant with the duty of receiving such notices, namely,

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to the person in charge of the tool room. This person, at the time plaintiff handed his notice to him, said to him, "Go on with your work, repairs will be made promptly." This person was not called at the trial, the defendant did not in any way account for its failure to call him. Plaintiff went on with his work, but repairs were not made, and two weeks afterwards the machine threw the chip into the eye of the appellee, which caused its total loss. Within a few hours after the accident, the defendant repaired the defective cross-head.

The defendant besides denying negligence on its part, sets up contributory negligence on the part of the plaintiff in that when he was struck he was not in a place of safety at the head of the machine, but had gone to a lunch box, taken out some luncheon and then turned towards the machine, when he was struck; the evidence was, however, that the machine did not throw chips constantly, but only occasionally, and none that it had thrown them so far as the position occupied by the plaintiff when struck; that the machine only threw chips when there was lost motion in the cross-head which held the tool, and that it indicated by irregular action that it was about to throw chips, and that when plaintiff left it to go to the lunch box there was no indication of danger. There was a conflict as to the relative danger of positions about the machine.

The defendant submitted, inter alia, a point asking for binding instructions in its favor. This, the Court refused.

Verdict and judgment for plaintiff, $2000. The defendant took this appeal and assigned as error, the refusal to direct a verdict in its favor.

Abram H. Wintersteen, for appellant.

A plaintiff employé cannot recover from an employer for injuries when the danger of using a machine at which he is injured is patent and known to him, and he might have used another arrangement provided for him which was more safe, though not perhaps so convenient.

Hart *v.* H. C. Frick Coke Co., 131 Pa. 125.
Pittsburgh & Connellsville R. R. Co. *v.* Sentmeyer, 92 Id. 276.

In this case the question of negligence was for the Court, not the jury.

Lehigh Valley R. R. *v.* Greiner, 113 Pa. 600.

The promise to remedy the machine did not justify the plaintiff in exposing himself to flying chips.

Reese *v.* Clark, 146 Pa. 465.
Brownfield *v.* Hughes, 128 Id. 194.

The injury to plaintiff resulted from his taking a position of obvious danger for his own purposes, he should, therefore, have been non-suited.

Hurley *v.* Lukens Iron & Steel Co., 186 Pa. 187.

Joseph W. Shannon, for appellee.

It can hardly be contended that the defective cross-head was not the proximate cause of the accident, nor that plaintiff did all that he was required to do in notifying the defendant of the need of repairs in the manner, at the place and to the person designated by the defendant to receive such information. It was manifestly not a case of such imminent danger as to make plaintiff's continuing at his work contributory negligence on his part. He had a right to assume that the necessary repairs would be made within a reasonable time after his notice of their necessity, and had this not been neglected by defendant, this cause would not be here. The fact that defendant caused the required repairs to be made immediately after the accident, when awakened to a sense of its neglect by the deplorable consequences of its delay, does not help its case. And its failure to produce its employé, to whom plaintiff's notice was given (a person unknown by name to plaintiff) while attempting to contradict the fact of the notice by negative proof of the employés who knew nothing of the fact, casts a doubt upon the bona fides of the defendant.

Testimony often consists in what is not proved, as well as in what is proved.

Frick *v.* Barbour, 64 Pa. 120.

Where evidence which would properly be part of a case, is within the control of the party whose interest it would naturally be to produce it, and without satisfactory explanation he fails to do so, the inference is that it would be unfavorable to him.

Hall *v.* Vanderpool, 156 Pa. 152.

It was contended at the trial by defendant that the order and promise, "go on with your work, repairs will be made promptly," given to the plaintiff by the person in charge of the tool room, at the time he gave written notice of the defect, was not defendant's promise because it was not shown affirmatively by plaintiff that such person was expressly authorized by defendant to make such promise, but this contention ignores the fact that plaintiff gave notice and received directions at the place and to the person provided by defendant for such purposes. If the authority of that person was so limited, as defendant would now contend, it should not have kept the testimony of so important a witness out of the case, and we have a right to say that if that person's testimony would have proven what defendant now contends was the fact, that person would have been called by the defendant.

However, the express promise by defendant to do what it was its duty to do is not an essential of the case. Had there been complete silence on the part of the person to whom the notice was

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given, it nevertheless was defendant's duty to promptly repair the defect of which it had actual notice.

Bennett *v.* Standard Glass Co., 158 Pa. 120.

July 19, 1899. GREEN, J. The learned trial Judge in an able charge committed this case to the jury in a most lucid, comprehensive and instructive manner, so that they could not fail to understand the precise character of the questions with which they had to deal. He carefully explained the exact conditions in which the defendant might be held liable on the one hand, and in which the plaintiff could not recover on the other. It seems to us after a most careful consideration of all the testimony, and of the entire charge, that it was strictly correct in every legal sense, that it fairly conserved every right for which the defendant could contend, and defined precisely the limitations within which the plaintiff might recover.

But a single assignment of error is made, to wit, that the Court below did not charge that under all the evidence the verdict must be for the defendant. The appellant does not now dispute the correctness of the finding of negligence on its part, and the only proposition upon which a reversal is asked is that the plaintiff was guilty of contributory negligence, and that the Court should have given a binding instruction to that effect. This proposition should be sustained if the evidence showing contributory negligence were undisputed or if the evidence to the contrary were only a scintilla. The scope of inquiry is therefore extremely narrow. The fundamental contention of the argument for the appellant, is, that the plaintiff voluntarily assumed a position of manifest danger from flying chips at the moment before the occurrence of the accident. If there was no dispute as to the correctness of this contention the plaintiff could not recover and the Court should have so instructed the jury. It is argued for the defendant that the undisputed testimony shows that the direct line of motion of the flying chips was towards the place which the plaintiff occupied when his eye was struck, that the plaintiff knew this and therefore assumed the risk of the consequences. The plaintiff was an experienced machinist, he had been running this particular machine for some time, and he knew that it had a habit of throwing chips when out of proper repair, that it was out of repair at the time of the accident and that he knew of that condition of the machine and had given notice of the defect at the repair shop some two weeks before the accident. He also knew that the defect in question caused the machine to throw chips, and that he had continued to work on it notwithstanding such knowledge and that it had not been repaired when the accident occurred. All of this appears in his own testimony and is therefore undisputed.

Now the contention of the appellant is that in these circumstances when the plaintiff left the head of the machine where the tool was doing its work and went to the lunch box and took some lunch from it and then turned towards the machine, he placed himself in a position which he knew to be dangerous on account of the defect in the machine which caused the chips of steel to fly in the direction where he stood and thereby contributed to the injury he sustained, and can not recover. If this contention were absolutely true in the breadth of statement in which it is made the conclusion expressed would be justified but there are qualifying circumstances which demand consideration, and there is an absence of facts which are necessary to give vitality to the argument. For instance it was not proved that the machine was in the constant habit of throwing chips when it was at work. On the contrary the testimony of the plaintiff was, and it was the only testimony on that subject, that he had seen it throw chips in several instances only, during the three months he had worked it. Then there was no proof that it had ever thrown chips so far as the position in which the plaintiff was at the moment of the accident. There was testimony that such machines would throw chips when the tool was working in very hard steel, but only for a very short distance, ordinarily four to six inches, and not more than a foot. It would not then follow as a necessary consequence that the plaintiff knew, or even had reason to believe, that the machine was then throwing chips, or would throw them, and especially there was no proof that he had any reason to expect that any chips would or could strike him at so great a distance from the tool. While the result in this instance proved that such a consequence was possible, there was no proof that it had ever occurred before, and hence no necessary inference could be drawn that he was facing a known danger in occupying the position he did at the moment of the accident. This consideration indicates that the question of contributory negligence resulting from this cause would have to be determined by the jury as a question of fact and not by the Court as a question of law.

But beyond all this the plaintiff did not in fact, according to his own testimony, occupy and remain in a position fronting the tool. The whole occurrence took place in an instant of time as described by the plaintiff. This is his account of it, "About half past two I was planing down one side of the hammer die and I had been alongside the machine. It was working right along all right

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and I walked about eight or ten feet to the lunch box and I had opened that and taken out a piece of bread, and I turned around and faced the machine and as I did it hit me in the eye. Q. What hit you in the eye? A. A piece of metal, a chip. . . . . Q. How far were you from the work at that time? A. About ten feet. Q. Was there anything in the machine which showed that it was going to throw a chip so you could have escaped it? A. No, sir." From the other testimony it appeared that the machine only threw chips when there was lost motion in the cross-head which held the tool, arising from a loose condition of the parts which composed the cross-head, the remedy for which was a tightening up of those parts. The plaintiff thus described the mechanism and working of the machine. "Q. Describe the feed mechanism of the machine at the time of the accident? A. The feed mechanism which you put your feed on, sometimes it would cut, then again it would not cut and after awhile she would drop down three-eighths of an inch and dig right into the work. Q. That is the tool of the machine would drop down? A. Yes, sir. Q. What would be the result? A. It would go right down and dig right down into the work, and the consequence would be it would throw a chip. . . . . Q. Tell in your own way just what caused the chips to be thrown from the work on which the planer was engaged? A. As far as I know the reason—my reason would be, there being so much lost motion in there that when the tool came down to take hold she would hook over this way, and the tool being up against the work had a tendency to drive it in, and the consequence would be when the pressure would be relieved she would throw chips. Q. There would be an uneven pressure then due to the lost motion? A. Yes, sir."

It will be seen from the foregoing that when the machine threw chips it would be the result of an irregular action of the machine, putting an unusual strain upon the tool. Now when the plaintiff testified that the machine was working all right when he left it to go to the lunch box, there was nothing to put him on guard against flying chips or to indicate that there would be any. It would be a vastly different question if the throwing of chips was a constant and necessary result of the movement of the machine, for in that event the plaintiff would be bound to take notice of this fact and to take precautions against injury from such a source. But when it was only an occasional habit of the machine to do this, and the machine itself gave notice by its irregular action, when it was about to, or might, throw chips, it would not be a conclusion of law when he went to the lunch box he was bound to assume that it would throw chips and that he must take precautions against it. Again it can not be said that he took a position facing the tool and remained there because on the instant of his turning around towards the machine he was struck by the chip. The utmost that the Court could do therefore was to leave it to the jury to say, whether in view of all the facts and circumstances of the case, the plaintiff was guilty of contributory negligence in doing what he did, and this is precisely what the Court did.

There was also a conflict of testimony on the point whether a position at the foot of the machine when it was throwing chips was more or less dangerous than a position on either side of it, and hence it was necessary to refer that subject and the whole of the testimony to the jury to determine. There was considerable testimony in the case and some other matters were brought out but nothing that could affect the question as to whether the case was for the jury or the Court. We think the action of the Court in submitting the case to the jury was entirely correct and therefore we must dismiss the assignment of error.

Judgment affirmed.

H. B.

May, '99, 24. Supreme Court. May 30, 1899.

Neff v. Harrisburg Traction Co.

Negligence—Contributory negligence—Charge of Court to jury.

The trial Judge in commenting upon the testimony of the witnesses said to the jury: "And if you take the version given by the defendant, that the car had not yet come to a stop when the plaintiff undertook to get out, then you *might* find her guilty of contributory negligence and in that case she would not be entitled to recover":

***Held*, that, while the use of the word "might" by the trial Judge was entirely unintentional, and that he did not design to convey a doubtful meaning, the instruction should have been in the absolute and peremptory, and not in the qualified and conditional, form in which it was presented.**

Appeal of the Harrisburg Traction Company, defendant, from the judgment of the Common Pleas of Dauphin County, in an action by John D. Neff and Mabel Neff, by her next friend John D. Neff, to recover damages for injuries.

The facts in this case are set forth in the opinion of the Supreme Court.

The Court charged the jury as follows:

"On the other hand, if that is not the true version, if the car had not stopped, and if the plaintiff was thrown off because she undertook to get off before the car had come to a stop, then you might ascertain that she ought to have waited, and that the defendant had done nothing out

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of the way; nothing but what is done on all occasions." (First assignment of error.)

"And if you take the version given by the defendant, that the car had not yet come to a stop when the plaintiff undertook to get out, then you might find her guilty of contributory negligence, and in that case she would not be entitled to recover." (Second assignment of error.)

The Court answered a point submitted by the defendant as follows:

"If the jury believe that the plaintiff, Mabel Neff, did not wait for the car to stop, but got off while it was moving, it was negligence on her part which will prevent a recovery, and the verdict must be for the defendant." Answer—"To that we say, that if she failed to wait until the car stopped, and if it was still moving, unless it was so slightly as to be substantially stopped, and she undertook to get off while it was so doing, she would be negligent, and if she was negligent she would have no right to recover." (Fourth assignment of error.)

C. L. Bailey, (*Wolfe* with him), for appellant.

It is the duty of a passenger, in the absence of exceptional circumstances, to wait until the car has stopped before attempting to alight.

Penna. R. R. Co. *v.* Aspell, 23 Pa. 147.
Victor *v.* Penna. R. R. Co., 164 Id. 195.
New York, Lake Erie & Western R. R. Co. *v.* Enches, 127 Id. 316.

The testimony in this case was such that under the rulings just cited, both the plaintiffs and the defendant were entitled to an unqualified instruction, that the jury should find for the plaintiffs or the defendant, as they believed the testimony on one side or the other.

The single point submitted by the defendant in this case is similar to the fourth point submitted by the defendant in the case of the New York, Lake Erie & Western Railroad Co. *v.* Enches, 127 Pa. 316, and nothing could be more appropriate to this case, and the charge of the Court below, than the language of GREEN, J., in delivering the opinion in that case.

S. S. Rupp, for appellees.

Detached portions of the charge, and especially only parts of sentences, should not be assigned for error. Considering the excerpts assigned apart from their context, there is no material error in them. Any doubt as to that is immediately dispelled by reading them in connection with other parts of the charge. It is unfair to the Court below to assign for error only parts of sentences, and if the charge as a whole is a correct and adequate presentation of the case to the jury it will be affirmed.

Penna. R. R. Co. *v.* Coon, 111 Pa. 430.
Little Schuylkill Nav. R. R. & Coal Co. *v.* French & Funk, Adm'rs, 81* Id. 366.
Irvin *v.* Kutruff, 152 Id. 609.

Although parts of a charge when taken separately may seem to be erroneous and indicate a leaning to one side or the other there is yet no error, if taken as a whole, the questions at issue are fairly left to the jury.

Reese *v.* Reese, 90 Pa. 89.
Smith et al. *v.* Meldren, Adm'r, 107 Id. 348.
Com'th *v.* Zappe et al., 153 Id. 498.

Where a judge has expressed himself in such a manner as to be understood by the jury, this Court will not reverse the judgment on critical objections to his language.

Galbraith et al. *v.* Black, 4 S. & R. 207.

Where a reversal of judgment is sought upon the ground that the charge of the Court below was one-sided or calculated to mislead the jury, such error must clearly appear. The Court must feel convinced that the charge as a whole has led the jury astray.

Penn Mut. Ins. Co. *v.* Anna Maria Snyder, 3 WEEKLY NOTES, 269.

Where the Court charges substantially as requested, the party requesting cannot afterwards assign such instruction as error.

Benson & West *v.* Maxwell, 105 Pa. 274.

July 19, 1899. GREEN, J. On the trial of this case two witnesses examined for the defendant testified positively that Mabel Neff and her sister left the car while it was in motion and before it stopped. She and her sister testified that they did not leave the car until it stopped and that it started with a sudden jerk while they were getting off and that this was the cause of Mabel Neff's fall. The witness Lillian Adams testified that the Neff girls got off while the car was moving and that she herself did not get off till after the car stopped and she then saw Mabel Neff lying on the street where she had fallen. Kohler testified to the same effect. He said, "I pulled the door open and I noticed one lady got off the car before it stopped and I seen her take a pitch. . . . Q. It was the first one you say you saw take that pitch? A. The first lady got off before the car stopped; I seen her take the pitch towards the corner of the house or curb as they call it."

As these witnesses were entirely disinterested there was no reason to disbelieve their testimony. It was not possible to reconcile their testimony with that of the plaintiff and her sister, because both of them swore positively that the car had stopped before they got off. It was therefore a matter of prime importance to determine how this disputed fact was, and that determination involved the question of the credibility of the witnesses. The plaintiff was of course directly interested, and her sister naturally sympathized with her. Miss Adams and Mr. Kohler were dis-

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interested spectators. If their testimony was believed the plaintiff certainly could not recover. All our decisions are to that effect. In Railroad *v.* Enches, 127 Pa. 316, we said, "We have so often held that it is contributory negligence for a passenger to leave a car while it is in motion, that it is unnecessary to discuss that question." In Victor *v.* Railroad, 164 Pa. 195, we said, "It may be stated as a general proposition that it is negligence on the part of a passenger to alight from a moving train."

It is plain, therefore, that if the jury in this case believed the testimony of the defendant's witnesses it was their plain duty to return their verdict in favor of the defendant. Now the learned trial Judge in commenting upon this part of the case said to the jury, "And if you take the version given by the defendant that the car had not yet come to a stop when the plaintiff undertook to get out, then you might find her guilty of contributory negligence and in that case she would not be entitled to recover." It is altogether probable from the context that the Court did not intend by the use of the word *might* in this connection, to put, or to intimate, a qualification upon the defendant's right to a verdict in case the jury should find that the plaintiff left the car while it was in motion. But the literal meaning of the words used in the charge is only that the jury *might* find for the defendant in the event stated and not that they should or must so find in that event. If, however, the jury only *might* find for the defendant in that contingency, there is a necessary implication that they nevertheless *might* find for the plaintiff notwithstanding the plaintiff left the car while it was in motion. In other words, they would be under no obligation to find for the defendant in case they found that the plaintiff left the car while it was in motion. As there was no proof of any circumstances which constitute an exception to the operation of the rule, it follows that the instruction should have been in the absolute and peremptory form, and not in the qualified and conditional form in which it was presented. The jury would be at liberty to understand from the words of the charge on this subject that the plaintiff's act of leaving the car while it was in motion would be no bar to her recovery in this action.

The portion of the charge covered by the first assignment is amenable to the same criticism, because if the plaintiff did get off the car before it stopped, it was the bounden duty of the jury to decide that she ought to have waited; and it would not be correct to say that they *might* ascertain that she ought to have waited. The use of the word "might" in this connection in these two portions of the charge would have a tendency to mislead the jury as to their proper function in the contingencies mentioned, and while we think it was entirely unintentional on the part of the learned Judge, and that he did not design to convey a doubtful meaning, yet as the jury might have been misled, we feel bound to sustain these two assignments of error.

As there was no evidence to show that the car was going so slowly as to be substantially stopped when the accident occurred, we think it was a mistake to introduce that element into the answer to the defendant's point, and we therefore sustain the fourth assignment. We think the point should have been affirmed without qualification just as it stood. The matter of the third assignment is covered by the same ruling. It is true the matter was introduced into the plaintiff's point, but as there was no evidence to which it could apply, the Court should have so said in their answer instead of affirming the point as it was presented.

Judgment reversed and new venire awarded.

W. C. S.

May, '98, 9. Supreme Court. May 30, 1898.

Harrisburg v. Guiles, et al.

Opening of judgment—Official bond—Sureties.

Conclusions of fact upon which an action of the lower Court is based in discharging a rule to open a judgment will not be disturbed by the appellate Court.

Where a judgment is entered on an official bond, conditioned for the faithful performance of the duties of the office, the fact that the official had been negligent prior to the execution of the bond, that the city officials had knowledge of said negligence and did not inform the bondsmen thereof, is not sufficient cause for the opening of the judgment as against the sureties, in the absence of proof of willful concealment on the part of the officials.

Appeal of S. W. Fleming and J. H. Forney, from the judgment of the Common Pleas of Dauphin County in discharging (1) a rule to set aside execution on a judgment entered by virtue of a warrant of attorney on the bond of Isaac W. Guiles, delinquent tax collector, and (2) a rule on behalf of said Guiles and the sureties on said bond to open judgment and admit petitioners to make defence.

In November, 1893, Isaac W. Guiles was appointed collector of delinquent taxes for the city of Harrisburg and with his sureties, the defendants, S. W. Fleming, George R. Fleming and H. J. Forney entered into a bond to the city of Harrisburg in the sum of $30,513.02, conditioned that he would faithfully perform his duties. On October 15, 1897, judgment was entered on this bond by virtue of a warrant or attorney annexed and

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damages were assessed thereon at $6438.36 being the amount of taxes which he had failed to collect and pay into the city treasury. Execution was issued on the judgment. On petition of the sureties the Court granted a rule to show cause why the execution should not be set aside. Upon petition of the defendant Guiles and also upon another petition on behalf of the other defendants the Court granted a rule to show cause why the judgment should not be opened and the petitioners allowed to defend. The petitions upon which these rules were granted averred that the bond did not contain any sum as liquidated damages, nor was there anything upon the record to show what amount if any was due upon the bond. The petitioners also averred negligence on the part of the authorities of the city of Harrisburg in not making known to the sureties any delinquency on the part of the defendant, Guiles, and in not informing them of prior delinquency on the part of defendant in his former administration of the office which he had held successively for several years by reappointment prior to 1893.

The answers to the petitions admitted the facts contained in the same and set up that the sureties at the time of the execution and delivery of the bond did not make inquiry as to the faithfulness of the defendant in the administration of his office. The rules were discharged by the Court in an opinion, saying, inter alia:

"The fact that city taxes, apparently to a considerable amount, were outstanding and seemed to be unpaid upon the duplicates in his hands, had been known to the municipal officers (including the councils) during the period from 1885 to 1892 inclusive, but no investigation seems to have been made and no account had ever been required. In spite, however, of all this blamable neglect and indifference to clear statutory commands, the evidence laid before us does not warrant the finding that the defendant, Guiles, had been guilty of embezzlement previous to November, 1893." (First assignment of error.)

"As the evidence does not warrant the finding that the collector had been guilty of crime, it follows that no city official had any reason then to suspect him of crime. But the testimony is ample to justify the conclusion—and we find it as a fact—that the principal city officials did then know that he had been grossly negligent in the discharge of his duty; and we also find that these officials themselves—whose duty it was either to receive moneys from him, or to supervise his conduct and compel settlement of his accounts—had alike been grossly negligent in leniency toward an unfaithful servant, and in disregard of the law." (Third assignment of error.)

The defendants appealed, assigning error, inter alia, as above indicated and that the Court erred in holding as matter of law that the city officials' knowledge of the collector's previous neglect and misconduct did not require them to inform the sureties thereof before the latter assumed the obligation of bondsmen.

W. M. Hargest and *C. H. Bergner*, (*Thomas S. Hargest* with them), for appellants.

The knowledge of the irregularities or misconduct on the part of the obligee concealed from the sureties will relieve them of liability.

Lee *v.* Jones, 108 Eng. C. L. R. 386.
Railton *v.* Mathews, 10 Cl. & F. 934.
Hamilton *v.* Watson, 12 Id. 109.
Franklin Bank *v.* Cooper, 39 Me. 551.
Harrison *v.* Lumbermen's Ins. Co., 8 Mo. App. 37.
W. C. & A. R. R. Co. *v.* Ling, 18 S. C. 116.
Graves *v.* Lebanon Nat. Bank, 19 Amer. R. 50.
Wayne *v.* Com. Nat. Bank, 52 Pa. 345.
Bolz *v.* Stuhl, 4 Pa. Super. Ct. 52.

Prior embezzlement by a State treasurer is sufficient to discharge the sureties for a second term, where the plea avers that at the time the bond was given for the second term the State had knowledge of the prior embezzlement and withheld that knowledge from the sureties, thus perpetrating a legal fraud.

Sooy *v.* State, 39 N. J. L. 135.
The Mayor *v.* Dickerson, 45 N. J. L. 38.
Vermont *v.* Bates et al., 36 Vt. 387.

If a misapplication of funds collected by a borough treasurer is made on the accounts for a different year than those on which the taxes were collected, and that misappropriation was made with the knowledge of the borough or its treasurer, the sureties on the bond of the collector will be relieved.

Com'th *v.* Knettle, 182 Pa. 176.

D. S. Seitz, city solicitor, and *M. W. Jacobs*, for appellee.

Failure of the obligee to disclose to the sureties the previous indebtedness or default of their principal, when not requested so to do, is not sufficient to avoid bond.

Domestic Sewing Machine Co. *v.* Jackson, 15 Lea, 418.
Araheim Union Water Co. *v.* Parker, 101 Cal. 483.
Bowne *v.* Bank, 45 N. J. L. 360.
Howe Sewing Mach. Co. *v.* Farrington, 82 N. Y. 121.
Home Ins. Co. *v.* Holway, 55 Iowa, 571.
R. R. Co. *v.* Ling, 18 S. C. 116.
Wade *v.* City of Mt. Sterling, 33 S. W. Rep. (Ky.) 1113.
State *v.* Dunn, 11 La. Ann. 549.
Cawley *v.* People, 95 Ill. 249.
Aetna Ins. Co. *v.* Mabbett, 18 Wisc. 667.
Beyerle *v.* Hain, 61 Pa. 226.
Boreland *v.* Washington County, 20 Id. 150.
Bank *v.* Braden, 145 Id. 473.

Nothing short of dishonesty need be disclosed.

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Bostwick *v.* Van Voorhis, 91 N. Y. 353.
Howe Sewing Mach. Co. *v.* Farrington, 82 N. Y. 121.
Tapley *v.* Martin, 116 Mass. 275.
Railroad Co. *v.* Gow, 59 Ga. 685; 27 Am. R. 403.
Screwman's Benev. Ass'n *v.* Smith, 70 Tex. 168.

And then only dishonesty known to the obligee.

Wayne *v.* Bank, 52 Pa. 343.
Tapley *v.* Martin, 116 Mass. 275.
Bostwick *v.* Van Voorhis, 91 N. Y. 353.
Bank *v.* Owen, 101 Mo. 558.

Regulations requiring periodical accounting, supervision of accounts, etc., and prohibiting reappointment until settlement in full has been made, are for the protection, not of sureties, but of the public or the corporation, as the case may be, and failure to comply with them cannot be taken advantage of by sureties.

Boreland *v.* Washington County, 20 Pa. 150.
Clarke *v.* Potter County, 1 Pa. 159, 163.
Pittsburgh F. W. & C. Rwy. Co. *v.* Shaeffer, 59 Pa. 350.
Osborne *v.* U. S., 19 Wall. 577.
Amherst Bank *v.* Root, 2 Metc. 522.
Watertown Ins. Co. *v.* Simmons, 131 Mass. 85.
Supervisors *v.* Otis, 62 N. Y. 89.
State *v.* Atherton, 40 Mo. 209.
Wade *v.* City of Mt. Sterling, 33 S. W. Rep. (Ky.) 1113.

July 19, 1899. McCollum, J. Isaac W. Guiles was appointed by the treasurer of the city of Harrisburg collector of the unpaid taxes for the year 1893. He entered into a bond to the city in the sum of $30,513.02 with the appellants as sureties. The condition of the obligation was that "if he faithfully accounted, according to law, for all taxes charged in the duplicate delivered or to be delivered to him by said treasurer, and in all respects faithfully performed the duties of his appointment as prescribed by the laws of Pennsylvania and the ordinances of the city of Harrisburg then the obligation to be void, or else to be and remain in full force and virtue." As he failed in the performance of the duty imposed by his appointment the city entered judgment on the bond and issued execution thereon. The appellants alleging that the execution was improvidently issued petitioned the Court to set it aside. On this petition a rule to show cause why the execution should not be set aside was granted pending which the writ was stayed, lien of levy remaining. In another petition filed subsequent to the petition already referred to, the appellants claim, inter alia, that they were relieved from liability on the bond in question by the fraudulent concealment by the city officials of the misconduct of Guiles as collector of delinquent taxes from and including the year 1885 down to and including the year 1893. They also charge the city officials with willful neglect of their duties pertaining to the collection of said taxes. On this petition the appellants prayed for and obtained a rule to show cause why judgment should not be opened to enable them to interpose their defence to it. Upon a full hearing had on the rule to show cause the Court below held that the claim and charge aforesaid were not warranted by the evidence and having ascertained the amount due to the city from the collector and his sureties discharged the rule to show cause and allowed the execution on the judgment to proceed for the sum due with interest thereon from October 15, 1897. S. W. Fleming and H. J. Forney, two of the sureties on the bond, being dissatisfied with the decision of the Court below appealed from it.

The principal question raised by the assignments of error is whether the negligence of Guiles in the performance of the duty imposed by his appointment and the neglect of the city officials to bring him to account as they might have done relieves the sureties from liability on the bond. In considering this question we must have in view the facts as found by the Court below and the evidence on which they were based. In the first place we note the absence of any charge in either of the petitions filed by the sureties that Guiles was guilty of embezzlement and of any evidence submitted on the hearing which would support such a charge if made. We notice also that there is no evidence in the case which can be considered as sufficient to establish willful and fraudulent concealment from the sureties by the city officials of the negligence and misconduct of Guiles in his capacity of collector of taxes. These are the conclusions reached by the learned Court below upon a careful and impartial consideration of the evidence which seems to us quite sufficient to sustain them. We certainly fail to discover in the evidence any warrant for an inference which would justify us in reversing them. As it was not shown that Guiles embezzled the money of the city, or that the city officials willfully and fraudulently concealed from the sureties his negligence and irregularities in the performance of his duties as collector there is no discoverable ground for relieving the sureties from liability on the bond. The assignments from four to ten inclusive do not require special notice. They relate to matters properly disposed of in the elaborate opinion of the Court below and need not be discussed here.

The assignments are dismissed and the judgment is affirmed.

W. D. N.

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Orphans' Court.

April, '93, 457. Orphans' Court. April 18, 1899.

Marschall's Estate.

Evidence—Parties in interest—Claim adverse to decedent— Clause (e), sec. 5 of Act May 23, 1887, P. L. 158—Minor's maintenance—Declarations of mother to charge therefor—Married woman's earnings.

The devisees and legatees of a widow are incompetent to sustain her claim against the heir of her husband claiming the latter's title by devolution.

Though it is presumed a mother gratuitously maintains her child, especially where she sustains no fiduciary relation to his estate, yet this presumption is rebutted by her declarations, made when the family including the minor are present, that she intended to charge for his board.

Sur exceptions to adjudication.

At the audit of the account of Theresa Marschall, administratrix (deceased) of Robert F. Marschall, deceased, as filed by Charles J. Kunz, her executor, before FERGUSON, J., a claim was presented by the accountant for the maintenance and education of the son and only child of Robert F. and Theresa Marschall (who became of age on November 18, 1898), from March 29, 1893, the date of his father's death, to August 23, 1896, when his mother died—a period of 182 weeks, at $5 per week, in all $910; which claim was allowed. Another claim was presented for $1080, being 72 months' payments, at $15 per month, upon building association stock in the name of Robert F. Marschall, which amount it was alleged Theresa Marschall paid out of her separate earnings. This claim also was allowed, whereupon the son filed exceptions.

Dwight M. Lowrey and *Alfred R. Haig*, (with them *William F. Harrity* and *Henry C. Thompson, Jr.*), for exceptant.

The two witnesses mainly relied on to prove the claim of the widow to the business and to her payments on the stock are clearly incompetent. One was Charles J. Kunz, the son, executor and devisee of the widow. The other was his sister, Mrs. Stover, daughter and devisee of the widow. If the fund were the widow's, she died intestate as to it, and each of these witnesses would be entitled to one-third of it, if it be recovered. The title to the stock was in Robert F. Marschall. His son, the exceptant, sustained his father's title. But the witnesses named, who were children of the mother by a former marriage, set up the mother's title, and that for their own benefit, for if the stock belonged to Robert F. Marschall they had no interest in it. Clearly this is not the case mentioned in the proviso to sec. 5 of the Act of May 23, 1887, P. L. 158. The exceptant claimed by devolution from the decedent; but the two witnesses named claimed against the decedent, not under him.

Miller on Competency of Witnesses, 29.
Buchanan *v.* Buchanan, 46 Pa. 186, 189.

The testimony to establish declarations of the widow showing her intention to charge for support and maintenance against the minor's share in his father's estate is seriously impaired by the fact that she set herself deliberately to work to deprive the minor of his estate. Can a mother who deliberately sets out to despoil her child be permitted to charge that child for maintenance and support?

Samuel P. Tull, for surety of Theresa Marschall, administratrix, and *Edwin F. Glenn*, (*George S. Graham* with them), for accountant, contra.

While the mere fact that a mother maintains her child raises no implied promise to pay, yet it is different where the mother sustains a fiduciary relation to the estate passing to the child.

Seitz's Appeal, 87 Pa. 159.
Smith's Appeal, 30 Id. 397.
Shollenberger's Appeal, 31 Id. 337.
Longaker's Appeal, 36 Leg. Int. 73.
Jones's Estate, 46 Id. 497.

That the building association payments were made in the husband's name does not preclude the wife's executor from showing they were her own.

Bank *v.* Mason, 95 Pa. 117.
Arnold *v.* Macungie, 71 Id. 287.
Hemphill *v.* Yerkes, 130 Id. 552.
Wayne *v.* Lewis, 23 WEEKLY NOTES, 441.
Phillips *v.* Hall, 160 Pa. 60.
Act of June 3, 1887, P. L. 332.

The witnesses were all competent.

Act of May 23, 1887.
Act of June 11, 1891, P. L. 287.

April 29, 1899. ASHMAN, J. The decedent died intestate, leaving surviving a widow and one child, a son, who is now of full age. The widow afterwards died, having first devised and bequeathed her estate to her two children by a former marriage. The executor of her will presented a claim on her behalf against the estate of the decedent, and called in its support her devisees and legatees. We think they were incompetent to testify. The Act of May 23, 1887, sec. 5, cl. (*e*), is in these words: "Nor where any party to a thing or contract in action is dead. and his right thereto or therein has passed, either by his own act or by the act of the law, to a party on the record who represents his interest in the subject in controversy, shall any surviving or remaining party

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to such thing or contract, or any other person whose interest shall be adverse to the said right of such deceased party, be a competent witness to any matter occurring before the death of said party." It is clear that the witnesses were within the letter of the Act, because they were adverse to the right of the decedent. It is equally clear that they were not within its exception, because, being strangers to his blood, they did not claim his property by devolution. The Act works some inequality. In this instance it renders the widow, if she should survive, or her representatives at her death, incompetent to testify in support of her claim, and yet it qualifies the son to testify in support of the estate and against her claim: Toomey's Estate, 150 Pa. 535; Smith *v.* Hay, 152 Pa. 377; Brose's Estate, 155 Pa. 619. The case would have been different if the claim had been by the husband against his wife and both parties had died. The children, all of whom were the offspring of the wife, would have been entitled to her estate by devolution, and would therefore have been competent witnesses for and against each other.

Eliminating the testimony of the stepchildren from the proceedings, there was really no evidence upon which the claim could be built. The demand was for reimbursement of dues upon building association stock standing in the husband's name, which were paid to the amount of $1080 out of the wife's separate earnings. The allegation was that throughout the married life of the parties the wife conducted a prosperous business on her own account as a milliner; that her husband gave up his trade as a printer and was maintained out of the profits of the business and the rent of a property, which netted him $100 a year, and that he did nothing practically to aid her, because the making of the goods required mechanical skill and their sale a certain kind of knowledge which he did not possess. On these points a single witness who was not disqualified by interest declared that she had been fifteen years in the claimant's employ; that the claimant had control of the business; that bills for work done and goods sold were generally made out in claimant's name, and that the decedent had no independent means of support and had himself told her that he had "stopped work" when his wife opened her store in his house, and that she knew the capital was Mrs. Marschall's. This testimony certainly would not justify a jury in finding that the wife's money paid the dues upon stock which stood in the name of her husband and at his death was inventoried as belonging to his estate.

The other claim, for there were two, was for $980, moneys expended in the support and education during minority of the minor son of the decedent. It was allowed by the auditing Judge and ordered to be paid out of the son's share. All of the witnesses who were examined were eligible to testify, because the transactions which they narrated took place after the death of the husband. At his parent's death the son was about sixteen years of age, and from that time up to the death of his mother, he lived with and was maintained by her. We shall not be likely to underestimate the services which he rendered in return for these benefits if we give his own statement of what these services were. According to that statement, he painted the back of the house on Columbia avenue, and the roof of the house on Brown street, and he ran some errands and earned $5 a week for several weeks at a dry goods store. According to the statement of another witness, he collected a few bills for the business, but failed to make a return of the moneys. There is no possible doubt that he was a hinderance and not a help, and that, as one witness put it, the widow "had trouble with the boy." There is also no doubt that she furnished the moneys which were needed for his education and sustenance, and the only question worth determining is as to the capacity in which she paid them. The legal presumption is that she gave them as a pledge of natural affection, but this presumption is rebutted by her frequent declarations, when the family, including the son, were present, that she intended to charge for his board. She was the administratrix of the husband's estate, and in that capacity had in hand moneys accruing from that estate to the minor. She was, besides, the natural guardian of her son. In a case in which the minors had a legally constituted guardian, and in which the mother sought to charge for their maintenance, the language of the Supreme Court was so apposite that we quote it: "She sustained no fiduciary relation to this estate thus devised to her children by their grandfather. It is unlike the case where the mother of the minor children was the executrix of her husband's will, under which she held the property of the children and expended a portion thereof in maintaining them. In the absence of a guardian, there was no injustice in her being allowed therefor": Seitz's Appeal, 87 Pa. 162. We think the evidence showed in the present case that the services after the father's death were rendered pursuant to an implied contract that they should be paid for, and that the amount of the charge was reasonable and was properly directed to be paid out of the share of the son.

The exceptions to the allowance of the claim for moneys paid to the building association are sustained; the remaining exceptions are dismissed.

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WEEKLY NOTES OF CASES.

VOL. XLIV.] *FRIDAY, SEPT. 29, 1899.* [NO. 26.

Supreme Court.

Jan. '98, 11. Supreme Court. May 24, 1898. May 22, 1899.

Kunselman v. Stine.

Dower—Charge in lieu of—Liability of purchaser of land charged in sale under Act of March 29, 1832.

The interest taken by a widow in lieu of her dower at common law is an interest in land and not a mere charge or lien.

When an Orphans' Court decree directs sale of land of decedent to be made and that one-third of the purchase money shall remain during the life of the widow in the hands of the purchaser, and that interest thereon shall be paid by him, his heirs and assigns holding said premises, to be recovered by distress or otherwise as rents are recoverable, the owner of the land during his ownership is personally liable by privity of contract for the interest accruing, which may be recovered in a personal action which is transitory in its character, and execution upon which will not be restricted to the land.

Appeal of W. Nelson Stine, defendant, from the action of the Common Pleas for Northumberland County, refusing to restrict the levy of a certain execution, and to strike off a judgment obtained by D. C. Kunselman and Lavinia, his wife, in right of said Lavinia.

W. Nelson Stine purchased under partition proceedings in the Orphans' Court for Schuylkill county certain land in said county, the sale was confirmed and the Court directed that "the share of Lavinia Stine, the widow of Jonas L. Stine, deceased, should remain in the hands of the purchaser during the life of said widow and that the interest thereof shall be annually and regularly paid to the widow during her natural life by the said purchaser, his heirs and assigns respectively holding said premises."

Lavinia Stine subsequently married D. C. Kunselman. In 1894, D. C. Kunselman and his wife in right of said wife brought action in the Common Pleas for Northumberland county against W. N. Stine to recover the annual interest for some twenty-five years due her by the terms of the Orphans' Court sale; in the meantime the interest of the widow had been sold under execution against her, and the defendant Stine had paid the interest to the purchaser. The Supreme Court held that the sale was irregular and entered judgment for the plaintiff in the sum of $3700, with interest from date of demand: (See 41 WEEKLY NOTES, 82.)

On the return of the record to the Common Pleas for Northumberland county the plaintiff issued a testatum fi. fa. directed to Schuylkill county. Under this writ the sheriff levied on land of the defendant other than that in which plaintiff's interest inhered; the petition prayed that the lien of the levy and execution be declared to be restricted to the land sold at the Orphans' Court sale, and that the case itself should be stricken off on the ground that the jurisdiction to try it was not in the Court for Northumberland county, which question had not been passed upon by the Supreme Court. The Court, after argument, refused both prayers. The defendant took this appeal. The case was first argued May 24, 1898.

W. A. Marr, for appellant.

An action of assumpsit may be maintained against the assignee of land subject to the charge of a widow's third, but the judgment must be entered so as to make the land only liable, and not the defendant personally.

It is held that where a party buys land from an heir who took it at an appraisement subject to the widow's third under the 41st section of the Act of March 29, 1832, the heir may recover his portion after the widow's death, in assumpsit against the purchaser, but the judgment must be de terris.

Pidcock v. Bye, 3 Rawle, 183.
Shelly v. Shelly, 8 W. & S. 160.

The judgment in the present case should be de terris and not general.

Dech v. Gluck, 47 Pa. 410.
De Haven v. Bartholomew, 57 Id. 126.

The action is local, arising from privity of estate, not of contract, and hence the Court below had no jurisdiction.

Rodney v. Washington, 16 WEEKLY NOTES, 226.
1 Tidd's Practice, 373 (1st Am. ed.).
1 Saunders Pl. & Ev. 865 (2nd ed.).
Clark v. Scudder, 6 Gray, 122.
Lienow v. Ellis, 6 Mass. 331.
Act of June 13, 1836, sec. 79, P. L. 587.

The question of jurisdiction is not res adjudicata as no reference was made to it by the Supreme Court, and the right to question jurisdiction was reserved with case stated.

If, however, the jurisdiction is sustained the lien of the levy and execution should be restricted.

S. B. Boyer, for appellee, cited—

Act March 29, 1832, secs. 41, 43, P. L. 202.
Act May 23, 1871, P. L. 274.

The latter Act says, that the Court may direct that a purchaser should enter into recognizance

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with sufficient surety, to be approved by the Court, etc. Can it be said that if surety is taken that an action on such a recognizance is de terris for the purchaser and general as to the surety? We take it that the law makers did not intend the action for the interest to be de terris or local. It could certainly not be local as to the surety; he would have no interest in the land; if the action is not local or de terris as to one, why is it not transitory to both? In the decree of sale, as well as in the decree of confirmation of the sale, the money was to remain in the hands of the purchaser during the life of the widow, and during the same period the widow was to receive the interest, collectible by distress or otherwise.

It is in the nature as if money was loaned to a person, the sum to be paid upon the happening of a certain event to one party, and that the interest thereof was payable to another up to the happening of that event.

The action can not be said to be local or de terris.

A reargument was ordered which was had May 22, 1899.

N. Heblich and *John W. Ryon*, for appellant.

When the cause of action could only have arisen in a particular place or county, it is local and the venue must be laid therein.

1 Chitty on Pleadings, 280.
Powell *v.* Smith, 2 Watts, 126.

It is not in the power of a party to change a local into a transitory action, and try the title to land in another county ex-directo, where the right to the land is the very foundation of the plaintiff's action.

Baker *v.* Howell, 6 S. & R. 482.

Under the Act of 1832 the widow's interest is real estate.

Miller *v.* Leidig, 3 W. & S. 458.
Mansell's Estate, 1 Pars. 367.
Mentzer *v.* Menor, 8 Watts, 296.
Mann's Appeal, 50 Pa. 380.
Scott's Intestate Law, 469, 470.
Thomas *v.* Simpson, 3 Pa. 60.
Dietz *v.* Beard, 2 Watts, 171.

The interest being real estate the judgment could be only de terris.

S. B. Boyer, for appellee.

By the terms of the sale the purchaser and his land are both debtor.

Kean *v.* Ellmaker, 7 S. & R. 1.
Pa. Co. *v.* Vansyckel, 2 Pittsb. 535.

July 19, 1899. FELL, J. The plaintiff sued to recover the arrears of annual interest due upon her share of the real estate of which her husband died seised. Her right to recover was settled by the decision in Kunselman *v.* Stine, 183 Pa. 1, in which it was held that her interest in the real estate of her husband was that of a tenant for life, and that it was not changed by the fact that in partition proceedings it was charged upon all the land of the husband passing to a purchaser. Her action was brought in Northumberland county, and the land is situate in Schuylkill county. Upon the return of the record from this Court to the Common Pleas of Northumberland county a testatum fi. fa. was issued directed to the sheriff of Schuylkill county. The defendant then obtained two rules, one to show cause why the levy should not be restricted to the land, and the other to strike off the judgment on the ground that the action was local and that the Court in which it was brought was without jurisdiction. The discharge of these rules gave rise to the questions now presented.

When the sale to the defendant was confirmed by the Orphans' Court it was ordered that one-third of the purchase money, being the share of the widow, should remain during her life in the hands of the purchaser, and that interest thereon should be paid to her by him, his heirs and assigns, holding said premises, to be recovered by distress or otherwise as rents are recoverable. This order was made in pursuance of the 43rd section of the Act of March 29, 1832, which provides that where a decree for the sale of real estate under proceedings in partition shall be made by the Orphans' Court, "the Court shall direct, that the share of the widow, if there be one, of the purchase money, shall remain in the hands of the purchaser during the natural life of the widow, and the interest thereof shall be regularly paid to her by the purchaser, his heirs and assigns holding the premises, to be recovered by distress or otherwise as rents are recoverable in this Commonwealth, which the widow shall accept in full satisfaction of her dower in such premises, and at her decease, her share of the purchase money shall be paid to the persons legally entitled thereto."

Difficulty has been experienced in all attempts to define the precise nature of the interest which a widow takes in this State in lieu of her dower at common law. The cases, however, agree that it is an interest in land, and not a mere charge or lien; and that the character of her interest is not changed by the Act of 1832, which prescribes the form of ascertaining and assigning it and changes somewhat the method of its use and enjoyment: Schall's Appeal, 40 Pa. 170; Gourley *v.* Kinley, 66 Pa. 270; Diefenderfer *v.* Eshleman, 113 Pa. 305; Kunselman *v.* Stine, 183 Pa. 1. But the only question now before us is whether a purchaser at the sale under proceedings in partition, who still holds the title to the land, is personally liable for the payment of the annual interest. That the acceptance by an heir of a por-

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tion of a decedent's estate charged with the payment of the interest of one-third of its valuation to the widow for life creates a personal liability on the part of the heir for the payment of the interest, was expressly decided by this Court in Penna. Co. *v.* Vansyckel, 2 Pittsburgh, 535, 5 Leg. & Ins. Rep. 107. In the opinion in that case it was said by STRONG, J.: "The heir then takes the land descending to him and adjudged to him in severalty on the conditions prescribed in the Act, which are, that he shall annually pay to the widow the interest on one-third of the valuation, and that it may be recovered of him as rents are recoverable. That this creates a personal liability to pay, even without a bond or recognizance securing the widow's interest, is manifest. In substance, the heir is a purchaser from the widow, and her interest is the price. Her dower is exchanged for her interest under the intestate laws, and the heir obtains the land unencumbered by her dower, in consideration for his assuming to pay her the annual interest."

This reasoning applies with equal if not with greater force to a purchaser at the sale. The 41st section of the Act, which provides for the interest of the widow where the land is taken by the heirs, requires that the sum at which her share of the estate shall be valued, together with interest thereon, shall be and remain upon the premises. The 43rd section provides that where the land is sold the widow's share of the purchase money shall remain in the hands of the purchaser during her life. The language of this section, more directly than that of the 41st section, imposes a personal liability.

The action, being founded on privity of contract, was transitory, and the Court in which it was brought had jurisdiction.

The judgment is affirmed.

H. B.

June, '99, 140. Supreme Court. May 17, 1899.

Lehr v. Brodbeck.

Sale of personal property—Debtor and creditor—Sale to creditor to protect him—Change of possession—New trial—Duty of judge in case of perverse verdict or one against the weight of the evidence.

While there is no fraud, per se, in a sale of personal property to a creditor, not intended to hinder, delay or defraud other creditors, but simply to prefer the vendee as a creditor, unless there is some change of possession as to the property, either actual or symbolical, so as in some public manner to manifest the change of ownership, the sale is constructively fraudulent as to creditors.

The granting of a new trial is in the discretion of the Court of first instance, and will not be reviewed except in a clear case of an abuse of that discretion.

The action of the Court, where the verdict is for the plaintiff, in directing a release or modification thereof, with the alternative of a new trial if the direction be not heeded, has more than once been held a proper exercise of discretion.

Where, however, the jury find a verdict for the defendant in flat disobedience to the direction of the Court, it is an abuse of discretion to refuse a new trial unless the plaintiff accept a smaller sum than under the law as held by the Court, he is on the evidence entitled to.

A suitor has a right to the opinion of the jury upon the evidence, and the Court can not deprive him of this right by refusing a new trial, unless he accept a smaller sum than he claims.

Any condition attached to the granting of a new trial which deprives a suitor of a legal right is outside the discretion of the trial Judge.

In an action of trespass for damages where a verdict was rendered for the defendant contrary to instructions, the Court imposed terms, as a condition of a new trial, unless the defendant tendered a sum smaller than that claimed in full settlement of the claim:

***Held*, that such conditions deprived the plaintiff of the right to have the law, as set forth by the Court as to the full claim, reviewed, and, therefore, was error.**

Bradwell *v.* Railway Co., 27 WEEKLY NOTES, 264, followed.

Appeal of Kizzie Lehr, plaintiff, from the judgment of the Common Pleas of York County, in an action of trespass brought by Kizzie Lehr against Andrew R. Brodbeck, sheriff of York county, to recover damages for the sale of certain personal property, belonging to her, which was sold by defendant upon an execution against the plaintiff's brother, Charles A. Lehr.

The facts of this case will be found set forth in the opinion of the Supreme Court. The plaintiff's witness, Charles A. Lehr, being on the stand, the defendant's counsel desired to cross-examine him, as follows:

"Q. (By Mr. Glessner.) And did you not reply, 'I sold everything, and I got the cash for it?' (By the Court.) Did you say that? A. Yes, sir; I said I got $696 cash. (Discussion.) (The purpose requested by Mr. Wanner.) Mr. Glessner—This is for the purpose of contradicting the witness, if he denies it, and to go as affecting his credibility; and for the purpose of showing fraud. Objected to (by Mr. Wanner), that it is not evidence for any purpose, except to affect the credibility of the witness, because the plaintiff was not present. The Court—Well, I understand that you alleged fraud in this transaction? Mr. Glessner—Yes, sir. The Court—That being the case, I think it is competent evidence. Mr. Glessner—This is a part of the con-

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tract. Mr. Wanner—This is not a party to the suit at all. The Court—It is cross-examination as to his selling this property to his sister at the time mentioned. We allow the question, and seal an exception for the plaintiff." (Fifth assignment of error.)

The plaintiff submitted, inter alia, the following points:

"1. That the plaintiff, having sworn that she purchased the goods and personal property of Charles A. Lehr previous to the sheriff's sale, and that the same remained hers to the date of the sheriff's sale, and that the said Charles A. Lehr after said sale exercised no acts of ownership about the same; and it further appearing from the evidence of the plaintiff, if believed, that she had for ten years been the lessee of the house and garden on the premises in question, it is for the jury to find from all the evidence in the case whether the alleged sale of the personal property of Charles A. Lehr to the plaintiff was bona fide, and whether or not there was a delivery of the goods in question to the said plaintiff, before the sheriff's levy on the same." "We answer this point as follows: This point is refused." (First assignment of error.)

"3. That the verdict of the jury should be for the plaintiff for the value, on the day of sale, of each and every article of personal property sold by the defendant, which the jury find from the evidence was then and there in the possession of Kizzie Lehr, and was her property before the levy, whether bought from Charles A. Lehr or any one else." "We answer this point as follows: This point is refused, because it includes the property bought from Charles A. Lehr, including the horses, farming utensils, posts, rails, tobacco, and other articles which, in the opinion of the Court, is not proven to have been delivered to the plaintiff, and over which she exercised exclusive control, in the manner I have already stated; and upon which the Court has already instructed the jury she cannot recover for in this case." (Second assignment of error.)

The Court charged the jury, inter alia, as follows:

"[There was no delivery, according to the testimony in this case, of these farm implements. They were used on the premises as they were before, and they were used there by Charles A. Lehr as before the sale. The horses remained in the stable without any visible change of ownership, or possession by the plaintiff. The implements were on the place as they were before; the tobacco remained in the shed where it was,—all on the premises where it was before, without apparently being taken into the possession of the plaintiff. As far as the evidence goes, there was no change, or visible change of this property,—nothing to show that it passed into her possession, or that she exercised any exclusive control of this property, that she alleges she bought from her brother, after the sale."] (Third assignment of error.)

"The Supreme Court has laid down, as I have said, the rule that the property must pass into the possession and control of another, as against a creditor, in such a case. In the case of Weller *v.* Meeder, one of the latest cases, found in the second Superior Court reports, the Superior Court says this in reference to a case that was then before it,—a case somewhat similar to this: 'With the imperative duty resting upon them,' that is, the parties who alleged the sale, 'of doing everything in their power to secure the public from that deception which the possession of property without the ownership always enables a person to practice, they did nothing to change the possession or apparent possession. Actually, by notice, sign, symbol or otherwise, no change of possession took place in any visible manner. The mother continued in her own house, on her own farm, with the same possession of the property named in the bill of sale that she had enjoyed for years.'

"[So in this case, there was no visible change of possession, either actual, by notice, sign, symbol or otherwise; and the property continued in the possession of Charles A. Lehr, on the property where he alleged the sale took place. And, as a matter of law, we instruct you that the plaintiff cannot recover for any articles which she alleged she purchased from Charles A. Lehr, her brother, and which remained in his possession, as we have stated, without any visible change of possession, excepting the growing grain and the manure. The posts and rails, and the farming implements, and the horses, and all the other articles, were not sufficiently, in the opinion of the Court, delivered to the plaintiff, and she did not exercise exclusive control over the same, in the opinion of the Court, to justify the matter being submitted to the jury, and to vest the property in her. Therefore, we instruct the jury that you cannot allow for any articles which she alleged she purchased from her brother, except the grain in the ground, the manure, and the cooking stove, which I understood was in the house. And we will take it for granted that it was in the house, because it does not appear that it was otherwise, so far as I remember, and it is alleged to have been sold for one dollar."] (Fourth assignment of error.)

Verdict for defendant. Upon motion for a new trial the Court made a peremptory order, as follows, saying, inter alia:

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"For value of the cows, bull, hogs, and turkeys, we think the verdict should have been for the plaintiff. They were clearly proven to have been her property, not in any way acquired from her brother, the defendant in the execution.

"We expressed ourselves to this effect at the argument. The calculation of the plaintiff's counsel of the value of these articles, sent out with the jury, made it slightly in excess of $300; that of the defendant's counsel about $200. We indicated at the argument that a fair adjustment of the case would be a judgment of $250 for the plaintiff, with the costs of suit. Counsel on either side did not assent to this.

"We determined if the case was not disposed of on this basis, to grant a new trial. We have since received a letter from Mr. Glessner, counsel for the defendant, saying defendant will pay $250 and the costs, as suggested by the Court.

"Upon proof of tender of said amount to plaintiff's counsel or either of them, and of the costs as taxed to the prothonotary and the refusal of plaintiff to receive said sum in full settlement of her claims, the rule for a new trial will be discharged."

Subsequently the plaintiff having refused to concede to the terms contained in the above opinion of the Court, judgment was entered in favor of the defendant; whereupon the plaintiff took this appeal, assigning for error, inter alia, the answers to her points as above, the portions of the charge given above in brackets, and the action of the Court, in discharging the rule for a new trial upon the given terms, and in entering judgment for the defendant.

N. M. Wanner, (*E. D. Bentzel* with him), for appellant, cited—

Bradwell *v.* **Pittsburgh & West End Railway Co., 27 WEEKLY NOTES, 264.**
Kohler *v.* **Penna. R. R. Co., 26. WEEKLY NOTES, 176.**
Reno *v.* **Shallenberger, 8 Super. Ct. 439.**

James G. Glessner, for appellee, cited—

As to change of possession—

Pressel *v.* **Bice, 142 Pa. 270.**
Lautner *v.* **Kann, 184 Id. 334.**
Berwald *v.* **Ray, 8 Pa. Super. Ct. 365.**

As to imposing terms upon granting a new trial—

McBride *v.* **Daniels, 92 Pa. 332.**
Crew, Levick & Co. *v.* **McCafferty, 23 WEEKLY NOTES, 278.**
Com'th *v.* **Roddy, 184 Pa. 292.**

July 19, 1899. DEAN, J. This is an action of trespass against defendant, sheriff of York county, to recover damages for the alleged wrongful seizure and sale of her goods on an execution against her brother, Charles A. Lehr.

The farm on which the property, live stock, farming implements, grain in the ground, etc., was seized, belonged to the brother. Both were single. The evidence showed, that they went upon the farm in 1886, she keeping house for him until the date of the sale. At the time they went upon the premises, by a written agreement, the brother leased to her the house, yard and garden; she to furnish board and lodging for all the help he might require upon the farm; further, that she should keep upon the farm, cows, hogs, chickens and turkeys; further, she should receive from him the sum of twelve dollars per month. It was further stipulated, that at any time her compensation amounted to sufficient sum, she should have the right to purchase all the personal property on the premises and hold the same as her own.

From the date of this agreement, for about ten years, the brother and sister lived upon the farm under the terms of it. In October, 1896, she claimed there was due her from him under it, $1440; and, further, that in October, 1891, she had loaned to him of her own money, $986; and had taken his receipt therefor, both sums with interest making $3388.50; and that in payment of this debt, he had sold and delivered to her by bill of sale in writing all the personal property upon the farm not already owned by her, including grain in the ground and tobacco. The plaintiff claimed, as belonging to her under the terms of the first agreement, made when they went into possession, and as purchased from others by herself, certain live stock and poultry of the value of $335.

To April term, 1895, one George Rutter obtained a judgment against Charles A. Lehr, on which, to January term, 1897, he issued execution, levied on all the property on the farm; the sheriff sold the same at public sale; before sale, he was notified by the sister, that the property belonged to her. She then brought this action. At the trial in the Court below, three questions arose on the evidence:

1. Was the sale by the brother to her actually fraudulent?

2. If not fraudulent in fact, was it against creditors constructively fraudulent, for want of such change of possession as required by law in a sale of chattels?

3. What articles were the sister's, not purchased from the brother under the bill of sale, and what was their value?

As to the goods purchased from her brother under the bill of sale, the Court instructed the jury thus:

"So in this case, there was no visible change of possession, either actual, by notice, sign, symbol or otherwise; and the property continued in

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the possession of Charles A. Lehr, on the property where he alleged the sale took place. And, as a matter of law, we instruct you that the plaintiff cannot recover for any articles which she alleged she purchased from Charles A. Lehr, her brother, and which remained in his possession, excepting the growing grain and manure. The posts and rails, and the farming implements, and the horses, and all the other articles, were not sufficiently, in the opinion of the Court, delivered to the plaintiff, and she did not exercise exclusive control over the same, in the opinion of the Court, to justify the matter being submitted to the jury, and to vest the property in her. Therefore, we instruct the jury that you cannot allow for any articles which she alleged she purchased from her brother, excepting the grain in the ground, the manure, and the cooking stove, which I understood was in the house, and we will take it for granted that it was in the house, because it does not appear that it was otherwise, so far as I remember, and it is alleged to have been sold for one dollar."

This is made the subject of complaint in appellant's first, second, third, fourth and fifth assignments of error. From the evidence, it is probable, there was no intentional fraud in this sale. The decided weight of the evidence seems to show, that the brother, during the ten years they had been living together on the farm, had become indebted to the sister to the amount of the purchase money; he appears to have been thriftless, perhaps to some extent unfortunate; she was industrious and frugal, carefully turned the products of the farm coming to her into money, and saved it. The purpose of the sale, seems not to have been to hinder, delay or to defraud the brother's creditors, but to prefer her as a creditor. But there was no change of possession such as the property was capable of, following the sale, either actual or symbolical. True, the brother was not required to separate from his sister, and leave the farm, so that she could remain in the exclusive possession of the property; but he could have withdrawn from the control of it; could have surrendered the keys of the barn to her; both or either could in some public manner have manifested the change of ownership which had taken place. But to all outward appearances, his ownership remained the same as before; there was no break in the possession, real or ostensible. As to creditors, therefore, the sale was constructively fraudulent, under all the authorities from Clow *v.* Woods, 5 S. & R. 275, down to Pressel *v.* Bice, 142 Pa. 270.

But as to the property which she took upon the farm ten years before, and purchased from others afterwards, that was clearly hers; the brother never had title to or possession of it; his creditors had no more claim to it, either in law or equity, than to the shoes upon her feet. The jury, as to this property, should have been peremptorily instructed to find in her favor its value on the evidence; and that was the opinion of the learned Judge of the Court below, as is apparent from his charge. But, evidently, much to his surprise, they brought in a general verdict for defendant. It is not improbable, they failed to comprehend his instructions. Instead, however, of at once setting aside the verdict and ordering a new trial, he entertained a motion for a new trial; while this was pending, the Court received a communication from defendant's counsel, stating that his client would pay $250 and the costs; thereupon it directed, that on proof of tender of that amount to plaintiff and costs in full settlement of her claim, and her refusal to accept it, the new trial would be refused. On tender, she did refuse it; thereupon, the Court overruled the motion for new trial, and directed judgment for defendant with costs of suit. This action of the Court forms the basis of appellant's seventh and eighth assignments of error. The exercise of discretion by the Court in granting or refusing a new trial, is never reviewed here, except in a clear case of abuse of that discretion. And the action of the Court, in directing the release or modification of a verdict in favor of the plaintiff, with the alternative of a new trial if the direction be not heeded, has more than once been held a proper exercise of discretion. But here, in flat disobedience to the instruction of the Court, the verdict was for defendant. The plaintiff claimed, that the value of her goods, wrongfully seized and sold, even under the law as held by the Court, was $335. And whether this was the value or not, she had offered evidence tending to establish it as the value. As a suitor, under the law, she had a right to the opinion of the jury on the evidence; and the Court at the trial thought so too. It, however, now directs her, arbitrarily, to strike from her claim $85, and as a penalty for refusal, in effect says, she shall have nothing and pay the costs. Under all the rules regulating the practice of Courts, she was entitled to a new trial, when the jury, either ignorantly or contumaceously refused to obey the law as directed by the Court; but where is the authority in precedent or reason for arbitrarily deducting from what she insists is an honest claim, $85? The Court does not say, take $250. or a new trial, for she has no verdict; but it says take $250, or nothing, and pay the costs, in the face of its own opinion at the trial, that she was in law entitled to the value of her goods wrongfully seized for her brother's debt. We think there

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was no discretion in the Court, authorizing it to impose such terms.

There was another stipulation in the terms imposed, which is, to say the least, of doubtful propriety. She was to accept the $250 in "full settlement of her claims." Her claims were over $3000, including the property embraced in the bill of sale by her brother; if she assented to the terms of the order, her right to have reviewed here, the law as announced by the Court with reference to constructive fraud, was relinquished; the defendant would have been discharged, not only from the claim for $335, but from that of $3000. We think the terms in this particular were hard ones, and not such as should meet the approval of this Court. Penalties should not be imposed upon suitors which shut them off from the appeals allowed them by law. If the Court had directed defendant to pay and plaintiff to accept $335, the amount of her claim, leaving her free to prosecute her assignment of error to the law laid down on the question of constructive fraud, she could then have had no ground of complaint, for no right would have been invaded.

Nor are we without authority on the point. In Bradwell *v.* Railway Co., 139 Pa. 404, the plaintiff brought suit for damages against the railway company for injuries caused by neglect to keep its track in repair; a broken and bent rail had caused a serious injury to himself and vehicle; there was no question as to the negligence of defendant; it was in dispute, whether plaintiff had contributed to the injury by negligent driving; this was left to the jury, who found a verdict for plaintiff in six and one-fourth cents damages. On a motion for a new trial, the trial Judge held, that either the plaintiff on the evidence was entitled to substantial damages or to nothing, but to avoid the trouble and expense of a new trial, he undertook to administer what seemed to him the equities of the case, and made this order: "That if defendant pay to plaintiff within thirty days $400 with costs, then new trial is refused, otherwise new trial will be granted." The plaintiff refused to accept the $400, and the Court entered judgment on the verdict. On review by this Court, in an opinion by the present Chief Justice, it was held, that plaintiff had a right to have the jury pass on the question of damages, and by their verdict award him such sum as he was entitled to. And for this reason, among others, the judgment was reversed.

There is nothing of merit in the sixth assignment of error calling for discussion, and it is overruled. But for the reasons already given, the seventh and eighth assignments are sustained. The judgment is reversed and a venire facias de novo awarded. S. H. T.

Jan. '99, 372. Supreme Court. March 14, 1899.

Brague v. Northern Central Railway Co.

Negligence—Infants—Trespasser on railroad.

A railroad company owes no duty to a trespasser upon its right of way, other than that of abstaining from wantonly injuring him; and is not bound to assume that anyone will be on its track at any place other than a crossing; when, therefore, it appears that a person upon the track at a place other than a crossing is run down by a train, the fact that no warning of the approach was given is not evidence of negligence.

A railroad company owes no greater duty to an infant trespassing upon its tracks than to an adult.

Appeal of Emory S. Brague, plaintiff, from the refusal of the Common Pleas for Bradford County to take off a judgment of non-suit entered in an action of trespass brought by him against the Northern Central Railway Company.

On the trial of this cause, before ALBRIGHT, P. J., the plaintiff showed the following case: In 1885, the defendant company maintained a railroad near a lumber camp known as Carpenter's, in Tioga county. The road, at Carpenter's, was the main, and two side tracks. The side tracks ran some sixty rods north and south of Carpenter's. There was also a short switch which connects the main, and east siding. The public road crossed the railroad near the middle of this short switch. The highway and railroad made nearly a right angle on the west; on the east they ran parallel. The highway made a bow in crossing the railroad.

On the right of way of the defendant, from ten to fifteen feet south of the public road, and from four to seven feet from the west rail of the west siding, there was a "penstock," at which at least eight families were supplied with water. This water was brought a long distance, through a pipe, to this point by the defendant, but had not been used by it for any purpose, unless it was to accommodate these families who got water there, for at least 12 years.

The plaintiff lived with his parents, on the east side of the railroad, and at least five families, who lived on the east, got water at the "penstock." For 12 years they had taken water from the "penstock," without objection

On March 28, 1885, the plaintiff, a boy of between seven and eight years of age, was sent by his parents for a pail of water. The child went from his father's house, which was near the railroad, to the highway, then up the highway to the crossing, over it till he left it to step to the "penstock." At the crossing, he passed between the defendant's cars, which were standing on the

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east siding, both north and south of the highway. While he was at the "penstock," the defendant's freight train came up and stopped over the crossing. With the engine of this freight train, four cars were taken from the east siding and put in the freight train. Just as the freight train was moving out, but before the cars which were on the crossing were in motion, the boy's pail having filled, he went back in the crossing, found the cars standing on it, left it in the west siding, walked south 2 or 3 feet below the "penstock," went upon the tracks when he was struck and run over and very seriously injured, losing a leg.

Frank Smith, a witness called by the plaintiff, said the boy came right on the track from the "penstock," and walked down the siding. The boy started down the siding, to go around the cars, to get across the railroad, to go home. In going directly across the railroad from the "penstock," the highway would be reached at the main track.

The tender and engine, called the "pusher," came from the main track, in on the west siding, 60 rods north of the public highway. The bell was rung when it came in on the siding, but not after that. The "pusher" ran noiselessly down the siding, running backward without steam, giving no signals of warning as it approached the crossing and "penstock," and stopped some 50 feet below where it ran over the boy. The "pusher" was running about six miles an hour. From the time it came in on the siding till it struck the boy, there was nothing to prevent the men on the "pusher" seeing the boy if they had been looking out for the crossing or "penstock."

There were three men on the "pusher," but none of them saw the boy until he had been run over. When the "pusher" passed over the crossing and by the "penstock," there was no one on the tender. After the accident, the engineer reversed the engine, stopped it, jumped down and stepped back a few steps, looked at the boy, and said, "Fred, if you had been in your proper posish, this thing could never have happened."

The plaintiff having closed, the Court entered a non-suit, which the Court in banc refused to take off. The plaintiff took this appeal, assigning the refusal as error.

D. C. De Witt, for appellant.

The plaintiff was not a trespasser, he was on the track by permission, going to and returning from the penstock.

There is a duty even to trespassers, and it is negligence, if a company have reason to suppose people will go upon the track, to proceed as though no such reason existed.

See the opinion of the Supreme Court in—

Pa. R. R. Co. *v.* Lewis, 79 Pa. 33.

And see—

Biddle *v.* Railway Co., 112 Id. 551.

And where an owner has reason to apprehend danger from the peculiar situation of his property and its openness to accident, the question of duty becomes one for the jury, to be determined upon all the facts of the probability of danger and the grossness of the act of imputed negligence.

Hydraulic Works *v.* Orr, 83 Pa. 332.

This case is governed by—

P. & R. R. R. Co. *v.* Troutman, 11 WEEKLY NOTES, 453.

W. T. Davies, for appellee.

Railroad tracks are exclusively for railroad purposes, and even the employés of the company could not grant leave to use the tracks as the boy was doing, when hurt.

R. R. *v.* Norton, 24 Pa. 465.

No negligence can be imputed under the undisputed facts in this case by a failure to give signals or to see the boy, when trespassing upon the track, in time to save him, and in the absence of evidence that the employés did see the boy in time to save him, no negligence can be charged upon the company.

Moore *v.* Phil., Wil. & Baltimore R. R. Co., 108 Pa. 350.
Hummel *v.* R. R. Co., 44 Id. 379.
Flower *v.* Pa. R. R. Co., 69 Id. 210.
Baltimore, etc., R. R. Co. *v.* Schwindling, 101 Id. 258.

The plaintiff was a trespasser, and though a child about eight years of age, cannot recover.

Hummel *v.* R. R. Co., 44 Pa. 378.
Caley *v.* Railway Co., 95 Id. 398.
Moore *v.* Pa. R. R. Co., 99 Id. 301.
Mitchell *v.* P., W. & B. R. R. Co., 132 Id. 227.

July 19, 1899. GREEN, J. The plaintiff and all his witnesses who speak upon the subject, testify that the plaintiff, at the time he was struck by the engine, was walking upon the track of the railroad in between the rails and along the track. He was not at the highway crossing, but some twenty feet away from it, according to his own testimony, and about thirty-five or forty feet distant according to the testimony of McCaslin, one of his witnesses. The engine was moving very slowly, about five or six miles an hour. Smith, another of the plaintiff's witnesses who was on the ground and saw the whole occurrence, testified: "I saw the accident. I was just across the track opposite the penstock. I was standing near the railroad where it goes into the main road at the crossing. . . . . Pusher engine was running very slow, should say not faster than five miles an hour; the boy was picked up right near the Drovleskey shanty; when he was hit he was

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walking down the track with his water, between the rails of the siding. I locate him when he was hit probably twelve or fifteen feet from the penstock; saw the boy at the penstock—saw him start; from the penstock he stepped down on the track—walked right on the track from the penstock—am sure about that—and walked down the track to get around this train."

Another witness for the plaintiff, McCaslin, said: "There was a freight train there at the time of the accident; it extended over the road three or four cars below the crossing; it started up—it was just nicely on a move—just pulling up—as the 'pusher' went back over the crossing. . . . . At the time the plaintiff was injured the train was moving north on the main track; it required about four cars to have passed before the train would have passed the crossing; it would have taken a little more than a minute—a little longer than that." This freight train was moving on the main track over the crossing and it was to get around this, according to Smith, that the plaintiff walked down on the siding. Had he waited this very brief space of time, a single minute, he could have crossed in perfect safety. He had gone from his father's house a few moments before to the penstock to get a pail of water. The penstock was about seven feet from the nearest rail of the track. He was asked by his own counsel: "Q. After you got the pail of water and started to go home, state what you did? A. I went back up into the public highway and started down the siding. Q. Why did you start down the siding? A. Because there was a train across the crossing. . . . . Q. You say you started down the siding. What happened then? A. I got struck with an engine." On cross-examination he was asked: "Q. Then when you left the roadway you went on the siding? A. Yes, sir. Q. And walked down the siding? A. Yes, sir. Q. Going south? A. Yes, sir. Q. On the siding? A. Yes, sir. Q. Between the rails of the siding? A. Yes, sir. Q. About where on the track were you walking, as to the middle of the track or by the side? A. In the middle between the rails."

There was other testimony to the same effect. It was therefore firmly established by the testimony of the plaintiff and his witnesses, that he went upon, and walked on, the track of the railroad voluntarily and of his own accord, without the least necessity or occasion for his so doing, without any permission to do so from any agent of the defendant, and without walking upon any beaten track, or upon any path or footwalk of any kind. Under all our decisions he was a clear trespasser upon the track at the time and place where he was hurt, and most clearly has no right of recovery. As far back as Railroad *v.* Hummel, 44 Pa. 378, in 1863, this doctrine was announced and enforced in the case of a child seven years old and in circumstances far more favorable to a recovery than in the present case, and the rule then adopted has been always adhered to and followed from that day to this. In view of the earnest contentions of the learned counsel for the appellant in the present case, it may be well enough to repeat some of the reasoning upon which the decision in Railroad *v.* Hummel was founded. The opinion of this Court was delivered by the distinguished jurist, Mr. Justice STRONG. In the course of the opinion he said, "But if the use of a railroad is exclusively for its owners, or those acting under them; if others have no right to be upon it; if they are wrong-doers whenever they intrude, the parties lawfully using it are under no obligations to take precautions against possible injuries to intruders upon it. Ordinary care they must be held to, but they have a right to presume, and to act on the presumption, that those in the vicinity will not violate the laws; will not trespass upon the right of a clear track; that even children of tender age will not be there, for though they are personally irresponsible they can not be upon the railroad without a culpable violation of duty by their parents or guardians. Precaution is a duty only so far as there is reason for apprehension. No one can complain of want of care in another where care is only rendered necessary by his own wrongful act. It is true that what amounts to ordinary care under the circumstances is generally to be determined by the jury. Yet a jury can not hold parties to a higher standard of care than the law requires and they cannot find anything negligence which is less than a failure to discharge a legal duty. If the law declares, as it does, that there is no duty resting upon any person to anticipate wrongful acts in others and to take precautions against such acts, then the jury can not say that a failure to take such precautions is a failure in duty and negligence. Such is this case. The defendants had no reason to suppose that either man, woman or child might be upon the railroad where the accident happened. They had a right to presume that no one would be on it, and to act upon the presumption. Blowing the whistle of the locomotive, or making any other signal was not a duty owed to the persons in the neighborhood, and consequently the fact that the whistle was not blown, nor a signal made, was no evidence of negligence. Were it worth while, abundant authority might be cited to show that the law does not require any one to presume that another may be negligent, much less to presume that another may be an active wrongdoer. . . . . There is as perfect a duty to guard against accidental injury

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to a night intruder into one's bedchamber as there is to look out for trespassers upon a railroad where the public has no right to be. And the rule must be the same whether the railroad is in the vicinage of many or few inhabitants. In the one case as in the other, going upon it is unlawful, and therefore need not be expected."

The whole of this reasoning is applicable to the present case and controls it. In Mulherrin *v.* Railroad, 81 Pa. 366, we held that where a person goes on a track he cannot recover from the company except for wanton injury, although the negligence of the company's agent contributed to the result. In the opinion, we said, "Except at crossings where the public have a right of way a man who steps his foot upon a railroad track does so at his peril. The company have not only a right of way, but such right is exclusive at all times and for all purposes. This is necessary not only for the proper protection of the company's rights, but also for the safety of the traveling public." In Moore *v.* Penna. R. R. Co., 99 Pa. 301, we said, "The circumstance that the trespasser in this instance was a boy ten years of age can not affect the application of the rule. The defendant owed him no greater duty than if he had been an adult. They are not subject to an obligation to take precautions against any class of persons who may walk on and along their tracks. In Railroad *v.* Hummell, 8 W. 375, the rule was applied to the case of a child seven years old. And so also in the latest case of the kind that has been before us: Cauley *v.* Railroad, 14 Norris, 398, the rule was in no wise relaxed, although the person injured was a boy of tender years."

We have applied the rule in many other cases of children, but it is not necessary to cite them as there is no dispute about the law. The appellant, however, claims that there are several considerations which take this case out of the ordinary rule. These are all fully considered and answered in the opinion of the learned Court below on the motion to take off the non-suit and we do not consider them of sufficient force to make any extended answer to them now. We concur entirely with the Court below and for the reasons stated in the opinion in the decision refusing to take off the non-suit. The permission to the neighbors to take water from the penstock can not possibly be regarded as a permission to any one to walk on the tracks. The boy was not at or on the crossing when he was struck, and it was not the duty of the men on the train to look out for trespassers. Whether the boy was on the main track or side track made no difference in the application of the rule. It is a mistake to say the boy was crossing the track. He and all his witnesses said he was walking along and on the track. The assignment of error is dismissed.

Judgment affirmed.

H. B.

Superior Court.

Oct. '98, 118. Superior Ct. December 13, 1898.

Anderson v. Williams.

Affidavit of defence—Set-off—Allegation of.

When the defence relied on in an affidavit of defence is set-off, the claim must be alleged with exactness not only as to source and character, but also as to amount.

Where in an action to recover the contract price of certain oranges, the affidavit alleges that but a "few" of the boxes were in accordance with the contract, that the defendant "put them up for sale by auction," and then found that the oranges were inferior and were worth "at least fifty cents per box less than they would have been worth had they been the kind of oranges ordered by the defendant"; the affidavit is insufficient, in that it does not state the circumstances of the sale by auction, the price brought at it or the market value of the kind of oranges alleged to have been ordered.

Appeal of Charles F. Anderson, Henry Wotten and Robert W. A. Godfrey, trading as Anderson, Wotten & Godfrey, plaintiffs, from the judgment of the Common Pleas No. 4, for the County of Philadelphia, in an action of assumpsit brought by them against Henry B. Williams.

This action was brought upon the following draft accepted by the defendant:

"$838. No. 15.

"Riverside, Cal., Dec. 3, 1897.

"15 days after date (or less 1 per cent. discount if paid on arrival of car) Pay to the order of Orange Growers Bank of Riverside $838.00, Eight hundred thirty-eight & no 100 Dollars, with exchange and collection charges.

"Value received and charge to account of

"ANDERSON, WOTTON & GODFREY,

"By H. J. DOOLITTLE.

"To H. B. WILLIAMS, Philadelphia, Pa.:

"Accepted Phil. 12-17-97 H. B. Williams."

The affidavit of defence set up that the plaintiffs had always been the holders of the bill or draft; the defendant had ordered in October, 1897, from the plaintiffs a supply of "fancy" oranges for the Christmas trade, ordering as follows:

"ANDERSON, WOTTEN & GODFREY,

"Ship soon as possible car navels, car seedlings, about three-fourths 150's to 200's, balance desirable sizes. Perfection Brand; quality must be up to grade ordered.

"H. B. WILLIAMS."

That on November 16, 1897, the plaintiffs wrote defendant that the fruit was selected for its color;

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to which, on November 23, 1897, defendant replied, stating: "It is understood fruit is to be selected and high colored, suitable for immediate use," to wit, the holiday trade; that on December 3, 1897, the plaintiffs wrote advising defendant of the shipment of the fruit, and that they were drawing upon him for the price, and further informed defendant that he would find this an exceedingly fancy car of fruit; and again, subsequently, on December 8, 1897, wrote him again, advising him of the further shipment of the seedlings and advising him that they were drawing against him; that the defendant accepted the bills of exchange, believing the fruit to be of the character and quality ordered by him, to wit, the plaintiff's "Perfection Brand" of "fancy" oranges, and to be high colored, perfect oranges, suitable for the Christmas trade; that defendant contemplated disposing of these oranges in the original packages, and this was known to the plaintiffs; that after the cars arrived, defendant put them up for sale by auction and then found that the oranges sent him by the plaintiffs, instead of being highly colored, perfect "fancy" oranges, suitable for the Christmas trade and for immediate sale to customers at retail, were green, unripe oranges, not suitable for the Christmas trade and for immediate sale at retail, and were not marketable or saleable as "fancy" oranges, and could not be sold by him as such, as he contemplated doing, and were worth in the market at least fifty cents per box less than they would have been worth had they been the kind of oranges ordered by the defendant.

The affidavit claimed to set off $336, viz., the loss on 672 boxes, the entire number shipped at fifty cents per box. A rule for judgment for want of sufficient affidavit of defence was taken by the plaintiffs. A supplemental affidavit being allowed, the defendant filed one, answering as follows:

"That the said oranges were shipped to him by the plaintiffs from California with no opportunity for inspection afforded until they arrived in Philadelphia, and the plaintiffs, when they shipped the same, drew the draft in question, which was attached to the bill of lading and sent on to Philadelphia, to be presented to the defendant and accepted by him before he could obtain a delivery of the oranges, and the defendant was obliged to accept the same before receiving the said oranges, and accordingly did so accept it, in order to secure such delivery, as under the instructions of the plaintiffs the railroad company, the common carrier, would not deliver the oranges to him unless the bill of lading were presented, and he could not obtain the bill of lading without accepting the draft.

"It is true that on the arrival of the oranges which were then boxed and in the railroad car on the railroad siding, defendant was permitted by the railroad company to open the door of the car and examine a few of the boxes of oranges, which he accordingly did, the boxes which he was thus permitted to examine being those nearest to the door. The oranges in these boxes were of a good color and in accordance with the contract. Defendant, however, could not examine all the oranges in the car, as that would have required the entire unloading of the car. Believing, however, that the bulk of the oranges in the boxes which he did not examine corresponded with those which he did examine, he accepted the draft, and after the oranges were delivered to him, found that the plaintiffs had fraudulently put the good oranges forward where they could be examined, and kept the green oranges in the body of the car, where defendant could not examine them until after the delivery was made. Deceived by this conduct on the part of the plaintiffs, defendant accepted the draft, which he would not have accepted had he known the fact in relation to the oranges to be as disclosed on his subsequent examination of them, and as set forth in his original affidavit of defence.

"Defendant further avers that the oranges when shipped to him in California were in the same condition as they were when they arrived here."

The Court discharged the rule for judgment. The plaintiffs took this appeal, and assigned the discharge of the rule as error.

Henry N. Smaltz, (with him *Charles C. Lister*), for appellants.

A deduction or set-off, alleged in an affidavit of defence, must, in order to be of any avail, be stated with precision and exactness as to amount, and the Court must be left in no doubt as to its source and character, so as to judge of the propriety of its allowance against the plaintiff's claim.

Close *v.* Hancock, 3 Pa. Superior Ct. 207.

Liquidation of defendant's damages in a claim of set-off may be approximated only where the circumstances of the case forbid an accurate calculation.

Kaufman *v.* Iron Mining Co., 105 Pa. 537.
Bridge Co. *v.* Bonta, 180 Id. 448.

As the defendant kept the goods and did not return them, it was immaterial whether they were fit for his particular trade or not, or what they were worth to him; he should state their value

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in the market with reasonable accuracy and liquidate his damages accordingly.

Gould *v.* Gage, 118 Pa. 559.

The averment here is vague.

George P. Rich, (*Henry C. Boyer* with him), for appellee.

May 18, 1899. W. W. PORTER, J. The defendant in this case had two opportunities to present a defence by affidavit. Neither the original alone nor as supplemented by the second, sets forth facts which should have prevented the entry of judgment. Independent of the question whether there was a warranty and a breach, the defendant admits that a "few" of the boxes contained oranges "in accordance with the contract." He wholly neglects to indicate more explicitly how many. The word "few" is a relative term and of great elasticity of meaning. The defence is set-off. The amount thereof is fixed by calculation of a loss alleged to be fifty cents per box. The set-off must be diminished to the extent of the number of boxes designated as a "few." The circumstances set out and the form of the defendant's allegation indicate that he could have made an accurate statement of the number of good boxes and an exact calculation of the loss alleged to have been suffered. Upon the present affidavits it is impossible to liquidate the damages claimed as set-off.

The affidavits are further deficient in that while alleging that the defendant sold the oranges at auction, he does not state under what circumstances the sale was held nor what price the goods brought, but only "that they were worth in the market at least fifty cents per box less than they would have been worth had they been of the kind ordered." He fails to give the market price of the oranges of the kind he claims to have ordered and contents himself with alleging of the oranges delivered that he "realized in consequence of their kind and character fifty cents per box less than he otherwise would have received," and fixes the gross amount at $336, based on the whole number of boxes being deficient in kind and quality. This is an insufficient statement. The facts are evidently within the defendant's knowledge. His claim of set-off must be alleged in his affidavit of defence with exactness not only as to source and character but also as to amount: Close *v.* Hancock, 3 Super. Ct. Rep. 207; Slag Works *v.* Krause, 5 Super. Ct. Rep. 622. The importance of the observance of this rule is made the greater since the passage of legislation permitting the plaintiff to take judgment for such part of his claim as is not denied by affidavit of defence, to be due. The judgment of the Court below is reversed and the record is remitted with direction to the Court below to enter judgment against the defendant for such sum as to right and justice may belong unless other legal or equitable cause be shown to the said Court why such judgment should not be so entered.

H. B.

U. S. Circuit Court—Eastern District.

April 21, 1898.

Haines v. Franklin et al.

Fraud—Warranty—Waiver of tort—Certificate under corporation Act of Legislature of Pennsylvania, April 29, 1874—Conditions under which creditor may hold corporation responsible for fraudulent representation in certificate.

Where from the same facts the violation both of a duty and contract appear, the party aggrieved may waive the tort and proceed in an action ex contractu but not where what is charged is a fraud pure and simple.

The subscribers to the certificate required by the corporation Act of the Legislature of Pennsylvania of April 29, 1874, as a preliminary to incorporation, certified under oath and seal that $50,000 had been paid in in cash; this statement was untrue:

***Held*, that it could not be treated by a person dealing with the corporation as a warranty that $50,000 had been paid in, so as to sustain an action of assumpsit, but was a fraudulent misstatement for which the remedy was in tort.**

One who purchases a judgment against a corporation, does not take with it any collateral remedy which the plaintiff in the judgment may have had against third parties, e. g., if a plaintiff deal with a corporation on the faith of a statement made by the signers of the certificate of incorporation, which statement turns out to be untrue, an assignee of the judgment cannot recover against the signers, unless his acquisition of the judgment was induced by a belief in and reliance upon the signers' statement.

Demurrer to statement.

The statement in this case brought to October sessions, 1897, set out that on November 6, 1886, the defendants, Franklin and others, applied to the governor of Pennsylvania for letters incorporating the Keystone Standard Watch Company, and filed the certificate required by law; that in said certificate, they declared over their hands and seals that the amount of capital was $500,000, "and fifty thousand dollars being ten per centum of the capital has been paid in in cash to the treasurer of said corporation, whose name and residence is William Z. Sener, Lancaster, Pennsylvania, thereby covenanting with the governor of this Commonwealth and with all persons who might thereafter deal with the said Keystone Standard Watch Company, that the

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sum of $50,000 had been paid in in cash to the treasurer of the said company"; that on the same day, three of the defendants, G. H. Franklin, J. T. Sener and George Steinman made affidavit that statements contained in the certificate were true; that in fact the said sum of $50,000 had never been paid in as alleged, and "the assertion under seal and oath was altogether false and untrue and was a fraud upon the Commonwealth of Pennsylvania and upon all persons who might thereafter deal with the said Keystone Watch Company, upon the faith of the charter or letters patent granted by the Commonwealth, and further constituted a joint and several covenant with such persons that the said money had been paid or would be paid into the treasury of said company to answer the claims of the said persons who might so deal with the said corporation; whereas the said sum, or any part of it, had and has not been paid in"; that the watch company on February 17, 1890, G. H. Franklin being then its president, made its promissory note for $4800, payable to the order of its treasurer, which was duly endorsed and the proceeds received by him; that the title to said note became vested in one Mitlain, and was unpaid at maturity, whereupon Mitlain recovered a judgment thereon in the United States Circuit Court on November 11, 1890, which judgment was never paid; that in 1891, the plaintiff, "after communication with the aforesaid George H. Franklin, and receiving from him an assurance that the judgment represented a bona fide debt of the corporation and in the full belief that everything necessary for the proper organization of the company had been complied with and on the bona fides of all the actions of the persons concerned in the organization of the same, purchased said judgment, and on April 15, 1891, the said judgment was marked to the use of said plaintiff"; that on April 21, 1890, the corporation made an assignment for the benefit of its creditors; "that the assets which came to the hands of the assignee had been exhausted in the payment of preferred claims and the plaintiff had received nothing"; that plaintiff claimed to recover $4838.63 with interest from November 11, 1890.

The defendants demurred.

William U. Hensel and *George H. North*, for demurrer.

The statement that ten per cent. of the stock subscription has been paid in is for the information of the Commonwealth, it is not a contract with other stockholders, creditors or customers of the proposed corporation. It is a "warranty" to the Commonwealth only.

The plaintiff does not show that he has been injured, he does not allege that if the $50,000 had been paid in the company would have been solvent, or that he would have obtained anything in the distribution of the company's assets.

Henry Budd, contra.

The representations of the certificate were made to all who might have dealings with the corporation, including the plaintiff and the person who obtained the judgment in whose shoes the plaintiff stands.

If the certificate were required simply for the information of the officers of the Commonwealth, there would be no need to require the certificate to be acknowledged and recorded in the county "where the chief operations are to be carried on," (Act April 29, 1874, sec. 3) it would be enough if the record were made at Harrisburg, but the Act provides that the corporate existence shall begin from the date of record of the certificate in the county of "the chief operations." The certificate is a "warranty" that ten per cent. has been paid in, because it does not recite a subscription of that amount, but that ten per cent. has been paid in in cash. This, by being recorded becomes a continuing warranty for the benefit manifestly of the public and future stockholders and creditors.

Ashbury Co. *v.* Riche, L. R., 7 H. L. 653.
See the opinion in Patterson *v.* Franklin, 38 WEEKLY NOTES, 441.
Pollock on Torts, 244.

An offer or warranty may be made to a class or to anyone who may hereafter bring himself within the class or fulfill the conditions of the offer.

Wilmoth *v.* Hensel, 151 Pa. 200.

Here the defendants who made the assertion which is false were the corporators and directors of the company, as appears by the certificate which is part of the statement, and there is direct authority for holding them liable to creditors for their misrepresentations.

Tate *v.* Bates, 118 N. Car. 287.
Bank *v.* Investment Co., 74 Tex. 421.

Public statements in reports are addressed to all who may afterwards come within the class for whom they are intended.

Morse *v.* Swits, 19 How. Pr. 275.
Cazeaux *v.* Mali, 25 Barb. 578.
Magan *v.* Skiddy, 62 N. Y. 319.
Vanleer *v.* Earle, 26 Pa. 277.
Erie City Iron Works *v.* Barber, 106 Id. 141.

C. A. V.

May 11, 1898. DALLAS, C. J. In Patterson *v.* Franklin, 38 WEEKLY NOTES, 441, the opinion of the Supreme Court of Pennsylvania begins with this statement:

"The defendants were the incorporators and holders of the stock of the Keystone Standard Watch Company. In their application for let-

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ters patent, they set forth among other things that the capital stock of the corporation was five hundred thousand dollars, divided into five thousand shares of the par value of one hundred dollars each; and 'that fifty thousand dollars, being ten per cent. of the capital stock, has been paid in cash to the treasurer of said corporation whose name and residence are William Z. Sener, Lancaster, Pa.'

"The statement is the method prescribed by law for assuring the executive department of the State government that the requirements of the law have been complied with by the corporators and that they are entitled to be made a corporation. After letters patent have been issued, the statement with all its endorsements must be recorded in the proper county, for the information of the public, in order that the fact of incorporation may be known and the credit to which the corporation is entitled may be intelligently judged of by all persons who may have occasion to do business with it.

"This statement, made and sworn to in the usual manner, is now alleged to have been false in so far as it asserted the payment of fifty thousand dollars to the treasurer of the corporation, and it is asserted that not one dollar in cash was so paid. It is certain that after a short business career, the corporation being unable to pay its debts made an assignment for the benefit of creditors. The plaintiff in this action is the assignee. The defendants are the corporators by whom the alleged false certificate was signed. The right to recover is rested on the alleged fraud committed by means of the false representation contained in the certificate."

In that case it was held that, "the corporation had no right of action against the defendants growing out of the false statement in the certificate, and the plaintiff, its assignee, has none." The decision has this extent, no more; but, it having been suggested that if the assignee could not recover in the right of his assignor, he might do so in the right of creditors, the Court further said: "But the creditors have no joint action against the defendants. If a right of action exists, it is several to those injured, and extends no farther than the individual loss of the creditor, who sues. The question of the defendants' liability to those who were led to trust the corporation because of the false certificate, is not before us. What we say is that if they had a right of action, it is not an asset, the proceeds of which are for general distribution. The action is misconceived, and there can be no recovery in this case, though the fraud was admitted on the record in the terms in which it is charged. The right to complain is in the individuals who suffer, and the right of action extends only to the individual loss of the particular person injured, if the right of action exists."

The present action is a several one. It is founded upon the same certificate, and is brought for recovery of the alleged individual loss of the plaintiff, who claims as a particular creditor of the corporation. Can it be maintained? As we have seen, Patterson *v.* Franklin did not decide that it could be, and the Court carefully abstained from intimating any opinion upon the subject. The question is therefore an open one.

The statement of claim, to which the defendants have demurred, is framed ex contractu. It alleges that the representation made by the defendants, that ten per centum of the capital stock had been paid in in cash, was "altogether false and untrue, and was a fraud upon the Commonwealth of Pennsylvania, and upon all persons who might thereafter deal with the said Keystone Watch Company upon the faith of the charter or letters patent granted by the Commonwealth, and further constituted a joint and several covenant with such persons that said money had been paid, or would be, into the treasury of said company to answer the claims of the said persons who might so deal with the said corporation." Now, if the contractual liability thus averred, exists, it must arise out of the Pennsylvania statute under which the certificate was filed. No independent and direct contract between the plaintiff and the defendant is asserted. Ordinarily, all contracts, whether express or implied, rest upon intent; and, therefore, to establish a contract of the latter class, it is necessary that facts should be alleged and proved from which an intention to contract may be implied. No such facts are present in this case. A contract, or quasi contract, may, it is true, be founded upon statutory provisions, as where by statute the stockholders of a company are made individually liable to its creditors to an amount equal to the amount of stock held by them respectively: Flash *v.* Conn, 109 U. S. 371. The liability thus created is directly to the several creditors, and is held to be contractual because the stockholders, by their acceptance of the stock taken by them respectively, are assumed to have intended to enter into the obligation which the statute attached to such acceptance. But a right of private action under a statutory provision must always be dependent upon the scope and language of the particular enactment, and the statute here in question creates no contractual liability whatever. I do not mean to say that one who has suffered legal injury in consequence of the false representation alleged to be contained in this certificate, may not sue for redress of that in-

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jury. On the contrary, I think the right to do so results from a correct perception of the purpose of the Pennsylvania Legislature in providing for its recording; that purpose, as was said by the Supreme Court of that State, in Patterson *v.* Franklin, supra, being, to supply means "for the information of the public, in order that . . . . the credit to which the corporation is entitled may be intelligently judged of by all persons who may have occasion to do business with it." The right thus resulting, however, is one which under the old system of pleading could have been enforced only through the appropriate action of tort, and the innovations which have been made upon that system have not gone to the extent of obliterating the broad distinction between actions ex delicto and actions ex contractu. In Patterson *v.* Franklin it was said: "The right to recover is rested on the alleged fraud," and some of the language which follows this statement quite plainly indicates that the Court had in mind a wrong committed, and not a contract broken, as the ground upon which an individual creditor might possibly recover: it referred to those "injured" by the "false certificate" as being the persons entitled to sue, and to "the fraud" as being the basis of their complaint, "if the right of action exists." It is contended, however, that a plaintiff may waive a fraud and sue in contract; and this, of course, may be done in some cases. Where, from the same facts, the violation both of a duty and of a contract appears, the party aggrieved may elect upon which ground he will proceed; but I do not understand that a fraud pure and simple can, at the choice of either party be converted into a contract, or that it is possible for a plaintiff by any device of form, to charge a defendant with breaking a promise which, neither in fact nor by implication of law, he had ever made. The true inquiry is not as to the remedy, but as to the nature of the right. Here, the defendants did not say "we warrant," which would be a contract; but they said "the fact is," and this, if untrue, was a false representation; and, therefore, the case aside from any question of pleading. is essentially one of deceit: Mahurin *v.* Harding, 28 N. H. 128; Derry *v.* Peek, Law Rep., 14 App. Cas. (1889) 337; Bragdon *v.* Perkins-Campbell Co., C. C. A., 3rd Circuit, 58 U. S. App. 91. "Deceit consists in leading a man into damage by willfully or recklessly causing him to believe and act on a falsehood." When you have alleged that the statement was false, you must further allege that the plaintiff believed and acted upon it, and has sustained damage by so doing: McHose *v.* Earnshaw, 3 U. S. Appeals, 545; and the existence of these essential facts may not be left to inference or conjecture from vague and indefinite language, but must be alleged with convenient certainty—that is to say, so distinctly and explicitly as to preclude any reasonably possible misunderstanding of what is meant.

With these principles in mind, I turn to the statement of claim and find that it nowhere alleges that the plaintiff believed and acted upon the representation in question, unless such an allegation may be supposed to be deducible from the statement that the plaintiff, in the year 1891 (more than four years after the representation was made), purchased a judgment against the Keystone Standard Watch Company, "in the full belief that everything necessary for the proper organization of the company had been complied with, and on the bona fides of all the actions of the persons concerned in the organization of the same." It is impossible to regard this as amounting to a distinct and explicit allegation that the plaintiff believed and acted upon the particular statement that ten per centum of the company's capital had been paid in in cash, and that he sustained damage in consequence. Nothing could have been more easy than to say this plainly, and it is not unfair to presume that it was not said simply because it was known that it could not be proved.

In the plaintiff's brief it is said that he stands in the shoes of the original judgment creditor. As respects the defendant in the judgment, the corporation itself, this may be conceded; but I cannot agree that the plaintiff, as assignee of the judgment, became clothed with any rights which his assignor may have had against these defendants. Their obligation, if any, was, though collateral, an independent one. The plaintiff's alteration of his condition consisted solely in his acquisition of the judgment, and if this was not induced by his belief in and reliance on the defendants' representation, his supposed cause of action against them is palpably defective and incomplete. This was exemplified by Lord CAIRNS, in Peek *v.* Gurney (Law Rep., 6 H. L. 1873, p. 377). He put the case of a person having built a house and desiring to sell it, and said, "He comes to me and wishes me to purchase it; he describes it as a highly advantageous purchase, and makes statements of fact to me with regard to the house which are untrue and are misrepresentations; but I decline to purchase, and our overtures come to an end. He subsequently sells it to some other person, upon what terms I know not. That other person completes the purchase, and that other person, desiring to raise money on mortgage, applies to me to lend him money. I lend him money upon a mortgage of the house. The facts stated to me originally turn out to be

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untrue, and are so material as that the house, not being as represented, becomes comparatively worthless. I then apply to the original vendor, remind him of what he told me, and complain to him that my money lent upon mortgage had been lost, and I commence an action against him for damages to recover my loss. I ask, could such an action be maintained? I know of no authority for it, and I am of opinion that an action of that kind would not lie."

In the instance thus suggested, the transaction of mortgage was much more nearly connected with the false representations than is the purchase of the judgment with the alleged false certificate in this case. In Peek *v.* Gurney the bill alleged misrepresentations of facts and concealment of facts on the part of the directors, in a prospectus they had issued, by which the complainant had been induced to purchase shares; and it was held, the case being treated as one of deceit, that, assuming the falsity of the representations, there was no liability to one who had purchased shares of the corporation in the market, notwithstanding that the purchase had been induced by the representations complained of. That case seems to me to closely resemble the present one. It was fully considered by very able Judges, both in the first instance and on appeal; and the reasoning upon which the complainant there was denied recovery, is, I think, conclusive against the plaintiff here. Furthermore, there was in that case no denial that the plaintiff had bought in reliance on the prospectus, whereas in this one there is no sufficient allegation that the plaintiff either believed or relied upon the certificate which he says was false. Upon the whole case, I am persuaded that the averment of the demurrants, that the plaintiff has not, by his said declaration, alleged a state of facts entitling him to recover from them, is well founded in law; and, therefore judgment for the defendants will be entered.

Nos. 90, 91. **District Court.**

In re U. Mercur and J. W. Mercur.

Bankruptcy—Practice—Assignment for benefit of creditors—Partnership and individual creditors.

A partnership creditor may file a petition in bankruptcy against any member of the debtor partnership.

An assignment for the benefit of creditors is an act of bankruptcy, but that an adjudication may be based upon it the petition must set it out as a ground for the Court's action.

A petition which does not describe the claims of the petitioner with sufficient definiteness to make it appear that the claim is provable against the alleged bankrupts is defective.

Motions for adjudication in bankruptcy.

A. E. Peterson, M. Hampton Todd and *E. H. Hall*, for petitioners.

John G. Johnson, contra.

July 22, 1899. McPherson, J. In each of these cases only one creditor petitioned, the allegation being that the creditors of the bankrupt were less than twelve in number. The answer in each case denied the allegation, averring that the number of creditors exceeded twelve, and appending a list containing the names and addresses of more than twelve such persons. Shortly afterwards, the Vulcanite Paving Company and the P. H. Fairlamb Company filed separate petitions, averring that they were creditors of the firm of J. W. Mercur & Co., consisting of James Watts Mercur and Ulysses Mercur, and asking to be permitted to join in the original petitions. This request is resisted by the bankrupts on the ground that the applicants are partnership creditors, and therefore cannot be counted among the individual creditors of each partner.

I am unable to sustain this objection. The creditors of a partnership are also creditors of each individual member, and have a right to petition against him, as well as against the firm. This has been several times decided, and is supported by principle no less than by authority. How far the partnership creditors may be entitled to share in the distribution of the separate property of each member is a distinct question, which can only be determined hereafter when the assets come to be marshaled.

That both bankrupts are insolvent, and that both committed an act of bankruptcy within four months preceding the filing of the petitions, cannot be successfully disputed. It was proved at the hearing that, on December 20, 1898, they executed a deed of voluntary assignment for the benefit of creditors, not only as individuals, but also as members of the firm of J. W. Mercur & Co. This deed has since been recorded, and nothing more is necessary to require the court to enter an adjudication. I should enter it without further delay, if it were not for the fact that the petitioners do not set forth the assignment as a ground for the Court's action. This may be done by amendment, however, and permission is now given to the petitioners to add such averment.

The petitions of the paving company and of the Fairlamb company are also defective, because they do not sufficiently describe the respective claims so that the Court may know that both claims are provable against the bankrupts. This may also be amended.

If the amendments referred to are made, and the petitions are thus put into proper form, the clerk will enter an adjudication in each case.

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WEEKLY NOTES OF CASES.

VOL. XLIV.] *FRIDAY, OCT. 6, 1899.* [NO. 27.

Supreme Court.

Jan. '99, 197. Supreme Court. May 17, 1899.

Nissley v. Brubaker.

Statute of Limitation — Married women — Evidence — Declarations.

The Act of June 3, 1887, P. L. 332, conferring upon married women the right to sue and be sued as if single, repeals the proviso in the Act of March 27, 1713, which prevents the statute of limitations from running against married women until they become discovert.

Where a married woman had a right of action at the time of the passage of the Act of June 3, 1887, P. L. 332, the statute of limitations must be held to have begun running against her from and after the date of that Act.

An admission by the debtor of indebtedness to a married woman made within six years from the date of the Act of 1887, if made in terms sufficiently definite to identify the debt, will toll the running of the statute of limitations.

Appeal of H. B. Nissley, administrator c. t. a. of Rebecca Nissley, deceased, plaintiff, from the judgment of the Common Pleas for Lancaster County, in an action of assumpsit, in which Isaac W. Brubaker, administrator of Isaac Brubaker, deceased, was defendant.

This was an action of assumpsit, brought October 10, 1894, in which the plaintiff claimed to recover $4545 alleged to have been received by the defendant's decedent for the use of the plaintiff's decedent. On the trial, the plaintiff proved Rebecca Nissley was the wife of H. B. Nissley, that she died October 11, 1888; and made various offers to prove that Isaac Brubaker had admitted that he had received, on or about April 1, 1873, various sums of the purchase money of a house which Rebecca Nissley had sold to one Rohrer, and had never paid over the same. All these alleged admissions were made after the death of Mrs. Nissley and within six years before the beginning of the action. Offers overruled. (First, second, third and fourth assignments of error.)

The plaintiff offered "to prove by the witness upon the stand that before six years had expired from the passage of the Act of 1887, he had an interview with Isaac Brubaker, in the presence of Rebecca Nissley's husband, H. B. Nissley; that in that interview Brubaker said he was with his daughter on or about the 1st day of April, 1873, when she passed title for the property near Landisville, to one John Rohrer and that when the purchase money was paid he, Isaac Brubaker, undertook to act for his daughter and receive $3045 of the purchase money, which he admitted at this interview in the presence of H. B. Nissley and the witness that he had never repaid to her." Offer overruled. (Fifth assignment of error.)

The plaintiff having closed, the Court charged as follows:

"Gentlemen of the jury: The testimony has been closed on the part of the plaintiff, and there being nothing upon which we can direct a verdict in favor of the plaintiff, we shall have to tell you that your verdict should be for the defendant in this case. No evidence has been offered in our judgment to sustain a verdict for the plaintiff. The clerk will take the verdict for the defendant." (Twelfth assignment of error.)

Verdict and judgment for defendant. The plaintiff took this appeal and filed assignments of error, inter alia, as above indicated.

J. Hay Brown, (*W. U. Hensel* with him), for appellant.

The Act of June 3, 1893, was intended for the benefit of married women, not to impose any new disability upon them.

Whalen *v.* Gabel, 20 WEEKLY NOTES, 274.
Real Estate Co. *v.* Roop, 132 Pa. 496.
Vocht *v.* Kuklence, 119 Id. 365.
Koechling *v.* Henkel, 144 Id. 215.

It did not, therefore, destroy the right a married woman had to wait until discovert before bringing an action.

The conferring of one right does not take away the other by implication. When there are no words of repeal and two rights are not in hostility with each other, both acts may co-exist without any conflict.

Osborne *v.* Everitt, 103 Pa. 424.

In any event the statute did not begin to run until the date of the Act of 1887, because it could not run until her right of action and ability to bring it were complete.

Kutz's Appeal, 40 Pa. 90.
Mitchel's Estate, 1 Pearson, 429.
Marsteller *v.* Marsteller, 93 Pa. 350.
Winters *v.* De Turk, 133 Id. 359.
Weldon *v.* Neal, 51 L. T. N. S. 289.
Lowe *v.* Fox, L. R. 15 Q. B. D. 667.

It was therefore error to refuse to admit evidence of an admission made within six years from the date of the Act of 1887, and within six years before the bringing of the action.

S. P. Eby and *H. M. North*, for appellee.

The exception or proviso in the limitation Act of March 27, 1713, 1 Sm. L. 77, which prevents

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the statute of limitation from running against a feme covert until discoverture has come to her, was repealed by the married person's property Act of June 3, 1887, P. L. 332, substantially re-enacted in the somewhat broader Act of June 8, 1893, P. L. 344. A married woman so far as regards her claims against all except her husband, must now sue within the time allowed for her in case she were a feme sole.

Hick's Estate, Pabst's Appeal, 7 Pa. Super. Ct. 274.

Under the above authority, the limitation certainly began to run against Rebecca Nissley on the passage of the Act of June 3, 1887. Six years from this time expired June 4, 1893, when any claim she had was barred. This suit was brought October 10, 1894, one year and four months and six days after the statute had closed on any claim she had.

July 19, 1899. GREEN, J. We are very clear that the Act of June 3, 1887, P. L. 332, which conferred upon married women the right to sue and be sued in the same manner as if they were single, operated as a repeal of the proviso in the limitation Act of March 27, 1713, which prevents the statute of limitations from running against married women until they become discovert. We consider this conclusion inevitable because a right to sue is fundamentally inconsistent with a disability to sue, and by consequence removes the disability. It follows, therefore, in the present case, that a right of action accrued to Mrs. Nissley to recover any money that might be owing to her by her father, immediately after the passage of the Act of June 3, 1887. This being so, the statute of limitations began to run against her from and after the date of the Act, June 3, 1887. See Hicks's Estate, Pabst's Appeal, 7 Pa. Super. Ct. 274. Recurring now to the offers of proof in this case, we find that the offer covered by the fifth assignment, was to prove that within six years from the 3d of June, 1887, Isaac Brubaker, deceased, admitted to the witness in the presence of Rebecca Nissley's husband that he was with his daughter about the first day of April, 1873, when she made title to John Rohrer for a piece of real estate belonging to her, and that when the purchase money, $3045, was paid it was received by him and that he had never paid the money to his daughter. This was a specific, definite offer to prove that the deceased had received the money of his daughter and had never paid it to her, and that the admission of the deceased to that effect was made while the statute of limitations was running but before it had closed. The words in which the admission was made were not set forth in the offer, but the offer was rejected just as it was made with objection on account of the omission of the precise words used. The inquiry results whether the offer should not have been received. The fact that Isaac Brubaker had received in 1873, $3045 of money which belonged to his daughter, and that he had never paid it to her, was certainly a most important and relevant fact. It was of course competent to prove such a fact before the jury. Whether the proof when received would be sufficient to establish his legal liability to repay the money at the time this suit was brought would depend upon just what was said at the time. If the words used were consistent with a promise to pay the debt they would suffice to toll the running of the statute. But that could only be known after the testimony was heard. We think, therefore, that it was error to reject the offer in the broad manner in which it was made. The proof was competent, for it consisted of the party's own declarations, the subject matter was competent because it tended to establish, or rather to confirm, a cause of action which was then pending. If after it was all in, it was not sufficient to establish the legal liability of the declarant, the Court could readily so instruct the jury. But we do not think it can be said that the offer should be rejected entirely. The matter offered would, in any event, be part proof of facts essential to the plaintiff's right of recovery and, for that reason, it would be admissible. If on the rendition of the testimony it contained enough matter to toll the statute, or if it was followed by further testimony to that effect, it would or might authorize a recovery. For these reasons we sustain the fifth assignment. The first four assignments cover the substance of the fifth in detached parts and therefore would include the same matter in the aggregate, and hence the offers should have been received. These assignments are therefore sustained. The sixth assignment is not sustained, as its subject matter is of no consequence. The tenth and eleventh assignments are rejected, as the matter of the tenth has no date, and of the eleventh has a date so remote that it would be of no consequence if received. The twelfth assignment cannot be sustained, because in the state of the evidence as it stood then the charge was entirely correct.

The offers of proof covered by the seventh, eighth and ninth assignments, we think should have been received. They tended to prove the actual receipt of the money which was paid to Isaac Brubaker for his daughter's property and which prima facie tended to show a liability on his part to account for it. We therefore sustain these assignments.

Of course, after all the testimony rejected on the trial has been received, it may not suffice to

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create a legal liability at the time of the bringing of this suit. On the other hand it may suffice to establish such a liability and for that reason it should have been received.

Judgment reversed and new venire awarded.

H. B.

Jan. '99, 87. Supreme Court. March 29, 1899.

Commonwealth Title Insurance and Trust Co. v. Ellis. Appeal of H. Victoria Ellis.

Mechanics' lien—Contracts preventing filing of—Contract—Written and printed clauses in contract—Purchase money mortgage.

Where in a contract, partly printed and partly written, there is a conflict between a printed clause and a written one, the written one will prevail; if it is subsequent in order to the printed clause, there is an additional reason for finding that it expresses the meaning of the parties.

A clause in a building contract which provides that no liens shall be entered by "any sub-contractors or any other persons" will prevent the filing of a lien by the contractor, notwithstanding the earlier clause in the contract providing that payment to the contractor shall not become due until the contractor shall deliver "a satisfactory release of all liens on the part of all persons who have delivered materials for use in or performed work on said premises."

It is not necessary that a purchase money mortgage, in order to be entitled to precedence as such, should disclose on its face that it is for purchase money, if in fact such is the case.

Appeal of H. Victoria Ellis from the decree of the Common Pleas No. 2, for Philadelphia County, distributing a fund arising upon a writ of levari facias issued at the suit of the Commonwealth Title Insurance and Trust Company, trustee for Susan C. Lex and Mary C. Neilson, assignee of the Commonwealth Title Insurance and Trust Company, against Amos Ellis.

On November 27, 1892, Amos Ellis entered into a contract with L. DuPont to purchase certain land, which was afterwards conveyed to him by deed dated January 31, 1893, but not delivered or recorded until March 1, 1893. On February 27, 1893, Ellis executed a mortgage of said land, to the Commonwealth Title Insurance and Trust Company, to secure the payment of the sum of $10,000, which sum was needed for part of the purchase money of said land. On December 22, 1892, Ellis had executed an agreement with one Amweg for the erection of a house on the mortgaged land. The contract contained, inter alia, the following:

"Third.—That the payments shall not become due until in each case the contractor [Amweg] shall have delivered to the promoter [Ellis] a satisfactory release of all liens against the premises on the part of all persons who have delivered materials for use in or performed work on said premises, together with a true and accurate showing of the state of such persons' accounts then due or thereafter to become due, for materials to be furnished or work to be done under this agreement, and it is further agreed that before the final payment shall become due, a full and complete release of liens including the lien of the party of the first part shall have been delivered to the party of the second part, and accepted by him as satisfactory.

"And it is further agreed, that if at any time there shall be any lien or claim for which, if established, the promoter or the said premises might be made liable, and which would be chargeable to the said contractor, the promoter shall have the right to retain out of any payment then due, or thereafter to become due, an amount sufficient to completely indemnify him against such lien or claim, until the same shall be effectually satisfied, discharged or cancelled. And should there prove to be any such claim after all payments are made, the contractor doth hereby covenant that he will refund to the promoter all moneys that the latter may be compelled to pay in discharging any lien on said premises, made obligatory in consequence of the former's default.

"Tenth.—It is hereby further agreed, that there shall be no liens entered or filed by any sub-contractors, or any other persons, for or on account of any work, labor, or materials, done or supplied, in or upon said building."

The third clause above quoted was part of the printed form; the tenth was in writing.

Amweg began excavation for the purpose of building on February 15, 1893.

On April 3, 1893, Amos Ellis by deed conveyed the premises to H. Victoria Ellis, subject to above recited mortgage. Numerous mechanics' liens were filed against the premises, amongst others by Amweg, the contractor. The Commonwealth Company assigned the mortgage to itself as trustee for Susan C. Lex and Mary C. Neilson, and default being made in the interest, issued a scire facias and after judgment, a levari facias, under which the land was sold and J. Granville Leach, Esq., was appointed auditor to distribute the fund. The auditor found in the course of two reports, the facts as above set forth, and the liens of the contractor, Amweg, and of certain sub-contractors, being presented as entitled to share in the distribution of the fund, the auditor ruled that they were not so entitled. The Court reversed, in part, the findings of the auditor and referred the matter back for further proceedings, in accordance with the opinion of the

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Court, delivered by SULZBERGER, J. The auditor accordingly reported sustaining the claims of the contractor. Exceptions were filed by H. Victoria Ellis, which were dismissed by the Court. Distribution was directed accordingly: (1) to the mortgage in full; (2) to the contractor, Amweg, and the architect, pro rata.

Mrs. Ellis took this appeal and filed, inter alia, the following assignments of error:

"1. The learned Court below erred in not sustaining the first report of the auditor awarding the balance of the fund to H. Victoria Ellis, the owner of the property, after payment of the mortgage to the Commonwealth Title Insurance and Trust Company.

"2. The learned Court below erred in dismissing the first exception of H. Victoria Ellis to the auditor's third report, which was as follows:—

" 'That the learned auditor has awarded the sum of $4154.01 to German-American Title and Trust Company, assignees of Frederick J. Amweg, the said Amweg being a claimant upon the fund arising under proceedings in the cause by reason of a certain lien filed against the premises sold.'

"3. That the learned Court erred in dismissing the second exception of H. Victoria Ellis to the auditor's third report, which was as follows:—

" 'That the auditor has failed to find that under the building contract between Amos Ellis and Frederick J. Amweg in evidence the said contractor, Amweg, had no right to file any lien, or participate in the distribution of the fund arising from the sale.'

"4. That the learned Court erred in dismissing the third exception of H. Victoria Ellis to the auditor's third report, which was as follows:—

" 'That the auditor has failed to award the balance of the fund in Court over and above the mortgage to the said H. Victoria Ellis.' "

Franklin Swayne, for appellant.

The appellant, H. Victoria Ellis, the mother of defendant, was the owner of the property sold under the mortgage at the time of said sale, and from which the fund arose upon which the several claims were made—her title was unquestioned—the conveyance was made to her by her son for moneys loaned him in April, 1893, twelve months prior to the sale of the building. Her rights as a creditor upon the fund therefore arise from two sources: first, for moneys loaned to her son; and second, as the bona fide owner of the property.

The vital question is whether, under the tenth clause of the contract between Ellis and Amweg, the contractor had any right to file a lien.

The tenth, as a written clause, in case of conflict governs the third, which was printed.

Granden *v.* Insurance Co., 137 Pa. 26.
Duffield *v.* Hue, 129 Id. 94.

The tenth clause prohibits liens "by sub-contractors or any other person." This covers the contractor.

See Schroeder *v.* Galland, 134 Pa. 277.
Nice *v.* Walker, 153 Id. 125.
Waters *v.* Wolf, 162 Id. 153.
Morris *v.* Ross, 184 Id. 241.

Sheldon Potter, (*William H. Staake* with him), for appellee.

July 19, 1899. GREEN, J. We agree entirely with the learned Court below in holding that the mortgage of the plaintiff in this case was a purchase money mortgage under the evidence, and was entitled to priority in the distribution. The delivery of the deed to the mortgagor, and of the mortgage to the mortgagee were concurrent and simultaneous acts, and the money for which the mortgage was given was in actual fact a part of the purchase money paid for the property, at the very time of the delivery of the deed. In both the cases, Cohen's Appeal, 10 WEEKLY NOTES, 546, and Albright *v.* The Association, 102 Pa. 411, this Court held that it was not necessary that the lien should disclose on its face that it is for purchase money, if in point of fact, whether it be a mortgage or judgment, it was given for purchase money. We agree with the auditor in holding that the positive prohibition contained in the tenth clause of the building contract against the filing of any liens by any sub-contractors, or any other persons, excluded the claimants who were sub-contractors from filing any liens, notwithstanding the provisions contained in the third clause. The learned Court below having held otherwise, and reversed the auditor on this subject, subsequently, in the second opinion filed, changed its ruling on account of the decision of this Court in Morris *v.* Ross, 184 Pa. 241, and sustained the action of the auditor in rejecting the claims of the sub-contractors. The decision of the Court in the first opinion was based upon the theory that the provisions of the third section of the contract contemplated the filing of liens and their release before payments could be required, and hence sanctioned the filing of liens, and as there was an absolute repugnance between the third section and the tenth in this respect, it could not be held that the right to file liens under the third section could be intended to be taken away by the tenth. But in the case last cited we had the precise question before us and we decided that the positive provision prohibiting all liens must prevail, and that the provision authorizing the owner to require of the contractor sufficient evidence that the premises were free of all liens before payments could be

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demanded, and to retain an amount sufficient to indemnify him against such liens, was not repugnant to the prohibitory clause, but only a protection against possible liens which might be filed without regard to the contract. In the present case the tenth clause of the contract is in the following words: "It is hereby further agreed that there shall be no liens entered or filed by any subcontractors, or any other persons, for or on account of any work, labor or materials, done or supplied in or upon said building."

That these words are a prohibition against any liens is established by all our decisions from Schroeder *v.* Galland to this time. The learned Court below held that they excluded sub-contractors, but, for reasons set forth in the opinion, they did not exclude the principal contractor. We are not able to agree with this conclusion. It seems clear to us that the words "or any other persons" include all other persons, and necessarily include the principal contractor, as the words are generic and necessarily include all persons who have a right to file liens. Moreover, we think it quite plain that the words of the third section are consistent with the theory of a mere protection against possible liens, and are therefore not repugnant to the positive prohibition contained in the tenth clause. All this we held in Morris *v.* Ross, supra. But if this is so the principal contractor has no more right to file a lien than any sub-contractor. The tenth section is in words that are written, as contra-distinguished from the other words of the contract which are printed words in a printed blank, and the tenth section is the last utterance of the contract on this subject, and if there were repugnance between the third and tenth sections, the tenth would prevail. In Grandon *v.* Insurance Co., 107 Pa. 26, in construing a policy of insurance we said: "This clause of the policy is in writing, and must be taken to be what the parties intended. The condition is the printed portion. The settled rule of law is that where the written and printed portions are repugnant to each other, the printed form must yield to the deliberate written expression."

We are therefore of opinion that the learned Court below was in error in awarding any part of the fund to the lien of the contractor.

The decree of the Court below is reversed at the cost of the appellee and the record is remitted with instructions to distribute the fund in accordance with this opinion.

H. B.

Jan. '99, 79. Supreme Court. March 29, 1899.

Commonwealth Title Insurance and Trust Co. v. Ellis. Amweg's Appeal.

This appeal was in the same case as the foregoing and was argued with it.

The ground of the appeal was that the contractor, having begun operations before the date of the mortgage given to the plaintiff, his lien took precedence of the mortgage in distribution.

William H. Staake, (*Sheldon Potter* with him), for appellant.

Henry T. Dechert, for appellee.

July 19, 1899. GREEN, J. In the opinion just filed in the case of the appeal of H. Victoria Ellis from the same decree entered in this case, No. 87, Jan. term, 1899, we have set forth our reasons for sustaining the decree of the Court below giving precedence to the mortgage held by the plaintiff in the distribution of the fund in Court. It is not necessary to repeat those reasons here. In the same opinion we have held that the present appellant is not entitled to any share of the fund as a mechanics' lien creditor of the defendant. The numerous assignments of error in the present appeal must necessarily fall upon the ruling that the appellant has no standing as a mechanics' lien creditor. The assignments of error are all dismissed.

Decree affirmed and appeal dismissed at the cost of the appellant.

H. B.

Jan. '97, 4. Supreme Court. March 26, 1897.

Devlin v. Phoenix Iron Company.

Negligence—Master and servant—Co-employe—Contributory negligence.

While it is the duty of a master to procure proper implements for the performance of his servants' work, yet he may entrust the actual supply of such tools to one of the servants; therefore, in an action by an employé against his employer for damages received in the course of his employment, if the evidence discloses the cause of the accident to have been a worn-out tool, the replacing of which with a new one is shown to have been the duty of a fellow-servant of the plaintiff, it is not error to give binding instructions in defendant's favor.

Appeal of the Phœnix Iron Company, from the judgment of the Common Pleas No. 3, for the County of Philadelphia, in an action of trespass wherein William Devlin was plaintiff.

The facts of the case are set forth in the opinion of the Supreme Court.

Upon the trial of the case, before McMICHAEL,

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J., the defendant requested a binding charge in its favor as follows: "Under all the evidence your verdict should be for the defendant," which was refused.

Verdict for the plaintiff, for $6500 and judgment thereon. Defendant appealed and assigned as error the refusal of its point.

John G. Johnson, (*Carroll S. Tyson* with him), for appellant.

An employé having an opportunity to become acquainted with the risks of his situation and he accepts them, cannot complain if he is subsequently injured.

Nuss *v.* Rafsnyder, 178 Pa. 397.

It is incumbent upon the plaintiff to establish a prima facie cause of action resulting from the defendant's negligence and entirely clear from contributory negligence on his part.

It is the duty of the master to furnish proper implements to his servants for the performance of their work, and if he entrusts that duty to a co-servant, the master is liable for the negligence of the co-servant in performing it. But, if safe and proper tools are supplied by the master, he is not liable for an injury which his servant receives by using, under the direction of the foreman over such servant, a tool not furnished for or adapted safely to the work.

Maher *v.* Thropp, 35 Atl. Rep. 1057.
McAndrews *v.* Burns, 39 N. J. L. 118.
Lynch *v.* Erie, 151 Pa. 380.

A. S. L. Shields, (*John W. Thompson* with him), for appellee.

The law is well settled that while a master is not responsible for accidents occurring to his servant from the ordinary risks and dangers which are incident to the business in which he is engaged, yet when he subjects his servants to extraordinary risks of which the servant has no knowledge, he is liable for any accident arising therefrom.

Patterson *v.* P. & C. R. R. Co., 76 Pa. 389.
Ross *v.* Walker, 139 Id. 42.
Woodward *v.* Shumpp, 120 Id. 458.
Payne *v.* Reese, 100 Id. 301.
Hoffman *v.* Clough, 124 Id. 505.

It was well settled that where there is a fair dispute in the evidence, or two classes of conclusions can be reached, whether the injury to the servant was the result of the negligence of the master to exercise care, either to provide proper machinery and appliances for the use of the servant, or a proper place to perform his work, or whether the injury was the result of obvious danger or risk to the servant, or want of ordinary care on his part to observe dangers within his knowledge or of which he ought to have known, then a case is made out which should be submitted to the jury for their determination.

Wilson *v.* Penna. R. R. Co., 177 Pa. 503.
Fitzpatrick *v.* Riley, 163 Id. 65.
Comben *v.* Belleville Stone Co., 36 Atl. Rep. 473.
McGill *v.* Railway Co., 152 Pa. 331.
Vannatta *v.* Railroad, 154 Id. 262.
Smith *v.* B. & O. R. R. Co., 158 Id. 82.

It has been decided in a number of recent cases that the plaintiff cannot be deprived of his right to go to the jury because of unfavorable fragments of testimony given by one of his witnesses, if on the other evidence he had such a right.

Kohler *v.* Penna. R. R., 135 Pa. 346.
Ely *v.* P. C. & St. L. R. R., 158 Id. 233.
Keng *v.* B. & O. R. R., 160 Id. 644.
Arnold *v.* P. & R. R. Co., 161 Id. 1.

July 15, 1897. WILLIAMS, J. The plaintiff was an iron worker employed by the defendant company. It does not clearly appear how long he had been employed by the defendant, but it does appear that his work had been in the same room and nearly in the same place where the accident complained of happened, for two or three years. He had been, at least during all the time now spoken of, one of the gang of men at work in and around a pit in which blooms were cast, and from which they were lifted by machinery and loaded upon trucks for removal to some other part of the works. As the "fourth man" of this gang his business was to fasten the tongs upon the bloom which was to be lifted out of the pit, so that it could be raised and swung over the truck upon which it was to be loaded for removal. This was done by the use of bitts which clasped the bloom so firmly as to sustain its weight while it was being lifted and carried to the truck. On the night of the accident plaintiff was temporarily acting as "third man," whose business it was to guide the swinging bloom, by means of a long iron hook, into a position directly over the truck upon which it was to be loaded. While he was engaged in this way the bloom, which was at a red heat, slipped from the tongs and fell to the ground. The plaintiff sprang backwards to escape the red-hot bloom and fell. Before he could get out of its reach it struck one of his legs and he was burned. He says that when he sprang backwards he came in contact with an obstruction on the floor of the mill which he could not see and of which he had no knowledge, and that on this obstruction he stumbled and fell. The presence of this obstruction was one of the things he complains of at the trial, and another was the fact that the bitts were too smooth to grasp the bloom with sufficient firmness to support its weight.

The defendant requested the learned Judge of the Court below to direct the jury to find in its favor, for the reason that no negligence on the part of the company had been shown, and be-

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cause the plaintiff's negligence had contributed to his injury. The learned Judge refused this point and submitted the question of the defendant's negligence upon the evidence relating to the obstruction on which it was alleged the plaintiff fell. This obstruction consisted of a "round" of iron about six inches in diameter and several feet in length. There was a chain with it and a few pieces of scrap lying near it. None of these articles belonged to that part of the mill, but had been improperly allowed to accumulate there by the inattention or want of care of the workmen themselves. There was a place provided by the defendant company for the storage of each of these articles when not in use, but they had been suffered to remain for two weeks or more, where they were at the time of the accident, greatly to the inconvenience and danger of those working about the pit, as the plaintiff himself testifies. While it was the duty of some of the workmen, it was clearly the right of any of them, whose personal inconvenience or safety might be affected by their continued presence, to see to the removal of these articles to their appropriate places. It appears however, according to the plaintiff's testimony, that the workmen most interested in their removal continued their work over and around these articles, neither attempting to remove them themselves nor requesting others to do so for them.

The company had constructed its mill according to a common and approved model. It was a safe place in which to conduct their business. If at any point it had been rendered unsafe by the neglect of the workmen to remove rubbish, or by permitting tools to accumulate where they had dropped them, the negligence was not that of the employer but of the employé. The trouble was not with the place. Neither the general construction nor the arrangement of its parts was complained of. There was a definite place where the round, chain and scrap belonged. They did not belong, and they were not intended to be left on the floor for workmen to stumble over, but after use to be returned to their place of storage, and left there until again needed. The duty of the employer is to provide his workmen with a safe place in which to labor; suitable tools with which to work; and to see that any dangers peculiar to their use are fully made known to them. He had a right to rely on the exercise of common prudence by his workmen, in the selection of materials, from a common stock provided for them, and in the use and care of the tools with which their work is done: Ross *v.* Walker, 139 Pa. 42; Lehigh Valley Coal Co. *v.* Hayes, 128 Pa. 294; McCombs *v.* Pittsburgh & Western R. R., 130 Pa. 182. A workman is bound to take notice of an obvious danger, and cannot be required to continue at work in a dangerous place: Reese *v.* Clark, 146 Pa. 465.

The proximate cause of the plaintiff's injury was the fall of the "bloom" from the tongs. The plaintiff says this fall was due to the circumstance that the bitts made use of were worn smooth so that they did not grasp the mass to be lifted with sufficient firmness. But the plaintiff was familiar with this work. He had been engaged in attaching the tongs and bitts to the bloom for about two years, and knew thoroughly when the bitts were unfit for use. He knew and his employers knew that bitts would grow smooth by use. In consequence of the knowledge the company kept a supply of sharp bitts on hand for the use of their workmen, and he knew the fact and the place where the sharpened bitts were kept in store. It was the duty of the workmen in the pit to discontinue the use of a bitt when it became smooth and replace it from the general stock with a sharpened one. The plaintiff knew, as he testifies, that the bitts in use at the time of the accident, were too smooth to grasp the bloom. Whose duty was it, upon these facts, to make the exchange? Not that of the employer, for his duty was discharged when he furnished the supply of suitable bitts that could be resorted to whenever it was necessary. The practical question, when an old bitt became too smooth for use and when a fresh one was required, was necessarily left to the judgment of those whose business it was to use them. The learned Judge of the Court below was of this opinion. The use by the workmen of bitts which were unsuitable, which they saw and knew to be so, was negligence that contributed to, if it did not actually cause the plaintiff's injury. Without this negligence the accident could not have happened. Upon a careful consideration, we are of opinion that the defendant's point should have been answered in the affirmative. There was no evidence of negligence on the part of the company. There was very clear proof of the negligence of the plaintiff and his fellow-workmen in the presence of the obstruction, upon which he stumbled, and in the use of unsuitable bitts, to which all the witnesses attribute the falling of the bloom. The evidence therefore fully justifies the point presented: Butler *v.* Gettysburg Ry. Co., 126 Pa. 160.

The assignment of error is sustained and the judgment entered in the Court below is reversed.

W. D. N.

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Superior Court.

Oct. '98, 46. Superior Court. December 6, 1898.

Hays v. Borough of South Easton.

Municipal improvements — Damages to property owner — Easement.

In adjusting the burden of municipal improvements, each property owner is to be credited with his contribution, in property injured, taken or destroyed, and charged with the benefits to his property from the contributions of others. The measure of liability, between each owner and the public is based on the difference between his contribution and the benefit he receives between the value of his property previous to the improvement and its value afterward, as affected by the improvement. If its value be made less, he is to be compensated for the loss; if made greater, he is to be assessed for the increase.

A municipality appropriated not only land of the plaintiff, but a sewer already constructed by him so that his contribution to the improvement was the easement thus created and the expense of constructing the sewer from which the borough was by the act of appropriation relieved:

Held, his damages were to be measured by the whole extent of the servitude to which the land was thus subjected rather than by the actual quantum of use at any particular time.

The appropriation of a sewer is the taking of private property for public use, for which the owner is entitled to compensation though the taking may leave the land across which it was built worth as much as before.

W. D. PORTER, J., dissents.

Appeal of the Borough of South Easton, defendant, from the judgment of the Common Pleas for Northumberland County, in an appeal by Elizabeth Hays, executor of Edward Hays, deceased, from the finding of viewers.

The facts are fully stated in the charge of the Court (SCOTT, J.), as follows:

"This is an action in which the present representatives of Edward Hays claim to recover damages in consequence of the appropriation of some property, which in his lifetime Edward Hays owned, for the public purpose of the borough of South Easton. The Constitution of this State provides that all municipal bodies who are invested with the right of eminent domain, that is, with the right to take private property for public uses, must make compensation for all property so taken, injured, or destroyed. It usually happens that the taking by corporations for public uses is of land, and in that case we always inquire what is the difference in the market value of the property as a whole, from which some part of it has been taken, immediately before the taking and just afterwards. In the ordinary cases presented to the consideration of a Court, the sole inquiry always is how much the property as a whole, in the market, has been injured by taking a piece from it.

"Edward Hays in his lifetime presented a petition to the town council of South Easton asking that some sewer be built upon Cooper alley, so as to provide for the safe conduct of the water that came by drainage from the territory beyond, and it is claimed by the defendant that such action would estop him from claiming damages in this proceeding, even if he were entitled otherwise to recover them. But a property holder who joins in a petition to the municipal councils praying that certain improvements be made is not thereby prevented from having damages assessed, provided the disadvantages by reason of such appropriation, if it be made, exceed the advantages to him, unless he has waived it, of which there is no evidence here (Lewis *v.* Borough of Darby, 166 Pa. 613). I have said that the usual cases presented to the consideration of the Court and the application of the rules usually made have been applied to the taking of real estate, but a municipal corporation invested with this right of eminent domain may also take personal property; it may take fixtures that are upon real estate; it may appropriate an easement, that is, some right which one man may have in the land of another to use that property in a particular way, or impose some servitude upon it, and in all cases the party whose right is thus invaded, if he can prove that he has suffered damages in consequence of that appropriation which are greater than any advantages which he has received, may recover whatever that difference may be. It is necessary to remember in all this class of cases, in proceedings for such assessment of damages, that you are to consider the advantages accruing to the property holder as well as the disadvantages that may be incident to him. [It is contended by the defendant in this case that the measure of damages in such a proceeding, as the evidence shows this to have been, is the difference between the market value of the property, the land itself immediately before his private sewer was taken, for the public purposes of the borough of South Easton, and immediately afterwards; and it is maintained by it that by the evidence here there is no difference whatever in the market value of that land unless it be that there was an advantage, and if the rule must be applied as is stated in this class of cases applicable to real estate, its contention would be true, and it would be my duty to instruct you under those circumstances to render a verdict in favor of the defendant. But there are some exceptional conditions relative to the taking in this proceeding that make it different from

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the ordinary appropriation of land. The case has been tried by both sides and the evidence presented upon the assumption that the borough actually took this property under the right of eminent domain, not that injury, if any, arose by diversion of water merely into the drain. In this way I must submit it to you. The amount of damages only is in issue under the pleadings. If Edward Hays had completed the construction of a sewer over his own property to carry the surface drainage away for which he had purchased material in stone and otherwise to the extent of $2000, so that it would to that extent increase its value, and the defendant immediately after that sewer was thus constructed by him, had adopted a resolution to appropriate it, to connect with one of their own for the public use, they would thus appropriate to public purposes that for which the material of Edward Hays had contributed the value of $2000, and if they might so appropriate it without any compensation, unless the land itself was depreciated, it would seem that the constitutional right of compensation for property taken had in some way been infringed. The market value of the real estate may not be impaired, but it would require him to pay for a sewer now made a public one. If he had constructed no sewer, but the borough had adopted this channel over which the surface water drained as the course of a sewer which they intended to erect, and had built one over it, the land would have received, so far as he was concerned, the same benefit of that construction without expense to him, and, therefore, the wide difference in those two conditions requires us to ascertain whether the rule is the same under both the circumstances that I have stated. It would seem as if there must be some easy solution of this problem. I have said that the damages are to be assessed to a property holder not only by reason of the taking of real estate, but by reason of taking fixtures, or of personal property, and if instead of Edward Hays having contributed any stone and material, the borough of South Easton had actually constructed the sewer and furnished that stone and material, the inquiry here would be, what was the difference in the market value of the property as it existed immediately before their appropriation of it and immediately afterwards.] But when a railroad company, under the right of eminent domain, thus takes land for purposes of its own, and in the construction of its road over it, takes stone or material from the ground under it for use in that construction, then the property holder may recover not only the difference between the market value of the land, but he may recover also the actual value of such material. In that event the appropriation is not left to be valued by an action of trespass as the ordinary conversion of personal property, but recovery is allowed for the materials so used in the actual construction of the road which, as the property of the owner, might otherwise be sold by him (Becker *v.* Philadelphia & Reading Railroad Terminal Co., 177 Pa. 252). An owner may recover not only the difference in market value of land, but actual loss in injury to crops or destruction of fences. (McGregor *v.* Gas Co., 139 Pa. 231; Gilmore *v.* Railroad Co., 104 Pa. 275.)

"[Now, if the borough of South Easton had built this sewer, and, in doing so, had taken the stones that they found under the surface upon the place where it was located and used them in the construction, then the measure of damages would have been not only the difference in the market value of the land before and after the taking, if there was any, but it would be for the additional value of the material that they thus took out of the land and used, unless the new use thus made of that material appreciated the real estate when completed, to which extent it would be offset. The rule is applicable to this present controversy. When the borough of South Easton adopted their ordinance to build a sewer along Cooper alley from some other territory beyond so as to connect with and take this private drain, immediately adjacent they found a sewer already constructed, with stones provided by Edward Hays and built by him over that property, and when they took that actual material they were in the same situation as a railroad company would be in constructing their road over the property of another and using the material which they took out of his ground. Whatever that is worth which they have thus taken, if you find that it exceeded the advantages conferred upon the property generally by the connection, the plaintiff may recover. Whatever the difference between the disadvantages and the advantages may be you would consider, as well as whatever difference there might be between the market value of the property as a whole immediately before the taking and immediately afterwards. But so far as the evidence in this case is concerned there is none whatever presented by the plaintiff of depreciation in the market value of the real estate in itself before and after the appropriation by the borough of South Easton of this sewer; of course, you understand that the property holder built the sewer himself for the purpose of improving rather than depreciating his property, and the act of the borough with relation to it was no physical act of disturbing its use, but merely the adoption of it as a public sewer by an ordinance of their councils. Therefore, you would confine your consideration of the amount of damages that the plaintiff would

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be entitled to receive, if any, to the value of the material when taken of which the sewer was constructed, and which was thus appropriated. But you must consider the advantages which Edward Hays still retained, or which remained upon this property, by reason of the fact that the sewer was still there and served for the property the same purpose and use exactly as it did when it was constructed by him for himself.] If a railroad company, under the illustration that I have already suggested, should take the real estate and then appropriate the material under its surface in construction you will perceive that there would be no advantage remaining to the property holder from that material that was thus so taken, and so the measure of damages for such a case as that would be the actual value of the material. When the borough of South Easton appropriates this drain for municipal use, the general public also shares in that right by having the drainage from a remote territory carried through, but the owner also retains the advantage that he previously had. [Are there also disadvantages to this property? The borough having adopted it now as a public sewer neither Edward Hays' representatives, nor the successors in title, may change its location, but it is subject to the municipal discretion. He might, had it not been made a public sewer, have changed the course of that water at any place where it flows over his property, or turned it into the public highway, so that it was not cast upon a property holder below, but it is so no longer. He would have that right at least unless this channel were what is denominated an ancient water-course. This has a technical significance; it does not mean any place where water is accustomed to flow, but it is a living stream with defined banks and channel not necessarily running all the time, but fed from other and more permanent sources than mere surface water.] If this were ordinary surface drainage the borough could not collect into its own connected sewer from a remote and distant territory surface water which did not originally flow over this property if the quantity of the water was thus largely increased without being responsible to keep that drain over Hays' land in repair and maintain it. This would be the situation for consideration in an action of trespass for diversion of water but is not when the property itself is actually taken. Thus the burden of keeping it repaired being now cast upon the borough of South Easton, it would relieve the property holder from any expense in the care of it, and yet permit him to have the same advantage that he had before its adoption by the borough and when constructed by him. You will see that this would be an advantage to him which you are to consider in the calculation of the amount of damages which the plaintiff may recover if he is entitled to recover at all. So also this connection now with the closed sewer in Cooper alley may appreciate the market value of the real estate on the whole.

"These are some of the considerations that you will reflect upon in endeavoring to arrive at a satisfactory result. [The plaintiff is entitled to recover the value of this material which is appropriated in stone and other material for the construction of the sewer measured by the amount of the disadvantages to him and the advantages which he receives in consequence of that appropriation, and the damages would not be the actual value of the material, if you find that there are any other advantages to Edward Hays by reason of this public appropriation that he has the expense of the maintenance cast upon the borough, and that he has the same use of it as he had before it became public property. The witnesses upon the part of both sides have said there is no difference in the market value of the real estate, and I have already said there is nothing to discuss upon that question.] [Upon the other proposition considered alone there is the testimony of Mr. Barr for the plaintiff, and that of Mr. Frederick for the defendant, who make an estimate of $350, but the methods by which they reach such a conclusion are before you. Of course, you are to ascertain this actual loss based upon comparison of advantages and disadvantages from all the testimony in the case.]

"The plaintiff is not permitted as of right to ask for interest, if you find he is entitled to recover anything. This sewer was adopted and these materials were appropriated to public use in the sewer sometime after August 10, 1896, the exact date does not appear. But if you find that the plaintiff is entitled to any damages at all you have the right to consider whether or not he would be fully compensated unless he received that amount substantially as of the day when the appropriation was made, and you may allow additional compensation for this delay not exceeding the rate of interest, or you have the right to reject it altogether and allow simply the amount of damages as of that time (130 Pa. St., p. 40).

"[The defendant has submitted a point in which he asks me to give you binding instructions for him: this point I deny. The determination of it is left to you."]

Verdict and judgment in favor of the plaintiff for $500, and this appeal was taken by the defendant, who alleged as error the charge of the Court and the answer to defendant's points, all enclosed in brackets.

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William C. Shipman, (*Aaron Goldsmith* with him), for appellant, cited—

Bohan *v.* Avoca Borough, 154 Pa. 404.
Huddleston *v.* Borough of West Bellevue, 111 Id. 110.
Elliott *v.* Oil City, 129 Id. 570.
Munn *v.* Pittsburgh, 40 Id. 364.
Reitenbaugh *v.* Railroad, 21 Id. 100.
Superior Court Act, P. L. 1895, p. 219, sec. 9.

Edward J. Fox, (*James W. Fox* with him), for appellee, cited—

Act of May 16, 1891, P. L. 75.
Strohl *v.* Ephrata Borough, 178 Pa. 50.
Trust Co. *v.* Motheral, 8 Super. Ct. 433.
Railroad *v.* Healy, 94 Ill. 416.
Wagner *v.* Long Island R. R. Co., 2 Hun, 633.
Eulrich *v.* Richter, 37 Wis. 230.

May 18, 1899. SMITH, J. In adjusting the burden of municipal improvement, each property owner is to be credited with his contribution, in property injured, taken or destroyed, and charged with the benefits to his property from the contributions of others. The measure of liability, between each owner and the public, is based on the difference between his contribution and the benefit he receives between the value of his property previous to the improvement and its value afterward, as affected by the improvement. If its value be made less, he is to be compensated for the loss; if made greater, he is to be assessed for the increase.

When the municipality in its work of improvement, appropriates only the land, the problem of adjustment and compensation is comparatively simple. In the case before us, had the borough constructed a sewer across the plaintiff's land, the measure of damages would have been the difference between the value of the land affected by the improvement, before its construction, and the value afterwards, as affected by the easement thus created, less any increase of value arising from its construction. But the borough, instead of constructing the sewer appropriated one already constructed by the landowner. This substituted a permanent servitude for the use which otherwise the owner could terminate at pleasure. His contribution to the improvement therefore, was the easement thus created, and the expense of constructing the sewer, from which the borough was, by the act of appropriation, relieved. On the other hand, it is difficult to see how this proceeding could benefit the owner (except to relieve him from future maintenance of the sewer), or increase the value of the property affected by the improvement, since all the benefits to be derived from the construction of the sewer were already enjoyed. Yet, if any benefit is to be found, it should be charged to the owner.

If a natural water course existed on the plaintiff's land, the diversion thereto of water which otherwise would not reach it is an enlargement of the servitude for which the landowner should be compensated. If the general sewage of the borough, also, is turned into the water course, the servitude becomes still more onerous. If it was necessary or desirable to substitute an artificial sewer for a natural water course, such a sewer became a municipal improvement, to be paid for as other public sewers are paid for.

It is not material whether the borough had, previous to the trial, diverted to the sewer water that did not naturally flow through the gully in which it was laid; it is sufficient that by the appropriation of the sewer as part of its general system, the borough acquired the right to use it as a conduit for water from all sources. The damages are to be measured by the whole extent of the servitude to which the land is thus subjected, rather than by the actual quantum of use at any particular time.

Thus the elements from which the measure of liability is to be determined are apparent. The landowner is to be charged with the benefits to his property arising from the improvement made by the borough. He is to be credited with his contribution to this improvement in property taken, injured or destroyed. In the present case, this contribution embraces the permanent and more onerous servitude imposed on the land, and the value of the sewer which the borough has taken for public use. This value is not necessarily fixed by the amount paid by the owner for its construction; the true measure is the cost of an adequate sewer, at the time of the taking, not exceeding the actual cost of the sewer taken. It does not dispose of the plaintiff's claim to show that his land was worth as much after his sewer was taken as before. The appropriation of the sewer is a taking of private property for public use, for which the owner is entitled to compensation though the taking may leave the land across which it was built worth as much as before. Benefits and injuries to the land stand by themselves, to be taken into account as items of debit and credit. A taking of property which, in effect, compels the owner to contribute more than his due proportion to the improvement, stands by itself, and is to be taken into account aside from the balance resulting from a comparison of benefits and injuries to other property.

While the course of the trial in the Court below was not strictly along the lines here indicated, it was not in conflict with the principles now stated. Under these principles none of the specifications of error can be sustained and, as the plaintiff is not here complaining of the verdict, the judgment is affirmed.

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May 18, 1899. W. D. PORTER, J., dissenting. In the judgment of the Court upon this appeal, I cannot concur. The plaintiff's decedent had constructed a sewer through his property from one street to another, for the use of his property and the purpose of conducting through it the surface water which flowed from higher lands beyond. The borough afterwards built a sewer running through a street upon the higher ground and connected it with the sewer running through plaintiff's property. The plaintiff elected to consider this action of the borough a permanent taking of the sewer and a lawful imposition upon the land of an easement, under the right of eminent domain. Upon the petition of plaintiff viewers were appointed to assess the damages to the property. From the report of the viewers the plaintiff appealed and the Court awarded for trial this issue: "What damage is the plaintiff entitled to?"

In the action of the plaintiff the borough acquiesced, and the parties went to trial upon the theory that the borough had fixed upon the lands of plaintiff a permanent easement. The question of damages is, therefore, to be determined in like manner as if there had been a formal taking under condemnation proceedings. The borough was invested with the privilege of taking private property for public use in the construction of its works, and the measure of damages to be recovered for property so taken, injured or destroyed is the depreciation in the value of the property of which that taken, or subjected to any servitude, is a part: Thompson *v.* Traction Co., 181 Pa. 131. The damage to which the plaintiff was entitled was the depreciation if any, in the market value of the property, as a whole, which resulted from the conversion of the private sewer into a public one, to be controlled and maintained by the borough authorities.

In ascertaining the amount of damages resulting from the appropriation it was essential to consider every element which affected the value of the property both before and after the change in conditions. In ascertaining the value of the property immediately before the appropriation the land with all its buildings and improvements, including the private sewer, must be taken into consideration. The amount that it would take to construct the sewer was indirectly involved, but the real question was, what was the land worth with that private sewer through it; not what was the sewer worth apart from the land. The sewer was built for the use of the land, not as an independent enterprise. Having arrived at the value of the land before the appropriation, we must, in the same manner, ascertain the value immediately after the sewer became a public sewer, subject to the control of the borough authorities with the duty upon said authorities to maintain it. If as a result of the appropriation the property was worth less money, then, the plaintiff was entitled to recover damages in the amount of that depreciation.

But while it is proper to consider the value of the buildings, roads, trees, sewers and other improvements as elements bearing on the difference of market value; an injury to or appropriation of such improvements is not to be considered as an independent item of damage, apart from the effect upon the property as a whole: Chambers *v.* South Chester, 140 Pa. 510; Dawson *v.* Pittsburgh, 159 Pa. 317.

All the evidence in this case is in accord upon the real question at issue. Every witness interrogated upon the subject said that the appropriation of the sewer had no effect upon the value of the property. The learned trial Judge instructed the jury that the plaintiff might recover damages on the theory that the materials of which the sewer was constructed were appropriated, and that on the basis of their cost the damages might be assessed, less the benefits accruing to the property of the plaintiff by reason of the appropriation of the sewer. In this we think there was error. The effect was to cause the jury to allow the plaintiff damages for the cost of the materials used in the construction of the sewer, as an independent element, without regard to the effect of the appropriation of the sewer upon the value of the property as a whole. It caused the jury to start in their calculation by giving the plaintiff a credit not authorized by law, and then required the borough to overcome this false balance by proof of special benefits.

The borough was not seeking to assess the property of plaintiff for benefits in excess of damages, and upon the record and under the evidence no such assessment for benefits could have been sustained. The question to be determined was the amount of depreciation in value of plaintiff's property as a whole, and the sewer was as much a part of the land as were the houses erected upon the lot. Whether the plaintiff was contributing more than his share to the sewer system of which his private sewer became a part was not material, and evidence as to what others had contributed would not have been admissible. Under the theory upon which this case was submitted to the jury a property owner in such a case might recover damages not only for the depreciation in the value of his land, but, in addition, in the amount of the benefit derived or expense avoided by the municipality in making the appropriation. In the present case the plaintiff has recovered a judgment, while it is upon all hands conceded

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that the appropriation did not depreciate the value of the property.

W. C. S.

April, '99, 36. Superior Court. April 11, 1899.

Eardley v. Keeling.

Negligence—Blasting—Leaving open trench.

Where the evidence shows that defendants were employed by the municipality to construct a sewer along the street upon which plaintiff's house fronted, and used dynamite to make excavations, and there is a conflict of evidence as to whether the use of the dynamite injured plaintiff's house, and the plaintiff's evidence is further to the effect that the trench, necessarily dug by the defendants was not closed up within a reasonable time after the work was done, in consequence of which water collected therein and caused plaintiff's soil to slip down, which allegation is denied by the defendants, the questions of negligence and injury thereby are for the jury.

Appeal of Joseph Keeling and Patrick Ridge, trading as Keeling & Ridge, defendants, from the judgment of the Common Pleas No. 2, for Allegheny County, in an action of trespass brought by Jesse Eardley against the said Keeling & Ridge and the City of Pittsburgh.

This was an action to recover for negligent injury done to the plaintiff's house. At the trial, before FRAZER, J., the plaintiff took a non-suit as to the city of Pittsburgh and as to the other defendants showed the following case: Keeling & Ridge were employed by the city of Pittsburgh to construct a sewer on Ethel street, in front of the premises of the plaintiff, upon which, some ten years before, buildings had been erected, upon sloping ground; the defendants dug a trench some nineteen feet deep in front of plaintiff's lot and left it open for two weeks, when it could have been closed in three days; and instead of using sledges to break the stone in making the trench, they used dynamite. The plaintiff's house was shaken and cracked by the dynamite explosion, and water collected in the unclosed trench, causing the soil of plaintiff's lot to slip down.

The defendants denied all negligence and gave evidence to the following effect:

The ground on the hillside on which was plaintiff's house was very marshy, loose and wet. Keeling & Ridge commenced the work of putting down the sewer in October, 1896. On account of the condition of the ground, the trench for the sewer pipe had to be dug to a great depth, namely, nineteen feet deep. The contractors took extra precautions as the work progressed to prevent the hill from sliding down. This was done by shoring up the walls of the trench. The shoring was done by using large plank, 18 feet long, 12 inches wide and 2 inches thick. These planks were laid as closely as possible, one on top of the other, along the walls of the trench, and kept in place by large iron screws. Twenty or twenty-five feet of the trench was all that was open at one time, and this for only three or four days. The dirt was put back in the trench in a careful, workmanlike manner.

During the progress of the work several large boulders were found in the line of the trench, and the only way they could be removed was by blasting them out. For this purpose a half a stick of dynamite was used, and this, by all the witnesses who testified on the subject, was considered a very small charge; the end desired could not be obtained by using a smaller charge. In each and every case before a blast was put off, boards or planks were laid across the trench to prevent stone, dirt and other missiles from flying about. The nearest blast was some 290 feet from the plaintiff's house.

The defendants requested a binding charge in their favor, which was refused by the Court. Verdict and judgment for plaintiff, $200. The defendants, Keeling & Ridge, took this appeal and assigned as error the refusal to direct a verdict for defendants.

Stephen W. Stone, (*Potter* with him), for appellants, cited—

Fischer *v.* Camden, etc., Ferry Co., 124 Pa. 154.
Ballard *v.* N. Y., etc., R. R., 126 Id. 141.
Curtin *v.* Somerset, 140 Id. 70.
Holland *v.* Kindregan, 155 Id. 156.

D. R. Jones, for appellee, cited—

Tissue *v.* B. & O. R. R., 112 Pa. 91.
Neslie *v.* Passenger Co., 113 Id. 300.
Railroad Co. *v.* Coon, 111 Id. 430.
Menner *v.* Canal Co., 7 Pa. Super. Ct. 139.
Company *v.* Orr, 83 Pa. 332.
Schilling *v.* Abernethy, 112 Id. 437.
Railroad Co. *v.* Barnett, 59 Id. 259.
Huyett *v.* Reading R. R. Co., 23 Id. 373.
McCully *v.* Clarke, 40 Id. 405.
Railroad Co. *v.* McElwee, 67 Id. 311.
Christman *v.* Railroad Co., 141 Id. 613.
Gas Co. *v.* Robinson, 99 Id. 1.
Bunting *v.* Hogsett, 139 Id. 363.
Pittsburgh *v.* Grier, 22 Id. 55.

May 18, 1899. BEEBER, J. This was an action of trespass to recover damages for injuries caused to plaintiff's house by alleged negligence of the defendants in the manner of constructing a sewer in front of plaintiff's premises. It appeared that the defendants had made a contract with the city of Pittsburgh to construct a sewer along Ethel street, upon which plaintiff's house fronted. The plans according to which the sewer was to be built required in some places excavations as deep as nineteen feet. At some places in this trench rocks or boulders were encountered which had to be removed. To accomplish this the defendants used dynamite to blast them. The plain-

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tiff submitted evidence to show that the explosions induced by the use of the dynamite partly caused the injury to his property. The other negligent act of the defendants complained of was their failure to close up the trench within a reasonable time after the work was done, in consequence of which it partly filled up with water, causing the soil to slip down and thereby contributing towards the injury to the plaintiff's property. The single assignment of error raises the question whether the Court below ought to have given binding instructions for the defendant.

In Menner *v.* Canal Co., 7 Pa. Super. Ct. 135, in considering the circumstances which justified the Court below in directing a verdict, we said: "To justify a verdict by direction, two conditions must concur: (1) The controlling facts must be established beyond doubt; (2) their effect in the conclusions to which they lead must be so clear and unquestionable that it may be judicially declared." Under this rule it would have been clear error to have directed a verdict for the defendants, for the controlling facts were not established beyond doubt. Plaintiff's evidence showed that the blasting was done in front of an adjoining lot and within about fourteen feet of his own lot, and that the trench was allowed to remain open from thirteen to fourteen days. It is true the defendants' testimony was to the effect that no blasting at all was done within 290 feet of one side of plaintiff's lot, and within 300 feet of the other side of his lot; and that the trench was not allowed to remain open more than three or four days. With the evidence thus conflicting, it is too plain for discussion that the learned trial Judge could not properly have given binding instructions for the defendants. He went as far as the defendants could have reasonably asked him to go when he said to the jury that if they believed that these blasts were as far off from plaintiff's premises as defendants' evidence showed they were, it was not probable that they would have done very much damage to plaintiff's property. There was also much conflicting evidence as to whether the explosion of the dynamite and the failure to fill up the trench were the causes of the injury to the plaintiff's property, but the plaintiff's evidence, if believed, was sufficient to have justified the jury in concluding that these two acts of the defendants did cause the injury. There being this irreconcilable conflict of evidence on these points, it is manifest that the learned trial Judge could not have given a binding instruction that would have ignored entirely the plaintiff's evidence. An examination of all the testimony satisfies us that it was a case that should have gone to the jury.

Judgment affirmed. H. B.

April, '99, 89. Superior Court. April 12, 1899.

Cote v. Christy.

Affidavit of defence—Note for purchase money—Misrepresentation as to value—Defence.

A. purchased from B. a brickyard, the consideration for which was the conveyance of certain real estate and $1000 in cash. The conveyance was executed and, about ten months after, a note for the price, payable in three months after date, was given. At the maturity of the note, A. declined to pay, and upon suit brought filed an affidavit of defence in which he set up that he had been induced to the original contract by the false representations of B. as to the value of the brickyard:

***Held,* not to be sufficient, as A. was in possession of the property for a sufficient time before the giving of the note to make full examination and inquiry as to the value of the property, and was late in complaining of any results which may have flowed from his omission, or that he had been deceived by the vendor's misrepresentations.**

Appeal of H. L. Christie, from the judgment of the Common Pleas No. 1, of Allegheny County, in an action upon a promissory note given by him to George M. Cote.

The statement set out that "the defendant is indebted to the plaintiff, in the sum of $350, with interest from May 2, 1898, upon a certain promissory note, dated January 31, 1898, wherein the defendant promised in three months after the date thereof to pay to the order of the plaintiff the sum of $350 without defalcation, for value received. Said note was duly executed and for value delivered by defendant to plaintiff, was duly presented at maturity and was not paid."

Defendant in his affidavit of defence, set up:

"That on or about April 1, 1897, the said plaintiff came to said defendant and endeavored to sell to him a certain interest in a certain brickyard on the Yough river, above McKeesport, Pa., for the price or sum of $10,000 and told said defendant that the said interest in said brickyard now known as the Yough brick yard, including the buildings, personal property, tools, engines, bricks and real estate was worth the sum of $10,000. That relying on the truth of the statements of said plaintiff and upon the values placed by said plaintiff, upon said property a schedule of which was given by him to said defendant, affiant agreed to pay to said plaintiff the said sum of $10,000 for said interest in said brick works, etc., in manner as follows:

Two houses on McPherson street, Pittsburgh, Pa., (equity of defendant less mortgage)	$7,000.00
Two lots in Christy Park, at $1000	2,000.00
Cash	1,000.00
Total	$10,000.00

"That said real estate was taken by said plain-

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tiff at this value and a deed was made, executed and delivered to said plaintiff by defendant for said real estate.

"That the note in question and upon which suit is brought was given in part payment of the balance of the $1000.

"That affiant is informed, and verily believes and expects to be able to prove that the values placed by said plaintiff upon the said personal property and real estate sold by plaintiff to defendant were false, and that plaintiff knew they were false when he made them.

"That defendant has already paid to plaintiff a sum far in excess of the value of the said interest in said property.

"That said note was procured from defendant by plaintiff by false and misleading statements, and that there never was any consideration or value passed for said note, but that plaintiff well knew at the time of the delivery of said note that there was no consideration for the same, but that all statements made by him with reference to the value of the property for which this note was given were made for the purpose of swindling said defendant and defrauding him.

"That moreover said plaintiff told said defendant that he never would have to pay said note, but that the profits of the Yough Brick Company would pay said note before it came due, and that defendant told said plaintiff at the time said note was made that he would expect it to be paid in that way.

"That said plaintiff obtained said note from said defendant by statements willfully and maliciously false and misleading. All of which defendant expects to be able to prove on the trial of this case."

The errors assigned were in making absolute the rule for judgment in default of a sufficient affidavit of defence; and in entering judgment against appellant for the sum of $362.02.

D. F. Patterson, for appellant, cited—

Smalley *v.* Morris, 157 Pa. 349.
Martin *v.* Kline, Id. 473.

W. K. Jennings, (*H. G. Wasson* with him), for appellee, cited—

Mahaffey *v.* Ferguson, 156 Pa. 156.
Shisler *v.* Baxter, 109 Id. 443.
Wetherill *v.* Neilson, 20 Id. 448.

May 18, 1899. W. W. Porter, J. The note upon which suit is brought bears date on January 31, 1898. It was given in part payment of the sum of $1000, contracted to be paid in cash on or about April 1, 1897. This cash was, with the conveyance of certain real estate, the consideration for the purchase of a brick yard by the defendant from the plaintiff. The conveyances were exchanged about the date last named. The defendant had therefore been in possession of the brickyard for some ten months when he gave the note in suit. When the note became due he for the first time, so far as the record shows, set up that he had been induced to the original contract by the false representations of the plaintiff as to the value of the brickyard. He does not allege that he had not discovered the falsity of the alleged statements of value at the time he gave the note, nor does he allege any reason why it could not have been ascertained by him.

The affidavit admits that the defendant was in possession of a schedule of the property he was acquiring and does not allege that he was prevented from making examination and inquiry as to the value of the property. If he did not utilize his opportunities for acquiring satisfactory information when entering into his contract of purchase, he can scarcely be heard to complain of any results that may have flowed from his omission, or that he has been deceived by the vendor's misrepresentations.

The allegations of misrepresentation relate wholly to the plaintiff's alleged assertions as to the value of the property he was selling. There is no allegation of any material fact which was falsely stated. The vendor of property may hold and express to a vendee views of value quite at variance with those held by persons having no interest, without vitiating a sale made of the property. It is the expression of opinion, not in any sense a warranty. It is said in Veasey *v.* Doton, 3 Allen, 380, and quoted with approval in Mahaffey *v.* Ferguson, 156 Pa. 169, that representation as to value "however exaggerated, false and deceptive it may be, is not actionable if the subject of the sale be open to the buyer's observation."

The affidavit does not set forth a defence to the note in suit and the judgment of the Court below is therefore affirmed.

W. C. S.

Common Pleas.

No. 3, March, '99, 252. June 12, 1899.

Conway v. R. B. Salter Building & Loan Association No. 2.

Ground rent— Personal liability of terre tenant, when rent has been created before the Act of June 12, 1878, P. L. 205.

One who, subsequently to the Act of June 12, 1878, P. L. 205, takes title to land subject to a ground rent, created by deed, containing the usual covenants, made prior to said Act, is personally liable

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for the rent falling due during his ownership of the premises.

Rule for judgment for want of sufficient affidavit of defence.

This was an action of assumpsit. The statement filed and as amended, set up that on January 27, 1849, Isaac Elliott and wife conveyed to one Buchanan certain land in fee, reserving a ground rent of $600 per annum, payable in semi-annual instalments on the first days of February and August in each year; that by mesne conveyances the said ground rent became vested in the plaintiff in 1885; that on February 25, 1893, the high sheriff of Philadelphia conveyed to the defendant the land out of which the aforesaid ground rent issued, and that the defendant remained seised of the said land until after August 1, 1898; that on February 1, 1898, an instalment of rent ($300) fell due, which instalment was not paid and which plaintiff claimed to recover from the defendant.

The affidavit of defence admitted the allegations as above set out, but averred that the defendant "never expressly assumed a personal liability for said ground rent by any agreement in writing or otherwise as is required by the Act of Assembly of June 12, 1879," and alleged that, therefore, there was no liability on its part for said rent.

The present rule was taken by the plaintiff.

James C. Stillwell, for rule.

If the Act of 1879 is retrospective it is unconstitutional; if it is not retrospective it does not affect the present action.

Plaintiff claims under the deed of 1849, in which the grantee Buchanan covenants for himself and assigns to pay the rent according to the terms of the deed. The defendant takes title to the land subject to the rent and through the same deed.

A contract or property right acquired by contract cannot be impaired by any subsequent Act of Legislature; or if founded upon an Act as interpreted by the Court at the time of the making of the contract or vesting of the right be impaired by a subsequent construction of the law as it then existed.

Lambertson *v.* Hogan, 2 Pa. 23.

And a legislative construction cannot be put upon an Act or a contract by a retrospective Act.

Haley *v.* Philadelphia, 68 Pa. 45.
Titusville Iron Co. *v.* Keystone Co., 122 Id. 633.
King *v.* Bank, 15 Mass. 447.
Weaver *v.* Mailliot, 15 La. Ann. 395.
Plank Road Co. *v.* Davidson, 39 Pa. 435.
Ray *v.* Natural Gas Co., 138 Id. 576.

As the law was when the ground rent was created the deposed ground landlord and his assignee (the plaintiff here) had the right to recover the rent as it matured, from the ground tenant or his assignee in a personal action. The terre tenant at the time the rent fell due became personally liable.

Berry *v.* M'Mullen, 17 S. & R. 84.
Weidner *v.* Foster, 2 P. & W. 23.
Royer *v.* Ake, 3 Id. 462.
Thomas *v.* Connell, 5 Pa. 13.

Their liability arose not from priority of contract, but from priority of estate.

Irish *v.* Johnston, 11 Pa. 483.
Wickersham *v.* Irwin, 14 Id. 108.
Hannen *v.* Ewalt, 18 Id. 9.

The right given by the deed of 1849 to the landlord to recover against both the covenantor and his assignee was as much part of the right reserved as the rent itself, and to take it away would be to deprive the landlord of his property, in violation of Art. I., sec. 9, and Art. I., secs. 1, 16, of the Constitution of Pennsylvania, and Art. V., of the amendments to the Constitution of the United States.

But the Act of 1879 was not intended to be retrospective and it does not apply to the owner of a ground rent created prior to the passage of the Act. This is shown by the reasoning of Miller *v.* Kern, 7 WEEKLY NOTES, 504.

Francis Cantrell, Jr., contra.

The defendant acquired title long subsequent to the passage of the Act of June 12, 1878, and by its terms is exempt from any personal liability for the ground rent falling due while it held title to the premises.

The mere taking title to land under and subject to a ground rent or mortgage does not impose any personal liability.

Taylor *v.* Mayer, 93 Pa. 42.
Easby *v.* Easby, 180 Id. 429.

C. A. V.

July 6, 1899. Rule absolute.

H. B.

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WEEKLY NOTES OF CASES.

VOL. XLIV.] *FRIDAY, OCT. 13, 1899.* [No. 28

Supreme Court.

Jan. '84, 428. Supreme Court. January 23, 1885.

Hopple v. Hutchinson.

Ground rent—Personal liability of terre tenant when rent has been created before Act June 12, 1878, P. L. 205.

The Act of June 12, 1878, P. L. 205, does not affect the personal liability of owners of land subject to ground rent, where the rent is reserved by a deed antedating said Act; and the owner of the land out of which a rent so reserved issues is liable on the covenants for its payment without any express assumption of the same by himself.

Error to the Court of Common Pleas No. 1, for the County of Philadelphia.

This was an action of covenant sur ground rent brought by Rachel B. Hutchinson, assignee of Rev. Thomas S. Malcom and Margaret N., his wife; Rev. Charles Howard Malcom, acting by his attorney in fact; Thomas G. Malcom, Melville Malcom and Rev. Howard Malcom, trustee of Louisa Stenton (late Louisa Malcom), and Robert S. Stenton and Louisa his wife, against William Hopple, Jr., assignee of William E. Roberts, who was assignee of William H. Wright Esq., late high sheriff of the city and county of Philadelphia, of Thomas Brown, by virtue of certain proceedings had upon a judgment obtained in the Court of Common Pleas No. 2, for the said city and county, of September term, 1876, No. 341, at the suit of Rachel B. Hutchinson and others against the said Thomas Brown.

The declaration averred that on January 10, 1856, the Rev. T. S. Malcom, and Margaret his wife, the Rev. Howard Malcom, Melville Malcom and the Rev. Howard Malcom, trustee, granted, in fee, certain premises unto Thomas Brown, reserving thereout a ground rent of $270 per annum, payable in semi-annual instalments on the first days of January and July in each year; the deed contained the usual covenant as to payment of ground rent by the grantee; that Brown entered; that the ground rent was subsequently, on May 19, 1856, conveyed to Rachel B. Hutchinson, the plaintiff; that by virtue of an execution against Brown, the premises out of which the rent issued were sold and a sheriff's deed therefor delivered to William E. Roberts, who subsequently, January 19, 1877, conveyed the premises, subject to the ground rent, to William Hopple, Jr., the defendant, whereby said Hopple became bound to keep the covenant for the payment of the ground rent, nevertheless he had not paid an instalment of said rent, $135, falling due January 1, 1883.

The defendant filed the following pleas:

"And the said defendant . . . . saith that the said plaintiff ought not to have or maintain her aforesaid action thereof against him, because he says that he, the said defendant, did not at the time of the making of the said deed last mentioned in the said declaration, nor at any other time before or since the time of the making of the said deed in the said declaration mentioned, by an agreement in writing, expressly assume a personal liability for the said ground rent alleged in the said declaration to have become due and owing to the said plaintiff; and this the said defendant is ready to verify. Wherefore he prays judgment if the said plaintiff ought to have and maintain her aforesaid action thereof against him, etc.

"And for a further plea in this behalf the said defendant, etc., saith that the said plaintiff ought not to have or maintain her aforesaid action against him, because he says that there were no express words in the said last-mentioned deed of conveyance in the said declaration mentioned, stating that the grant in the said declaration alleged to have been made to the said defendant was made on the condition of the defendant assuming any personal liability for the payment of the ground rent alleged in the said declaration to be due and owing to the said plaintiff, and this the said defendant is ready to verify. Wherefore he prays judgment if the said plaintiff ought to have and maintain her aforesaid action thereof against him.

"And for a further plea in this behalf the said defendant, by leave, etc., says that the said plaintiff ought not to have or maintain her aforesaid action thereof against him, because he says that he did not at the time of the making of the said last-mentioned deed in the said declaration mentioned, nor at any other time before or since the making of the said deed, by any agreement in writing, expressly assume any personal liability for the said ground rent alleged by the said plaintiff in the said declaration to be due and owing to her; and the defendant further says that there were no express words in the said deed of conveyance to him as aforesaid, stating that the said grant in the said declaration mentioned was made on condition of the defendant assuming any personal liability for the said ground rent alleged in the said declaration to be due and owing to the

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plaintiff, and this the said defendant is ready to verify. Wherefore he prays judgment if the said plaintiff ought to have and maintain her aforesaid action thereof against him, etc."

The plaintiff demurred. The Court sustained the demurrer and entered judgment for plaintiff. The defendant took this writ.

Walter J. Budd, for plaintiff in error.

The question here is whether since the passage of the Act of June 12, 1878, P. L. 1878, 205, there can be any recovery against the defendant below, the plaintiff in error.

This Act provides:

"Sec. 1. That grantee of real estate, which is subject to ground rent or bound by mortgage or other encumbrance, shall not be personally liable for the payment of such ground rent, mortgage, or other encumbrance, unless he shall by an agreement in writing have expressly assumed a personal liability therefor, or where there shall be express words in the deed of conveyance stating that the grant is made on condition of the grantee assuming such personal liability; provided that the use of the words 'under and subject to the payment of such ground rent, mortgage, or other encumbrance' shall not alone be so construed as to make such grantee personally liable, as aforesaid.

"Sec. 2. The right to enforce such personal liability shall not inure to any person other than the person with whom such an agreement is made; nor shall such personal liability continue after the said grantee has bona fide parted with the encumbered property, unless he shall have expressly assumed such continued liability."

This Act changes the evidence necessary to entitle plaintiff to recover in such suit, and is clearly constitutional.

Towler *v.* Chatterton, 6 Bingham, 258.
Evans *v.* Montgomery, 4 W. & S. 218.
McFarland *v.* Commissioners, 12 S. & R. 297.
Foster *v.* Gray, 10 Harris, 10.
Bambaugh *v.* Bambaugh, 11 S. & R. 191.

The Act does not impair any contract between the parties to this suit. No contract was ever made between them. An Act taking away vested rights is not void when it does not literally impair the obligation of a pre-existing contract.

Wallace *v.* Harmsted, 8 Wright, 492.
Satterlee *v.* Matthewson, 2 Pet. 414.
Deichman's Appeal, 2 Whart. 395.
Bambaugh *v.* Bambaugh, 11 S. & R. 191.

William Henry Lex, for defendant in error.

The Act of June 12, 1878, is not retrospective.

Smith *v.* Conrad, 11 WEEKLY NOTES, 101.
Merriman *v.* Moore, 9 Norris, 78.

The right of the owner of a ground rent to bring covenant against the assignee of the land out of which the same springs is conferred by the statute, 32 Henry VIII., chap. 34, which is in force in this State. The right to bring an action of covenant is further expressly conferred by the Act of April 25, 1850, and the validity of this Act has been repeatedly sustained.

Taggart *v.* McGinn, 2 Harris, 155.

A covenant to pay ground rent, moreover, is a covenant which runs with the land. It is binding upon the assignee without his being specially named. And an action of covenant for arrears of ground rent will lie not only on privity of contract, but also upon privity of estate. The covenant runs with the land. The assignee takes it "cum onere," and the covenants affect the owner of the title.

Weidner *v.* Foster, 2 P. & W. 23.
Berry *v.* McMullin, 17 S. & R. 87.
Hannen *v.* Ewalt, 6 Harris, 11.

This case is practically decided by the opinion of ALLISON, P. J., in—

Miller *v.* Kern, 7 WEEKLY NOTES, 504.

February 2, 1885. PER CURIAM. The rights of the plaintiff below and the liability of the other party were fixed before the passage of the Act of June 12, 1878. As this Act is not retrospective (Merriman *v.* Moore, 9 Norris, 78), it has no effect on the present case. It matters not that the rent in question accrued afterwards; the vested right on which it rests existed before, and is not impaired.

Judgment affirmed.

H. B.

[N. B.—This case, in which the same question is involved as that in Conway *v.* R. B. Salter B. & L. Assn. No. 2, (C. P. No. 3), *ante* p. 439, has never been reported. In view of the importance of the question involved, it is now printed.—REP.]

Jan. '98, 223. Supreme Court. January 10, 1899.

Philadelphia Ball Club, Limited v. City of Philadelphia.

Municipality—Damage caused by change of grade —Street—Time of estimation of damage—Lease — Compensation for delay — Speculative damages.

Damages, caused by injury to property, caused by a change of grade, must be estimated as of the time the injury is complete; and the injury to be valued is that to the property without reference to the person of the owner or the actual state of his business.

In no event can there be a recovery for estimated loss of business profits occurring or to occur after the injury is complete.

Schuylkill Nav. Co. *v.* Thoburn, 7 S. & R. 411, followed.

These rules cannot be evaded, when damages are claimed by the owner of a leasehold, by estimating the probable loss of business profits during the time the lease has to run, due to the altered condition of property on account of the change of grade, and

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treating that sum as the damage done to the leasehold.

When, some years after a change of grade is made, alterations are made in the buildings upon the injured premises, there can be no recovery from the municipality of any part of the expense thereof, on the ground that had it not been for the change a different kind of alteration, costing less, would have been made.

Damages for detention of the sum which should have been paid by the municipality to the owner of injured property upon a change of grade are not payable in all events, but only under proper circumstances, and where the settlement of damages has been delayed by inordinate demands on the part of the plaintiff, damages for detention should not be allowed.

Appeal of the City of Philadelphia from the judgment of the Common Pleas No. 4, for the County of Philadelphia, in a proceeding to determine the damages suffered by the Philadelphia Ball Club, Limited, from the change of grade of Broad street between Cumberland and Somerset streets, in the city of Philadelphia.

This case was twice tried; on the former trial a judgment for $29,761.98 in favor of the plaintiff was recovered. This was reversed by the Supreme Court (see 41 WEEKLY NOTES, 184), and a venire de novo awarded.

On the second trial, before AUDENRIED, J., the facts appeared as follows:

The plaintiff, the Philadelphia Ball Club, Limited, was the lessee of a square of ground bounded by Broad street and the Philadelphia & Reading Railroad, Lehigh avenue, Fifteenth street, and Huntingdon street, in the city of Philadelphia. The ground was fitted up and used by the club as a base-ball ground. The lease ran from January 4, 1886, for a period of ten years, at an annual rental of about $7000. By writing, dated December 31, 1891, the lessee was given an option to renew the lease for ten years from January 1, 1896. The lease was renewed. All improvements on the ground belonged to the lessee. The Philadelphia & Reading R. R. Co. owned a piece of ground which formed the northeastern boundary of the lessee's ground, and was used by the railroad company as a part of its roadbed, several tracks of the said railroad company crossing Broad street and Lehigh avenue at this point at grade, making a dangerous grade crossing.

In order to avoid the dangers and delays of this grade crossing, an ordinance was passed by councils, approved December 26, 1890, changing the grade of Broad street at that point so as to carry the street over the railroad. Plans were prepared by the bureau of surveys and confirmed, and in 1893, Broad street was elevated and the railroad tracks depressed, and Broad street thus carried over the railroad tracks.

By the change of grade no land or building of the lessee was taken, nor was the square of ground in any way invaded. The change of grade began at Broad and Cumberland streets, one square south of the lessee's ground, the grade ascended gradually northward to the railroad and thence descended gradually to the northward. At Huntingdon street, which was the south side of lessee's ground, Broad street was elevated 11 feet 3¾ inches; at the intersection of the railroad, Broad street was elevated 14 feet 11⅝ inches; at Lehigh avenue, 12 feet 7⅞ inches. The grade of Huntingdon street was elevated to meet Broad street; the elevation began at Carlisle street, about 177 feet west of Broad street, and Lehigh avenue was also elevated to conform to Broad street. Before the making of the new grade on Broad street, the lessee's ball field sloped from the north towards the south and from the west towards the east at the rate of about one foot to the hundred, and along the east side of the ground the natural surface was from two to three feet above the level of Broad street, and the rain water falling on the ball field flowed toward the southeast into an inlet 120 feet north of Huntingdon street, near the southeast corner of the ball field, which inlet led into a twelve-inch wooden trunk, or box, which carried the water out to Broad street pavement, or footway, and at this point the water flowed over the footway into the gutter on the west side of Broad street, and thence south along the gutter into a city inlet at the corner of Broad and Huntingdon streets, and from this inlet into a sewer. This sewer on Broad street was ten to eleven feet below the surface of Broad street at the old grade and was not changed. Its size was 1 ft. 8 in. x 4 ft. 3 in. In order to support the embankment and to prevent the earth from falling from the street into the ground of the lessees, the city built a heavy stone wall along Broad street and Huntingdon street, wholly within the lines of the street. Before the change of grade the ball club had a carriage gate on Broad street just north of Huntingdon street, at which place carriages were admitted into the space back of the right-field seats; this space would probably hold fifty cariages, thirty being about the average number that occupied it; there was also an entrance for pedestrians at a gate opposite Carlisle street; at both of these gates before the change of grade, the entrance was practically on a level with the streets. The change of grade did not interfere with the entrance and exit of pedestrians on Huntingdon street, but did destroy the carriage entrance on Broad street. Before the change of grade the lessee had along the Broad street front a brick wall about twelve feet high, which was necessary

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to prevent the public from witnessing the games without paying fees. The wall on Broad street extended northward to the railroad. From this point to Lehigh avenue, and thence to Fifteenth street, there was before the change of grade a wooden fence.

At the time of change of street grade, there were large buildings at the southwest corner of the lot, with rows of benches extending northward and eastward, known as left and right-field seats, capable of holding several thousand people. An admission fee was charged to witness the games.

The buildings and seats were destroyed by fire in August, 1894, and rebuilt.

being raised in places several feet and a new sys-

In winter of 1895-96, the ball field was regraded, tem of drainage established. In winter of 1896-97, the right-field seats were torn down and rebuilt. After change of street grades everything was built on new plans and in a more expensive and substantial manner.

The items of damage claimed by the plaintiff and supported by expert testimony were as follows:

1.	Plumbing for temporary sewer connections	$206.80
2.	Cost of raising corner store	832.87
3.	Cost of raising and altering Carlisle street gate	150.00
4.	Cost of temporary fences	1,627.89
5.	Cost of extra policemen during change of grade	350.00
6.	Cost of temporary awning screens	57.72
7.	Cost of building walls after grade finished	15,543.00
8.	Value of signs buried by change	237.00
9.	Value of trees and treeboxes destroyed	399.50
10.	Value of score board destroyed	100.00
11.	Loss of rent of corner store while grade was being changed	600.00
12.	Value of carriage stall destroyed	250.00
13.	Value of Broad street gate destroyed	1,267.00
		$21,621.78
14.	Cost of regrading the ball field made necessary because the park was left in a hole	$6,589.63
15.	Cost of grading back of and raising right field seats so as to conform to the new grade of the street and permit carriage entrance approximately as before	9,871.28
16.	Extra cost of keeping higher walls and fences in order, to the end of the lease, over cost otherwise	3,000.00
17.	Loss in value of leasehold as such	10,000.00
		$51,082.67
18.	And to this he added damages for the detention of the money during four and a half years	10,000.00
	Total damage	$61,082.67

The loss in value of leasehold was testified to by experts, basing their judgment upon the value of the land as a ball park.

The defendant submitted, inter alia, the following points:

"2. The jury cannot, under the evidence in this case, allow the plaintiff as an item of damage the cost of regrading the ball field.

"3. The jury cannot under the evidence in this case allow or consider the cost of regrading the ball field as an element of damage chargeable to defendant.

"4. The jury cannot under the evidence in this case charge the defendant with the cost of raising and rebuilding the right-field seats.

"5. The jury cannot under the evidence in this case take into consideration as an element in arriving at the damage, if any, the cost of raising and rebuilding right-field seats.

"6. The defendant is under no legal liability to pay the sum of $6589.63, or any other sum, for the regrading of the ball field.

"7. The defendant is under no legal liability to pay the sum of $9871.26, or any other sum, for the raising and rebuilding of the right-field seats.

"8. The jury cannot allow or take into consideration as an element of damage, the claim oi $10,000, or any part thereof, for alleged depreciation of leasehold on account of the alleged defective drainage still existing since plaintiff regraded and drained the ball ground.

"9. The jury have no right to allow the plaintiff or take into consideration as an element of damage, the sum of $3000, or any part thereof, for extra maintenance of walls until expiration of lease."

All of which points were refused without reading to the jury. In the general charge to the jury the Court said, inter alia:

"The total damage claimed by the plaintiffs to have been caused to their fixtures, their walls, their seats, the surface of their ground, their drainage and all that, by the change of grades in the surrounding streets, was, I think, some $38,000. This was made up of these undisputed items to which I have already directed your attention, and two other items which are not undisputed but which are very strenuously objected to by counsel for the city. [The first of these is an item of $6589.63 for changes, which the plaintiffs claim were necessitated by the change of grade in the surrounding streets, to the grade of the base ball park itself, so that the park could have that drainage which it seems to be admitted all base ball grounds require. Whether this change of grade of the base ball ground was really necessary, was necessarily involved by reason of this change of the surrounding streets, is a question which you

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will have to determine. If the change of grades in the streets in your judgment did not necessitate any change of the grade in the base ball ground for the purpose of giving the ground of the base ball company the same good drainage which it has been testified they had before these changes in the streets took place, then you must not consider this item of this $6600 as any element of depreciation when you come to make up your minds what was the value of the company's leasehold and fixtures as they were left after the change of grade of the streets. If you do not believe that there was any reasonable necessity for the base ball company's change of its grades, and the putting in the sewers or drains that you have heard so much about, if you believe that the grounds would have been adequately drained by the provisions contemplated by the city, by the use of the ten-inch trough that I think has been testified was there formerly, and its connection with the sewer through a pipe left in the Broad street retaining wall, then there should be no consideration whatever paid to this matter and no depreciation allowed in that respect.]

"[Another disputed element of depreciation claimed by the plaintiffs is the expense of changing the right-field seats and of making a carriage entrance reasonably similar to the old gate which had existed at Broad and Huntingdon streets prior to the change of grade. It is claimed that because this outlay was rendered necessary, the value of the property of the plaintiff here was diminished to the extent of $9871.28. Whether any such change was necessitated by the changes of grade in the surrounding streets is a question which you must determine. If you believe, in the light of the evidence which you have had given before you, that this change of the right-field seats was rendered reasonably necessary to the use of the park by anything that the city did there, and that the cost of such changes, as were rendered necessary in this way, if you find any to have been rendered necessary, would have amounted to $9871.28, then you may consider that item as one of the elements in the depreciation of the property. Otherwise you must not consider it.] So much for the depreciation in the market value of the fixtures of the Philadelphia Ball Company, Limited.

"Other claims are made by the plaintiffs here, and these are three-fold. [The company claims that this leasehold interest—that is, its interest in this park as tenant for the remainder of its term—has been seriously affected by the change of grade necessitated in its grounds by the change of grade in the surrounding streets, or rather it claims that the drainage of its grounds is not as good for its purposes now, even after it has done all that it can to correct that matter, as it was before the change of grade in the streets took place. It is alleged that a leasehold interest in property drained as this was prior to the change of grade of the streets, a property where the natural surface drainage was such that within a short time after a comparatively heavy rainfall the ground would be so dry that a game of ball could be played, has a much greater value than a leasehold interest in property where the drainage is as it is stated the drainage of this particular property is at present. You must determine from the evidence whether there is any material difference between the drainage of that base ball park now and its drainage as it was before the change of grade of the streets was made. If there is any difference, then you may consider to what extent this element of depreciation affected the value of the plaintiffs' leasehold. It is your right to apply the test of your own common sense to the figures which have been given you as to the effect which the alleged inferiority of drainage facilities affected the value of the plaintiffs' leasehold, and I need only mention those figures. Colonel Rogers is of opinion that in respect to the impairment of the drainage facilities of the company's tract, the company's leasehold interest suffered to the extent of at least $1000 a year in the aggregate, and in consideration of the fact that the company's lease had some twelve years to run from August 1, 1893, the company had suffered in this respect to the extent of $10,000. In this he was corroborated by the testimony of three or four other witnesses called on behalf of the plaintiffs, one of them fixing the depreciation in respect to this change of drainage at as high a figure as $12,000.]

"[Another element of depreciation reckoned by the plaintiff and claimed in this case, is the sum of $3000 in respect to the extra expenses of maintaining the higher walls along Broad street necessitated by the change of grade of Broad street. Whether or not any such extra expense is necessary you must decide, and, if necessary, you will have to decide what is a proper allowance for that burden.] These matters, about which I have spoken to you, which have been considered at such length by counsel, and as to which so much testimony was given before you by the witnesses, are all important only in determining the market value of the plaintiffs' property after the change oi grade in the surrounding streets had been made, and those changes of grade had affected the property's market value. In other word, our inquiry is, what were these fixtures and what was the plaintiffs' leasehold worth in the market after the city had changed the grade of Broad street and Huntingdon street? What would any rea-

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sonable man pay for it? Of course anybody going to buy the interest of the Philadelphia Ball Company in this park, and in the building and benches and fixtures, would be willing to pay for them only what he considered they were worth, and his opinion as to what they were worth would be based largely on what he would have to spend upon the property to make it convenient and suitable for a continuation of the business for which alone it could be used. He would naturally take into consideration all the reasonable consequences of this change of grade in the surrounding streets. Anyone buying that leasehold would buy it in full contemplation of the fact that the walls there would have to be raised, that the drainage, if it had been left defective, would have to be corrected, that the gates which formerly left carriages out into Broad street at grade, could no longer be used for that purpose and would have to be changed to some other location, that the trees and boxes surrounding those trees had been rendered worthless and would have to be taken away, that while the city was changing the grade of Broad street policemen would have to be hired and paid to keep the boys from looking down in the park free while the games were going on, and that temporary fences would be required for the same purpose. All those things would naturally be taken into account, and it is this that I mean when I say that this evidence is to be considered by you only as affecting the question of how much was the market value of the plaintiffs' fixtures and leasehold after the change of grade of the streets had been made, as they were affected by that change of grade.

"[Finally, after you have fixed the value of the property involved in this litigation before the change of grade and the value of that property as affected by the change of grade after the change had been accomplished, and determined what the difference between those two market values is, and in that way determined to what extent the plaintiff here has been injured by the act of the city, you must add to that reasonable compensation, for the fact that these damages suffered by the plaintiff, to which in theory the plaintiff was entitled at once upon the change of grade being made—that is, on the 1st of August, 1893, have not yet been paid. You must add to the damages which the plaintiff suffered reasonable compensation for the detention of those damages, and return a verdict here for a round sum, including both the damage for the injury to their property and their damage in respect to the detention of that money up to the present time. That is not interest. That is compensation for damage caused by the city's delay in this behalf.]"

Verdict for plaintiff $39,089. The Court, on the entry of a remittitur for all above $30,000 entered judgment for plaintiff.

The defendant took this appeal and assigned as error the refusal of its points above quoted, and the portions of the charge included in brackets.

Robert Alexander, (*John L. Kinsey*, city solicitor, with him), for appellant.

It was error to allow the jury to decide whether the changes and cost of changes in 1895 and 1896 were reasonable and necessary; it was so decided when this case was in this Court on the first appeal.

Phila. Ball Co. *v.* Philadelphia, 182 Pa. 368.

The rule of damage is the difference in value immediately before and that immediately after the change of grade. It is proper to take into consideration the condition of the property immediately before and immediately after the work, but the condition referred to must be an actual condition, discoverable by observation, not a prospective or possible one depending upon future action of the municipality.

Markle *v.* Philadelphia, 163 Pa. 344.

When the Court told the jury it *must* give reasonable compensation for delay, it usurped the province of the jury, for whether such compensation should be allowed is a matter of fact depending on circumstances. If the delay in settlement is due to the plaintiff, e. g., on account of an inordinate demand, such compensation should not be allowed.

Richards *v.* Citizens' Gas Co., 130 Pa. 37.
Klages *v.* Reading Term. Co., 160 Id. 396.
Becker *v.* P. & R. R. R. Co., 177 Id. 252.

Alexander Simpson, Jr., (*John I. Rogers* with him), for appellee.

If the general charge covers the ground suggested by the points, the latter may be ignored, or even read and refused.

Patterson *v.* Kountz, 63 Pa. 246.
Groft *v.* Weakland, 34 Id. 304.
Munderbach *v.* Lutz, 14 S. & R. 220.
Winsor *v.* Maddock, 64 Pa. 231.

No one point is to be taken alone, but each shall be taken in conjunction with the rest and the charge generally.

Rowand *v.* De Camp, 96 Pa. 501.

In the present case the points were not read to the jury, and hence if the case was properly presented to them, as confessedly it was, the ignoring of the points is a matter of no moment.

Judged by the above rule, the charge was not erroneous. There was evidence: (1) That before the change of grade the surface drainage was adequate; (2) that that drainage was necessary for the proper use of the property; (3) that it was seriously injured by the change of grade of the street; (4) that the regrading was done to relieve the difficulty in the only way it could be relieved;

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(5) that it was done as the result of many consultations, and the adoption of the plans of the city's own surveyor; (6) that the expense was a necessary result of the change of grade of the street; (7) that by reason thereof it was considered by the experts as an element in determining the values.

As to the depreciation of the value of the leasehold: Since the qualifications of the experts are not attacked, under R. R. Co. *v.* Eby, 107 Pa. 166, and other like cases, it cannot be held to be error to allow the experts to consider the question of the permanent loss in value of the leasehold.

The case resolves itself into this: Expert witnesses, admittedly qualified, fix a value before and after, and thus determine the damage exactly as this Court says it should be done. The experts considered that certain elements affect those values, and without evidence attacking their views, defendant asks this Court to resolve itself into a jury and determine not merely the effect to be given to those views, but to draw the inference that their conclusions were wrong because thereof. All this he argued before the jury, and got the benefit thereof in a judgment less than one-half of the lowest of the damages fixed by any expert. What effect the reasoning of the experts should have is a matter for the jury only as affecting the weight to be given to their evidence.

October 6, 1899. GREEN, J. The solution of the questions arising upon this record is not difficult if we do but define with accuracy the rule which controls the assessments in all cases of this character. There has never been a better statement of that rule than was given in the case in which it originated. Although the decision was made seventy-eight years ago it has proved itself equal to all the emergencies and contingencies, and all the ever-varying conditions and questions that have been developed in the almost innumerable cases that have arisen since it was pronounced. Fortunately the original case was not one of the mere taking of land by a railroad company, and more fortunately still, it presented and decided a question of future results which it was contended might, or would, have happened after the direct injury was inflicted. Since that day in an infinite variety of circumstances, it has been sought to found a right of recovery upon subsequent events, not in existence at the time of the injury, but which it was claimed might, or would, result with a greater or less degree of natural or probable sequence from the injurious act or appropriation complained of. But the doctrine then announced for the first time has proved to be so just, so sensible, so reasonable and yet so entirely adequate to the proper and legitimate demands of the party injured, that it has received the constant and persistent sanction and approval of this Court through all the years that have elapsed to this very day. The case referred to is The President, Managers and Company of the Schuylkill Navigation Co. *v.* Thoburn, reported in 7 Serg. & Rawle, 411, and decided in the year 1821. The opinion was written by Mr. Justice GIBSON. It was not a case of the taking of land, but of injury by the flooding of the plaintiff's land with water. It originated under the provision of the tenth section of the Act of March 8, 1815, incorporating the Schuylkill Navigation Company, which gave a remedy for the inundation of land by means of dams erected in the river in the creation of the system of slack water navigation of the river Schuklkill. The plaintiff was the owner of a cotton mill erected on and near the mouth of a small stream tributary to the river, and when a dam was built in the river below the stream the water flowed upon the land of the plaintiff and into the tailrace of his mill, so seriously that the water power of the mill was destroyed and the owner was obliged to remove his machinery to another mill. Of course his injury was most serious and it was direct. One of the claims of the plaintiff was for damages resulting from the loss of his business which would occur after the injury. Another question was as to the time at which the damages were to be estimated as having been suffered, and these two were the principal contentions in the case. Mr. Justice GIBSON in the course of the opinion thus states and disposes of these questions: "The material inquiry is, *at what point of time* were the jury to estimate the damages as having been suffered? Indisputably, *at the time when the injury complained of was complete*; which was the moment the dam was finished; or rather when the obstruction by swelling the water permanently produced its most injurious consequences. The principle that the extent of an injury at the time it is suffered, is to govern the compensation to be received, without regard to enhancement from subsequent circumstances, is familiar and applicable to all cases which I at present recollect, where compensation is to be made in damages. . . . . The compensation was to be prospective, as well as retrospective; but to be estimated with reference to the time when the injury was committed. It was in fact to be the price of a privilege to swell the water to a particular height for an indefinite time. Now this price was due the moment the privilege was entered upon, and the price could be ascertained, which was obviously the time when the obstruction was first completed. The jury were therefore to ascertain what was then due; and the amount

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clearly could not be enhanced, or in any way affected by subsequent injuries, the *consequences* of the obstruction. How far the omitting to instruct the jury to this effect may have operated on the amount of the compensation assessed I am unable to say, as the bills of exceptions contain no more of the evidence than is absolutely necessary to an understanding of the points submitted; but as the particular injury to the plaintiff in his business as a manufacturer was necessarily subsequent to the erection, and as the defendant prayed the direction of the Court on the legal effect of the evidence relating to that part of the case, he was entitled to have it, for, so far it would have operated in his favor. . . . . The jury are to consider the matter just as if they were called on to value the injury at the moment when compensation could first be demanded; they are to value the injury to the *property* without reference to the person of the owner or the actual state of his business; and in doing that the only safe rule is to inquire what would the property, unaffected by the obstruction, have sold for at the time the injury was committed? What would it have sold for as affected by the injury? The difference is the true measure of compensation."

It may be well enough to pause at this point before referring to other authorities, to consider the application of the foregoing decision to the facts and questions arising in the case at bar. It was a case of injury and not of taking. There was a manifest, serious and real injury inflicted directly upon the owner by the act of the defendant company. It involved necessarily a question of future results in depriving the owner of the business and its profits which would occur in the future. About that aspect of the case there could be no question. But this Court held, (1) that only the difference in the actual value of the entire property before and after the injury was inflicted could be considered; (2) that the time at which this difference of value was to be estimated was immediately after the injury was completed; (3) that no consideration could be given to circumstances occurring after the completion of the injury; (4) that in no event could there be any recovery for loss of profits of business resulting from the enforced abandonment of the mill and its machinery; (5) that there could be no recovery for any damages which were imaginary, speculative or remote.

All of these rulings have been repeatedly sustained and enforced ever since the Thoburn case was decided.

Applying these principles to the present case, let us inquire how it is affected by them. The plaintiff ostensibly sought to conform to at least the letter of the rulings above stated. The witnesses were asked to state what was the depreciation in the market value of the leasehold caused by the change of grade in the streets. They did this in this way. They fixed a valuation of the leasehold at the sum of $296,000; one of them $300,000. They then specified a number of items of damage caused by the change of grade according to their ideas and made the aggregate of these items $61,082. Deducting this from $296,000 left a resulting sum of $234,918, and that sum they said was the value of the leasehold after the change of grade. As a matter of course the legal sufficiency of this kind of an estiamte depends absolutely upon the character of the details which make up these aggregates. Looking at the method by which the valuation of the leasehold before the change of grade was worked, we find it consisted of a valuation of $110,000 for all the buildings, improvements and fixtures of the park, and $186,000 as the value of the business to be done during the remainder of the term of the lease, after the change of grade was made, to the end of the lease. It seems incredible that this method could have been allowed or could have received any kind of sanction, but a few citations from the testimony will demonstrate the correctness of the statement. The witness who invented this mode of fixing a valuation was the largest stockholder of the plaintiff company, he was the chief witness in behalf of himself and his company, and was also one of the counsel in the case for the plaintiff. He was asked: "Q. Tell us what in your judgment the market value of the leasehold of the Philadelphia Ball Club, Limited, was immediately prior to the change of grade of Broad street? A. I valued it then at $296,000 after careful examination. Q. Will you tell us what was the market value of that leasehold immediately after the change of grade, as affected by that change? A. I valued the leasehold immediately after the change of grade at $234,918. Q. Making a depreciation caused by the change of grade of how much? A. $61,082. . . . . Q. The value as given by you before the change of grade includes what? A. It includes the balance of the lease, which was twelve years and five months to run, and the fixtures of the ball park, consisting of all its buildings and improvements, fences, gates, ticket offices and everything which I knew was worth $110,000. That included in the estimate of the whole thing I made $296,000." According to this the value put upon the lease for twelve years and five months was $15,000 per annum.

The method was more clearly explained by the witness A. J. Reach, who was the president of the club. He was asked: "Q. You value the whole thing before the leasehold at $296,000? A. Yes, sir. Q. How did you make up that value

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before? A. As I said a moment ago I went to the club's office and got such information as I could, knowing I was to be a witness here, and our improvements cost $110,000, what we had at that time, our buildings and so on. In figuring over what our profits were and averaging, it would be a low estimate to figure them out what the difference would be in twelve years; in other words something over $15,000 a year. Q. That is, I suppose having counted $110,000 for fixtures that would leave $186,000 to be accounted for? A. Yes, sir. Q. Then you said this leasehold runs twelve years? A. Yes, sir. Q. And you said there is a profit each year over and above what you have to pay for rent? A. I said we struck an average for a number of years. Q. The average net profit for a number of years calculating for a number of years, would justify you in saying that there was in that leasehold $186,000? A. Yes, sir."

Here it appears again that the valuation of the plaintiff's property consisted of $110,000 as the value of all the physical property owned by them, and $186,000 consisted of profits of business which were to be made in the future during a period of twelve years and five months. If this is a lawful method of assessing a property which has been injured by an exercise of the right of eminent domain, then the decision of this Court in the Thoburn case was a wrong decision and ought never to have been made. For we there said: "It is evident that the profit in any branch of manufactures, must mainly depend on the amount of capital invested, the number of workmen employed and the extent of the business carried on; but it would be plainly unjust to put it in the power of the plaintiff, by an increase of all these to an amount beyond what the demand for the manufactured article would justify, to charge the defendant in the same proportion for the injury sustained by the impeding of his works in his business thus extended, as for a loss in his ordinary mode of carrying it on; that would make the defendant an insurer of ordinary profits in a new state of the business pushed to a morbid extent and would put it in the power of the plaintiff to increase the damages to any extent he might think proper. I mention this to show the danger of taking into consideration circumstances posterior to the time when the privilege is fully entered on, and its consequences to the individual to be compensated, are ascertained."

To sustain the valuation upon which the present case was founded the plaintiff in the Thoburn case should have been permitted to prove, first the actual value of his physical property, including his land, his cotton mill, machinery and all his other tangible property, real and personal, and in addition to that to prove what the annual profits of his business were, and then to add the principal sum which those profits would represent at 6 per cent. interest, to the value of the physical property, and this Court would have been bound to declare that the aggregate of these sums was the value of the plaintiff's property before the injury was inflicted. But we not only did not do that, and thereby sanction such an absurd proposition, but declared that the future profits of the plaintiff's business were not to be considered for any purpose whatever, not even to show the diminution in the value of his property, by showing the loss of his future profits, when he was actually driven out of his mill and compelled to quit doing any business there. As a matter of course this manner of adding to the value of the actual property the value of future profits, which are entirely uncertain and may never be realized, was altogether illegal and should never have been permitted. But bad as this feature of the plaintiff's case was, it was no worse than the other details of what the witnesses chose to describe as damages suffered by the change of grade. When asked to state how the $61,082 of loss was made up, they said it was composed in part of $38,082 depreciation in fixtures, $13,000 depreciation in the value of the leasehold, and $10,000 for detention of payment. In making up the $38,082 item they said it was composed in part of $6589.63 for regrading the ball field, $9871.26 for rebuilding right-field seats, $15,543 for rebuilding walls and fences, $1267 for loss of gate, $1627 for cost of fences, and a number of smaller items. It is only necessary to deal with the larger items.

The depreciation in the value of the leasehold when described by the witnesses, represented twelve years' loss at $1000 per year, resulting from a supposed diminution in the receipts of the business, because the drainage after the change of grade was not as perfect as it was before the change. As a matter of course no such testimony could be permitted either before or after such a result occurred. But in point of fact there was not a particle of testimony to show that there was any diminution of actual receipts to that amount, and it was all a mere guessing estimate of what the loss of profits would be on this account during the whole of the remaining twelve years of the lease. In addition to this, it was affirmatively proved by the plaintiff's witnesses that instead of a falling off of business during the years following the change of grade, from this or any other cause, there was an actual and large increase in the business. It was represented by the attendance of spectators in constantly advancing numbers as follows: In 1892 the attendance was 197,574; in 1893 it was 293,924; in 1894

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it was 352,773; in 1895 it was 414,891; in 1896 it was 357,025. We dealt with this subject when this case was here before, 182 Pa. 362, and then said: "Now upon comparing the business of 1893 with that of 1892 it will be found that there was a gain of very nearly 50 per cent. over the business of 1892. The business of 1894 showed a gain of just about 65 per cent. over the business of 1892 and of 10.6 per cent. over that of 1893. The business of 1895 showed a gain of more than 100 per cent. over that of 1892, and a little rising of 23 per cent. over that of 1894. In this state of the testimony it was absolutely established by the affirmative and uncontradicted evidence of the plaintiff that there was not only no loss of business resulting from the change of grade, but a very large increase of business between the time before and after the change of grade. . . . . In this particular case we find there was a positive and very large increase in the business of the club after the change. Hence it is not true that there was or could be a diminution in the value of the plant on account of a loss of business, for the simple reason that there was no loss."

On the subject of the loss from inferior drainage, Mr. Rogers, the principal witness for the plaintiff, gave his views of the loss resulting from this source in the following manner: "After those things were done, or ought to have been done, the leasehold estate was depreciated in my opinion at least $13,000. Ten thousand dollars of that I think is a conservative estimate as to its injury by reason of the drainage being still very much inferior to the surface drainage that we formerly enjoyed." On cross-examination he said: "The $10,000 was after we had fixed our grounds in the best possible way; we have still a ground, that is, a base ball lease of ground, for twelve years and five months that is worth in the market at least $10,000 less to a purchaser than it would have been if we had had surface drainage."

As the witness gave no explanation of his opinion except loss of business, he was asked as to how the business was after the change in the grade of the street was made and before the change in the grade of the field. He said: "The regrading of the playing field began in November or October, 1895, but we did not finish it." He was asked: "Q. You played ball through the year 1893, the change of grade commencing in August. 1893? A. Yes, sir. Q. You did not miss a day during that year, did you? A. The balance of that year, no, I think not. Q. You played ball there the year 1894, did you not? A. Yes, sir; except on certain days when the condition of the ground did not let us. Q. There were three days you have stated during the year 1894 when you did not play ball? A. Three days when we were at home that we would have played but did not play. Q. You played ball all through the year 1895 with the exception of one day. A. One day . . . . Q. How many days were you unable to play in the year 1896 on account of defective drainage? A. The club played every game it was scheduled to play in 1896. Q. How many games were you unable to play in 1897 on account of defective drainage? A. One."

Thus it seems that no day was lost in 1893, three days were lost in 1894, one day in 1895, none at all in 1896, and one in 1897. For this the city is asked to pay a sum of $10,000, by the testimony of this witness, and $15,000 by that of Shetzline, who was the secretary of the club, because the leasehold would be worth that much less, by reason of the loss of business, when in point of fact, the business of the club steadily and largely increased during all the years until 1896. In 1896 and 1897 there was a falling off in the business, and Mr. Rogers explained just how that occurred. He said: "The attendance at our ball games depends mainly on two circumstances, the most important of which is the luck of winning games after a close competition. If you have a close competition with the other clubs and can win your share of games the public come out in crowds. If you do not they religiously stay away in crowds. That is the most important. The next important is having a place where it is the centre of transportation facilities. That is the centre of all transportation facilities of this town having the two main railroads and all the trolley cars congregating there. . . . . In 1896 we played very poor ball indeed, very wretched, and our attendance went down. In 1897 we did even worse, and our attendance went down." From this testimony it is apparent that loss of business is due to the quality of the play, and that the loss in 1896 and 1897 was due to the bad playing, while the business constantly advanced during all the years from 1893 to 1895, both inclusive, notwithstanding the condition of the drainage. It follows hence that any inference as to the value of the business at times posterior to the change in the grade of the streets, has not the least importance which the law can recognize, in the determination of the question of the difference in the value of the property affected before and after the infliction of the injury. The writer has gone into the analysis of this testimony, not for the sake of showing what the real value of the business done on this property in the years succeeding the change in the grade of the streets was, but for the purpose of illustrating the wisdom of the rule which prohibits all such inquiries in cases of this kind. The business to be done in the future on, or with, a property, which is taken or injured un-

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der the power of eminent domain, is uncertain, remote, imaginary, entirely incapable of being determined with truthfulness, and the testimony on such subjects is the result of the personal interest or the friendly bias of the witnesses, and hence necessarily and absolutely unreliable. Ever since the decision of the Thoburn case all such inquiries and all such evidence, have been positively prohibited and cannot in any circumstances be permitted to affect the decision of such cases as this. The underlying principle upon which such damage questions must be determined, necessarily precludes the consideration of such testimony. For it is a fundamental proposition that the valuation of the property affected must be made immediately before and immediately after the property is taken or the injury is inflicted, and the difference in those valuations is the measure of the damages which the owner may recover. In the present case the change in the grade of the streets was made in August, 1893, and the value of the leasehold at that time as contrasted with its value in the spring of 1892, when the work was commenced, must represent the damages to which the plaintiff is entitled. It was proved by the plaintiff's witnesses that the ball playing went on during the years 1893, 1894 and 1895 just as it had been conducted previously to that time without any change in the grade of the field, and with a largely increasing business. It was not until three seasons had been finished that any changes were made in the field, and after that time the work was done, for which the very large damages in question are now claimed. As a matter of course these works and improvements, being long subsequent to the change of grade, could not lawfully have entered into the computation of the leasehold in 1893, for the very simple reason that nothing could be known about them at that time, they were long subsequent at the time of their occurrence. They were not at all a matter of necessity but of mere improvement of the condition of the field The grade of the field was changed in the latter part of 1895, after the season had closed, and for this the plaintiff demands that the city shall pay as damages $6589.63. There is no principle in the law upon this subject, upon which this claim can be sustained. As the case was tried the jury was allowed to award the whole amount of this work as specific damages for the change in the grade of the streets made three years before. It is too plain for argument that no part of it can be allowed, either specifically as the cost of so much work done, or as entering into the value of the leasehold at the time the grade of the streets was changed. If such a claim could be allowed for work done at the end of three years, there is no reason why it should not be allowed for work done at any time afterwards during the pendency of the lease. We rule now distinctly and positively that the whole of this claim must be rejected in any subsequent trial of this case. The same is true with increased force as to the claim for $9871.26 for rebuilding the right-field seats. These seats were continued in use after the change of grade in the streets precisely as they had been before, until in August, 1894, when they took fire and were destroyed. They were at once rebuilt as they had been before and remained in use during 1894, 1895 and 1896. In 1896 the club decided to build an entirely new system of seats on a larger and much more expensive scale. They accordingly did so at an expense of $38,000, and they now claim that the city should pay one-fourth of this sum, $9800, upon the theory that it would have cost that much to rebuild the part which was required by the change of grade. This work was not commenced until 1896 and finished in 1897, long after the present proceeding was begun, and several months after the first verdict was rendered. This work was done by the plaintiff for its own convenience and for the purpose of improving their business by making the field more attractive. It had nothing on earth to do with the change of grade in the streets, and in no conceivable point of view can a single dollar of this claim be allowed, or be permitted to affect the valuation of the leasehold in 1893, immediately after the change of grade in the streets. It must all be rejected for any purpose whatever.

Another claim was made on the trial, which, if possible, is more indefensible than any of the others. It is a claim for $10,000 for detention of payments, on the theory that the plaintiff suffered damages on that account, and was entitled to be paid that amount in lieu of interest. If the plaintiff suffered any damage on this account it has nobody but itself to hold responsible for that result. It would have been a plain dereliction of duty on the part of the city officials if they had paid without a contest in the Courts, the grossly excessive and unreasonable demands of the plaintiff. In the former trial the claim was for $85,000, and it was sought to be supported by theories and testimony of such an illegitimate character that we were obliged to reverse the judgment although the jury only allowed $29,000 by their verdict, thus condemning the whole of the demand in excess of that sum. On the last trial, other theories and testimony were set up in support of a demand for $62,000, quite as indefensible and unreasonable as the demand on the first trial. The jury on the last trial refused all of the claim over $39,000, and the Court below struck out all over $30,000. It is therefore manifest that it is

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the oppressive and unreasonable demands of the plaintiff that have caused the delay in the payment of the damages really sustained by the plaintiff. As a matter of course there can be no recovery of any sum whatever for such a claim in such circumstances, and the whole of this claim must be rejected. It was error to leave such a question to the jury at all. In Richards *v.* Citizens' Gas Co., 130 Pa. 37, our brother MITCHELL, in commenting upon claims of this character, and speaking for the whole Court, said: "Interest is recoverable of right, but compensation for deferred payment in torts, depends on the circumstances of each case. The plaintiff may have set his damages so inordinately high as to have justified the defendant in refusing to pay. Or in other ways the delay may have been the plaintiff's fault. . . . . In such cases the jury probably would not, and certainly ought not, to make the allowance." It is altogether likely that when the two persons who own the majority of the stock of the plaintiff company can make up their minds to accept a fair and reasonable sum for their claim an adjustment will quickly follow. But it must not be expected that the imaginary, remote, speculative and illegitimate demands that have thus far been set up, or any others of like character, will ever receive the sanction of this Court. There are other objectionable items in the plaintiff's claim, but as they are not covered by any of the assignments of error, we do not discuss them. The fundamental method which was adopted to establish the difference of value in the leasehold before and after the change of grade is radically vicious and fallacious. Fixing a valuation before the change by adding the anticipated profits of twelve years and five months in the future to the value of the physical property, is so glaringly and violently in opposition to all our decisions that it must be entirely rejected in any future trial of the case. Then the method of building up an extravagant mass of items of alleged damage, nearly all of them based upon future transactions remote, imaginary, speculative and altogether illegal, and naming the aggregate of all of these as the difference in the value of the leasehold before and after the change of grade, is so certainly contrary to the law of this Commonwealth that it cannot possibly be sustained.

Some reference to a few of our more modern decisions will be appropriate in this connection. In the case of Watson *v.* Pittsburgh & Conn. R. R. Co., 37 Pa. 489, we said, speaking of the claim of the plaintiff, "He was allowed the benefit of the rule laid down in Schuylkill Nav. Co. *v.* Thoburn, 7 S. & R. 411, that the true measure of compensation is the difference between what the whole property would have sold for, unaffected by the railroad, and what it would have sold for as affected by it. Nor was the advantage of this rule in any degree taken from him by the rejection of the evidence which he offered. His attempted mode of proof of the difference between the two values was entirely inadmissible and hence was the reason for the rejection of the evidence. His offers all had the same fault. They proposed to submit to the jury the conjecture of the witnesses as to what the plaintiff's lands would be worth at some unknown future time, when the railroad shall have been constructed. Such testimony does not rise even to the standard of an opinion. It is a mere guess, with no substantial foundation upon which to rest. . . . An estimate of what property will be worth at a future day, or in an altered condition, is entirely without guide or measure, and must be wholly fanciful." In Hornstein *v.* Atlantic & Great Western R. R. Co., 51 Pa. 87, decided in 1865, we said, "If judicial authority can fix any rule the series of adjudged cases from Thoburn's case, 7 S. & R. 411, down to Harvey's case, 11 Wright, 434, has established the measure of damages for building a railroad through a man's land, to be the difference betwixt the value of the land before the road was built, and its value after the road is finished. In estimating the disadvantages resulting from the road, consequential or speculative damages are to be rejected."

In Shenango & Allegheny Valley R. R. Co. *v.* Braham, 79 Pa. 447, decided in 1875, we said, "In one of the early cases upon this subject (Schuylkill Nav. Co. *v.* Thoburn, 7 S. & R. 411), it was held by this Court that the jury should consider the matter just as if they were called upon to value the injury at the moment when compensation could first be demanded; they are to value the injury to the property without reference to the person of the owner, or the actual state of his business, and in doing that the only safe rule is to inquire what the property unaffected by the obstruction would have sold for at the time the injury was committed. What would it have sold for as affected by the injury? The difference is the measure of the compensation. This rule has been followed in Penna. R. R. Co. *v.* Heister, 8 Barr, 450," and a large number of other cases, citing them. "In none of these cases is there any authority for the doctrine that the value of the land is to be limited to, or measured by, a particular use." In Railroad *v.* Patterson, 107 Pa. 461, we said, "But the Court was certainly correct in saying that the jury could not take into consideration any supposed loss to the plaintiff, of profits in his business. Such an assessment would be merely speculative, and a rule which justified it would lead to most ruinous re-

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sults." In Railroad Co. *v.* McCloskey, 110 Pa. 436, decided in 1885, we said, "In estimating the damages to a land owner, caused by the construction of a railroad, the rule as to the measure of damages, declared by Judge GIBSON in the case of Schuylkill Nav. Co. *v.* Thoburn, 7 S. & R. 411, has ever since been recognized and followed," stating the rule: "Merely speculative damages cannot be allowed. . . . The jury cannot include in the verdict a fund to cover the costs of fencing, or to provide an indemnity against losses by fire, or casualties to the cattle and stock upon the farm. Such an assessment must necessarily be purely speculative, as the matters thus sought to be provided against are in their nature altogether ideal and fanciful. . . . The estimate of a merely prospective injury can be founded in no rational or correct legal principle, and cannot, therefore, be allowed."

In Penn. S. V. R. Co. *v.* Cleary, 125 Pa. 442, there is a good illustration of the application of the rule to those subjects which are proper, and those which are improper to be considered by the jury. "The true measure of the damages sustained by any given lot of land is found in the difference between its selling value before and after the injury complained of. It is proper to consider for what purpose it may be used to advantage, in order to determine for what price it will sell. It may be saleable as a site for the erection of a hotel, a factory, a dwelling or a wharf, but it is not proper to lay before the jury proof of what the hotel or other structure would cost, together with proof of the value of the lot with such structures upon it, and treat the difference between these sums as the value of the lot. Such a method would be speculative and fanciful. Equally improper is evidence showing how many building lots the tract under consideration could be divided into, and what such lots would be worth separately. It is proper to inquire what the tract is worth, having in view the purposes for which it is best adapted, but it is the tract and not the lots into which it may be divided, that is to be valued. . . . The jury are to value the tract of land and that only. They are not to determine how it could best be divided into building lots, nor conjecture how fast they could be sold, nor at what price per lot. . . . They (the jury) are not to inquire what a speculator might be able to realize out of a resale in the future, but what a present purchaser would be willing to pay for it in the condition it is now in."

In Schuylkill, etc., R. R. Co. *v.* Stocker, 128 Pa. 233, we said, "The proper and legitimate inquiry in all these cases is, what was the actual market or selling value of the property, just as it was, immediately before the land was taken for the railroad and what was its same value after the completion of the road? Of course the possible uses of the ground may be considered and estimated by the witness in forming his opinion, but it would be highly dangerous to permit verdicts to be founded upon a consideration of future speculative operations which may never transpire, and whose results, whether profitable or otherwise, cannot be known in advance."

When this case was here before, 182 Pa. 362, we said, "But in a mere legal sense, and that is the way we are obliged to view it, the radical and fatal vice of the contention we are now considering is, that it is entirely too remote, altogether imaginary and purely speculative to the last degree. All the elements of certainty in deductions are absent. They exist only in the future and therefore cannot be known; they depend upon variable and uncertain conditions and they cannot possibly form the basis of a sound and reliable judgment." These authorities might be multiplied, but it is not necessary. We are clearly of opinion that all the assignments of error must be sustained.

Judgment reversed and new venire awarded.

H. B.

Oct. '98, 179. Supreme Court. October 26, 1898.

Reimer v. Reimer.

Devise—Construction of—Words of limitation—Fee simple.

A. by his will gave to his daughter Sarah certain lots of ground "for her own use and profit during her natural life and provided she leaves no heirs, in that case said property to be sold and the proceeds divided amongst her brothers and sisters and their heirs." A. also gave to his daughter Caroline certain other lots of ground, "the said lots for her sole use and benefit during her natural life and for her heirs; if dying she leaves no heirs, then the said property to be sold and divided amongst her brothers and sisters and their heirs:"

***Held,* that under the above devises, Sarah and Caroline each took an estate in fee simple.**

Appeal of Isabella Reimer, from a judgment of the Common Pleas of Westmoreland County, entered upon a case stated, as follows:

"And now, March 28, 1898, it is agreed by and between the parties to the above suit that the following case be stated for the opinion of the Court in the nature of a special verdict:

"1. Aaron Reimer, deceased, late of Lower Burrell township, Westmoreland county, Pennsylvania, being seised in fee of certain real estate situate in the city of Pittsburgh, made his last will and testament, dated August 27, 1884, which provided, inter alia, as follows:

"'First. I give and bequeath unto my wife

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Mary A. Reimer, the income or rents of all my estate in the city of Pittsburgh, county of Allegheny, and State of Pennsylvania, for her maintenance during her natural life, after her death my estate to be divided as follows: . . . .

"'Item. I give and bequeath to my daughter, Isabell Reimer, the three-story brick house and lot on Frankstown avenue, between Park and Lowell streets, lot being 24x100 feet. Also one-third of undivided grounds,—between said house and lots and frame buildings belonging to my wife Mary A. Reimer, said lots being 100 feet in depth. Item. I give and bequeath to my daughter Sarah Reimer, the double frame house and lots on the northwest corner of Carver and Park avenue. Also one-third of the grounds on Frankstown avenue between Isabell's lots and the improved lots belonging to my wife, Mary A., said lots being for her own use and profit during her natural life and provided she leaves no heirs then in that case said property to be sold and the proceeds divided amongst her brothers and sisters and their heirs. Item. I give and bequeath to my daughter Caroline Reimer, the double frame house and lot on Park avenue, adjoining lot of Sarah Reimer, between Carver and Meadow streets. Also one-third of grounds on Frankstown avenue between Isabell's house and the improved lots belonging to my wife Mary A. Reimer. Also one lot on the northerly side of Carver street 23x100 feet next lands of Andrew Reimer between Park and Ashley street, the said lots being for her sole use and benefit during her natural life and to her heirs, if dying she leaves no heirs, then the said property to be sold and divided amongst her brothers and sisters and their heirs.' Thereby devising and bequeathing to the said Isabella, unmarried, Sarah, unmarried, and Caroline, now intermarried with Elmer J. Baxter, each an undivided one-third interest in such estate as they take under said will in certain real estate, which is fully described in exhibit 'A', after the death of their mother, the said Mary A. Reimer.

"II. The said Aaron Reimer died. . . .

"III. The said Mrs. Mary A. Reimer, widow of the said Aaron Reimer, deceased, having accepted the provisions of the said will of her said husband Aaron Reimer, deceased, by quitclaim deed dated February 25, 1898, and acknowledged on February 28, 1898, for the consideration therein mentioned, remised, released, and quitclaimed unto Isabella Reimer, Sarah Reimer and Mrs. Carrie Baxter, their heirs and assigns, all her estate, right, title, interest, claim or demand whatsoever, of, in, and to all that certain tract or piece of land, fully described in exhibit 'A,' and being the same land which is variously described in the said will of the said Aaron Reimer, deceased, as 'undivided grounds,—between said house and lots and frame buildings belonging to my wife Mary A. Reimer, said lots being 100 feet in depth,' 'the grounds on Frankstown avenue between Isabell's lots and the improved lots belonging to my wife Mary A.,' and 'grounds on Frankstown avenue between Isabell's house and the improved lots belonging to my wife Mary A. Reimer.' And the said Mrs. Mary A. Reimer has no further interest whatsoever in the said land.

"IV. The said Sarah Reimer and Mrs. Carrie Baxter and Elmer J. Baxter, her husband, by article of agreement, dated February 26, 1898, and acknowledged March 1, 1898, executed at Parnassus borough, Westmoreland county, Pennsylvania, agreed to sell and convey unto the said Isabella Reimer, all the undivided two-thirds of all that certain tract or piece of land, fully described in exhibit 'A.' for the sum of $30,000, $10 of which was to be paid at the signing of the article, and the balance of $29,990 was to be paid March 1, 1898, and upon the payment of the said sum, the said plaintiffs agreed, at their own proper cost and charge, to make, execute and deliver to the said defendant a good and sufficient deed for the proper conveying and assuring of the said premises in fee simple free from all encumbrance and dower or right of dower; such conveyance to contain the usual covenants of general warranty. And the said Isabella Reimer, defendant, on her part, thereupon undertook, promised and agreed to pay to the said plaintiffs the sum of $30,000 according to the terms of said contract, to wit, ten dollars at the execution of the agreement and the further sum of $29,990 on March 1, 1898, when the deed was to be delivered as aforesaid, and the said defendant paid to the said plaintiffs the said sum of $10 upon the execution of the said agreement—and the said article of agreement was properly signed and acknowledged as aforesaid.

"V. In compliance with the terms of the said article of agreement, the said Sarah Reimer and Mrs. Carrie Baxter and Elmer J. Baxter, her husband, executed a good and sufficient deed, dated February 26, 1898, regularly acknowledged March 1, 1898, for and in consideration of the sum of $30,000, conveying all the undivided two-thirds of all that certain tract or piece of land fully described in exhibit 'A,' to the said Isabella Reimer in fee simple, free from all encumbrance and dower or right of dower containing the usual covenants of general warranty.

"VI. The said Sarah Reimer and Mrs. Carrie Baxter and Elmer J. Baxter, her husband, on March 1, 1898, tendered to the said Isabella Reimer the said deed and demanded the payment of

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the balance of the purchase money, to wit, $29,990, in compliance with the terms of the said article of agreement.

"VII. The said Isabella Reimer then and there refused, and still does refuse, to accept the said deed and to pay the said balance of the purchase money, alleging as her only objection that the said Sarah Reimer and Mrs. Carrie Baxter do not have a fee simple title in the said real estate by the terms of the said will of their father, the said Aaron Reimer, deceased.

"VIII. This suit is brought to recover the said balance of purchase money, to wit, $29,990, with interest from March 1, 1898, in compliance with the terms of the said article of agreement.

"If the Court be of the opinion that the said Sarah Reimer and Mrs. Carrie Baxter have a fee simple title in the said real estate then judgment for the sum of $29,990, with interest from March 1, 1898, to be entered for the plaintiffs; but if not, then judgment to be entered for the defendant. The costs to follow the judgment, and either party reserving the right to exception and appeal."

The Court, DOTY, P. J., after argument entered the following judgment:

"Have the plaintiffs title in fee simple to the land embraced in the article of agreement? An answer to this question is decisive of the case. Both sides are anxious to carry out the agreement, if plaintiffs can give a marketable title. The question seems to be ruled in Doebler's Appeal, 64 Pa. 9, and Kleppner *v.* Laverty, 70 Pa. 70.

"Judgment therefore in favor of plaintiffs and against the defendant in the sum of $29,990, with interest from March 1, 1898."

Thereupon this appeal was taken, specifying for error the action of the Court.

M. N. McGeary, (*J. R. Spiegel* with him), for appellant.

The word "heirs" as used in this will was evidently intended in the sense of children and are therefore words of purchase, and the first takers have but a life interest.

Findlay *v.* Riddle, 3 Bin. 139.
Stump *v.* Findlay, 2 Rawle, 168.
Cote *v.* Von Bonnhorst, 41 Pa. 243.
Gernet *v.* Lynn, 31 Id. 94.
Chew's Appeal, 37 Id. 23.
Guthrie's Appeal, 37 Id. 9.
Keim's Appeal, 125 Id. 480.
List *v.* Rodney, 83 Id. 483.

H. H. Dinsmore, for appellees.

The words "if she leaves no heirs" contemplate an indefinite failure of issue.

Grimes *v.* Shirk, 169 Pa. 74.
Lawrence *v.* Lawrence, 105 Id. 335.
Hill *v.* Hill, 74 Id. 173.
Kay *v.* Scates, 37 Id. 31.
Eichelberger *v.* Barnitz, 9 Watts, 447.
James's Claim, 1 Del. 47.

And this vests a fee tail in the first taker, which under the Act of April 27, 1855, becomes a fee simple.

The word "heirs" in a will is a word of limitation and not of purchase; and the presumption of the law always is that it is used in its technical sense. The intent not to use it in its legal sense must be unequivocal,—it must appear so plainly that no one can misunderstand it.

Guthrie's Appeal, 37 Pa. 9.
Appeal of Cockins and Harper, 111 Id. 26.
Nice's Appeal, 50 Id. 143.
Auman *v.* Auman, 21 Id. 343.
Doebler's Appeal, 64 Id. 9.
Grimes *v.* Shirk, 169 Id. 74.

The word "heirs" being used in its technical sense as a word of limitation, the rule in Shelley's Case applies.

Doebler's Appeal, 64 Pa. 9.
Kleppner *v.* Laverty, 70 Id. 70.
Haldeman *v.* Haldeman, 40 Id. 29.
Seely et al. *v.* Seely et al., 44 Id. 434.
Yarnall's Appeal, 70 Id. 335.
Lawrence *v.* Lawrence, 105 Id. 335.
Carroll *v.* Burns, 108 Id. 386.
Appeal of Cockins and Harper, 111 Id. 26.
Bassett *v.* Hawk, 118 Id. 94.
Reinoehl *v.* Shirk, 119 Id. 108.
Cochran *v.* Cochran, 127 Id. 486.
Hackney et al. *v.* Tracy et al., 137 Id. 53.
Hiester *v.* Yerger, 166 Id. 445.
Potts *v.* Kline, 174 Id. 513.

The rule in Shelley's Case is a rule of law and not simply of construction, and where the language used in the instrument brings the case within the rule, the fact that it was the intention of the grantor, or devisor, that the rule should not operate, is of no importance.

Fearne on Remainders, 188.
Hayes' Real Est., 95.
Hileman *v.* Bouslaugh, 13 Pa. 344.
List *v.* Rodney, 83 Id. 483.
Kleppner *v.* Laverty, 70 Id. 70.

So imperative is the rule that, though there be an express declaration that the ancestor shall have only a life estate, yet this expressed intention will not defeat its operation.

Grimes *v.* Shirk, 169 Pa. 74.
Physick's Appeal, 50 Id. 128.

Rule XVII. (general rules of construction): "That where a testator uses technical words, he is presumed to employ them in their legal sense, unless the context clearly indicate the contrary."

3 Jarman on Wills, 707.
Carroll *v.* Burns, 108 Pa. 386.

In cases of doubtful construction the law leans in favor of an absolute, rather than a defeasible estate; of a vested, rather than a contingent one; of the primary, rather than the secondary intent; of the first, rather than the secondary taker, as the principal object of the testator's bounty; and

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of a distribution as nearly conformed to the general rules of inheritance as possible.

Amelia Smith's Appeal, 23 Pa. 9.
Fitzwater's Appeal, 94 Id. 141.

October 6, 1899. McCollum, J. The question presented by the case stated is whether the plaintiffs have a title in fee simple to the land described in the article of agreement, or only a life estate therein. If they have a title in fee simple the judgment entered by the Court below must be sustained, and if they have but a life estate it must be reversed. The parts of the will which relate to the contention in this case are as follows: "Item. I give and bequeath to my daughter, Sarah Reimer, the double frame house and lots on the northwestern corner of Carver and Park avenue. Also one-third of the grounds on Frankstown avenue, between Isabell's lots and the improved lots belonging to my wife, Mary A. Said lots being for her use and profit during her natural life and provided she leaves no heirs, in that case said property to be sold and the proceeds divided amongst her brothers and sisters and their heirs. Item. I give and bequeath to my daughter Caroline Reimer, the double frame house and lot on Park avenue adjoining lot of Sarah Reimer between Carver and Meadow streets. Also one-third of grounds on Frankstown avenue, between Isabell's house and the improved lots belonging to my wife, Mary A. Reimer. Also one lot on the northerly side of Carver street, the said lots being for her sole use and benefit during her natural life and for her heirs, if dying she leaves no heirs, then the said property to be sold and divided amongst her brothers and sisters and their heirs."

The estates devised to the plaintiffs respectively are of the same nature. There is no room in the devises for a construction which passes to one plaintiff a title in fee simple and to the other a life estate. This much is conceded by the defendant. But it is contended in her behalf that the word "heirs" in each devise is a word of purchase and means "children." The principal case relied on by the defendant to sustain this contention is Lessee of Findlay et al. *v.* Riddle et al., 3 Binney, 139. But an examination of the will in the case cited shows that its provisions differ materially from the provisions of the will under consideration in the case at bar. Matters which influenced the construction of the will in the former case, are not present, and cannot control the interpretation of the will in the case before us. The other cases cited by the defendant are Cote et ux. *v.* Von Bonhurst, 41 Pa. 243; Gernet et al. *v.* Lynn et al., 31 Pa. 94; Guthrie's Appeal, 37 Pa. 9, and Chew's Appeal, on page 23 of same volume; List *v.* Rodney et al., 83 Pa. 483, and Keim's Appeal, 125 Pa. 480. In these cases the testator or testatrix devised or bequeathed to a son or daughter or nephew a life estate with remainder in fee to their children. The word "children" being a word of purchase and there being nothing discoverable in the wills which authorized a conclusion that it was intended or used as a word of limitation, the first takers were held to have a life estate only. It is very clear that these cases are not decisive of or applicable to the case at bar. The word "heirs" in the parts of the will under consideration in the latter is a word of limitation and there is no warrant in the will for an interpretation of it in accordance with the defendant's contention.

Our conclusion from an examination of the cases which seem to us as applicable to the case in hand is that the plaintiffs have a fee simple title to the land in question. The cases to which we call particular attention are Doebler's Appeal, 64 Pa. 9; Kleppner *v.* Laverty, 70 Pa. 70, and Grimes *v.* Shirk, 169 Pa. 74. In the latter case Judge Livingston in an exhaustive opinion reviewed the cases pertinent to the subject considered in this case, and to them in addition to the cases cited, we refer.

Judgment affirmed.

W. M. S., Jr.

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WEEKLY NOTES OF CASES.

VOL. XLIV.] *FRIDAY, OCT. 20, 1899.* [NO. 29.

Supreme Court.

Jan. '99, 86. Supreme Court. March 30, 1899.

People's National Bank v. Kern.

Equity—Practice—Bill of discovery—Act June 16, 1836, P. L. 755—Scire facias—Creditor's bill.

A bill for discovery in aid of an execution does not draw the whole case into equity; the jurisdiction given by such bill is for discovery only, and ends with it.

Where a bill for discovery is filed, under the Act of June 16, 1836, P. L. 755, without being accompanied by a scire facias, no lien is acquired as against attachments.

A creditor's bill cannot be sustained where the plaintiff has an adequate remedy by attachment execution.

When a bill is filed as a bill for discovery, and, after answer and testimony taken, the plaintiff attempts to treat it as a creditor's bill, he cannot thereby prevent an objection being raised to the jurisdiction, by alleging that the defendant waived the objection by failing to demur or raise the question of jurisdiction by answer.

Appeal of the People's National Bank, plaintiff, from the decree of the Common Pleas No. 4, for Philadelphia County, dismissing its bill in equity, filed against Howard R. Kern, and Louis C. Haughey, surviving partners of William A. Baeder, Howard R. Kern and Louis C. Haughey, late co-partners, trading as the William A. Baeder Glue Company; William H. Kern, James E. Salter, Walter R. Kern, Emily L. Bentz, Carrie Maud Kern, Mabel Ella Kern, the American Coal Company, and the Acme Glue Company.

The bill filed by the People's National Bank against Howard R. Kern and Louis C. Haughey, surviving partners of William A. Baeder, Howard R. Kern and Louis C. Haughey, late co-partners trading as the William A. Baeder Glue Company, averred in effect as follows:

1. The plaintiff was a judgment creditor of the partnership, the William A. Baeder Glue Company, in the sum of $9862.79, and there had been a return of nulla bona to the execution issued on the judgment.

2. The plaintiff had reason to believe that the defendants in the judgment, or some of them, had property wherewith the same might be satisfied.

3. Such property had been transferred by Howard R. Kern, one of the debtors, to his father, William H. Kern, and the other defendants in the bill with the intent to cheat and defraud the creditors of Howard R. Kern and the William A. Baeder Glue Company, and was so accepted by its recipients.

The defendants had property belonging to the defendants in said execution, or have knowledge of property belonging to said defendants, or some of them, by which the plaintiff's judgment can be satisfied.

4. The partnership, the William A. Baeder Glue Company, composed of William A. Baeder, Howard R. Kern and Louis C. Haughey, which was engaged in the manufacture of glue, failed in the spring of 1890.

5. At the time of the failure of the William A. Baeder Glue Company, Howard R. Kern transferred a large amount of the assets of the partnership to William H. Kern, amounting in value to about $100,000, which the said William H. Kern claimed to hold as collateral security for the indebtedness of said partnership to him, which was only about $26,000.

6. Said assets consisted of, among other things, 3204 barrels of glue, of the value of at least $80,420, and also of mercantile paper of sundry persons of the value of about $8000, also mercantile paper of the Indianapolis Glue Company of the value of about $14,000.

At the time of the failure of the William A. Baeder Glue Company, Howard R. Kern also confessed judgments to his father for the indebtedness of the partnership to him. These judgments were entered in various places and aggregated $145,948.21. Sales were had on executions issued on these judgments and large sums of money realized, the amount of which is unknown to the plaintiff.

7. During the spring of 1890, and soon after the failure of said William A. Baeder Glue Company, the said William H. Kern, while holding the said assets as collateral security, did fraudulently and collusively, with the intent to cheat and defraud the other creditors of the said firm, conspire with his son, Howard R. Kern, to sacrifice said assets, which the said William H. Kern held as collateral security, for the purpose of cheating and defrauding said creditors, in order that the said Howard R. Kern might derive personal benefit therefrom.

For the purpose of carrying out this scheme, as to certain large amounts of glue of the value of $80,000, the Acme Glue Company was organized by Howard R. Kern and Emily L. Bentz, his aunt and the guardian of his minor children, and the glue was fraudulently transferred by William

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H. Kern to James E. Salter and by him immediately transferred to Howard R. Kern, who turned it over to his own company, the Acme Glue Company This scheme was carried through in the latter part of March or the 1st of April, 1890.

8. In addition to the glue William H. Kern had notes of the Indianapolis Glue Company and sundry other parties, upon which he realized upward of $30,000

9. At the time of the failure of the William A. Baeder Glue Company, Howard R. Kern was the owner of certain real estate specifically described, which was transferred without consideration to his daughters Mabel Ella Kern and Carrie Maud Kern. Subsequently, on a judgment fraudulently confessed by Howard R. Kern to William H. Kern, this real estate was sold at sheriff's sale and was bought in and held by William H. Kern for the benefit of Howard R. Kern.

10. Howard R. Kern was the owner of stock of the American Coal Company to the value of $28,000 and upwards, which is held by Walter R. Kern, or William H. Kern, or through them, or one of them, for the benefit of Howard R. Kern.

The prayers of the bill were substantially that the several defendants make discovery by answering specifically the allegations of the bill; that they be enjoined from disposing of the assets in question in the suit; that a receiver be appointed to take charge of the assets of the defendants in the judgment in the possession of the other defendants in the bill; that the defendants be required to account, and the plaintiff be given general relief.

An amendment to the bill prayed that the several defendants be ordered and decreed to pay to the said plaintiff such sums of money as may be properly chargeable against them.

A second amendment to the bill, (filed after first report of master had been filed), averred:

1. In November, 1892, after the filing of the bill, William H. Kern, claiming to be the owner of the American Coal Company stock described in the tenth paragraph of the bill, transferred it to the defendant, Mabel Ella Kern, as a simple gift.

2. The only interest William H. Kern had in said stock was the right to be paid the sum of $10,000 out of the proceeds to reimburse him for money he had loaned Howard R. Kern to pay off a loan due to the estate of Elizabeth C. Bloodgood, subject to which said stock had been held as collateral.

3. In March and May, 1893, the said stock was sold, and Mabel Ella Kern received therefor the sum of $22,419.

4. The real owner of said stock was Howard R. Kern and the transfers to William H. Kern and Mabel Ella Kern were made for the purpose of defrauding the creditors of Howard R. Kern.

The amendment prayed that Mabel Ella Kern account to the plaintiff for $12,419, to be released on the payment of the judgment of the plaintiff with interest and costs, and for general relief.

Answers were filed denying fraud and the case was referred by the Court to Hampton L. Carson, Esq., as examiner and master. The master filed a report sustaining the allegations of the bill as to fraud and recommending the following decree:

"And now, this day of A. D. 1895, this cause having been heard upon bill, answer, and proofs, and the master's report having been read and considered, it is hereby ordered, adjudged and decreed that the executors of the estate of William H. Kern do account to the plaintiff for the sum of $46,098.55, to be released upon the payment to the plaintiff of the sum of $9862.79, with interest and costs from the date of recovery of the judgment.

"That Mabel Ella Kern account to the plaintiff for the sum of $12,419, to be released on the payment of the judgment of the plaintiff with interest and costs.

"That James E. Salter account for the sum of $8249.44, to be released on the payment of the plaintiff's judgment, with interest and costs."

Exceptions having been filed, and the report referred back to the master, he took additional testimony and reported the same decree as before. Exceptions were filed, which, after argument, were sustained by the Court, ARNOLD, P. J., delivering the following opinion:

"On May 27, 1891, the People's National Bank of Pittsburgh sued Howard R. Kern and Louis C. Haughey, surviving partners of William A. Baeder, trading as the William A. Baeder Glue Company, and on August 22, 1891, obtained judgment against Howard R. Kern for $9862.79. Haughey was not served. A fi. fa. was issued on December 4, 1891, and returned nulla bona. On January 25, 1892, the People's National Bank filed this bill in equity against Howard R. Kern and Louis C. Haughey, surviving partners, etc., William H. Kern (father of Howard R. Kern), James E. Salter, Walter R. Kern, Emily L. Bentz, Carrie Maud Kern and Mabel E. Kern (daughters of Howard R. Kern), the American Coal Company and the Acme Glue Company, charging that the defendants (other than Howard R. Kern and the Baeder Glue Company), had real estate and personal property of Howard R. Kern and the Baeder Glue Company in their name and possession, and charging all the defendants with conspiracies and arrangements to cheat and defraud the creditors of Howard R. Kern and the Baeder

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Glue Company. The prayers were for injunction, discovery and a receiver. The case was referred to a master on May 4, 1892, and was before him several years. In the meantime William H. Kern died, on April 8, 1893, and after his death several judgment creditors of the Baeder Glue Company, including this plaintiff, issued attachments on their judgments directed to the executors of William H. Kern, deceased. Prior to filing this bill, and during the lifetime of William H. Kern, there were several attachments served on him. After taking testimony, the master found in favor of the plaintiff in this suit and recommended a decree, that the executors of the estate of William H. Kern account to the plaintiff for the sum of $46,098.55, to be released upon the payment to the plaintiff of the sum of $9862.79, with interest and costs from the date of the recovery of the judgment; that Mabel Ella Kern account to the plaintiff for the sum of $12,419, to be released on payment of the judgment of the plaintiff, with interest and costs; and that James E. Salter account for the sum of $8249.44, to be released on payment of the plaintiff's judgment with interest and costs.

"It is difficult to understand exactly what kind of a bill the present bill is. If it is called a creditor's bill pure and simple, we have no authority to entertain it, according to the decision of the Supreme Court on the appeal of the Girard National Bank, 13 WEEKLY NOTES, 101, for the reason that, as to real estate, the creditor may levy upon and sell the debtor's interest, if he has any in it, and, as to personal estate, the Acts relating to attachments give a full and adequate remedy. If it is a bill of discovery in aid of execution, it should have been accompanied by a scire facias, under the Act of June 16, 1836, P. L. 763, secs. 9, 14 and 17, in order to obtain a lien. If since the death of Mr. Kern it has been continued as an administration bill (a kind of bill of which I know of no instance in this State, but which is treated of in Bispham's Principles of Equity, sec. 528), then the decree should have been to get in the assets and distribute them. There are indeed some peculiar instances of creditor's bills to set aside settlements of real estate in which the grantor reserved a benefit to himself, or to get at the debtor's property invested in another person's real estate, of which Houseman *v.* Grossman, 177 Pa. 453, and People's National Bank *v.* Loeffert, 184 Pa. 164, are conspicuous examples; but this case differs so much from those that we can get no aid from them. Here the plaintiff has filed a bill and the master has recommended a decree of a peculiar character for large sums of money to be released on payment of lesser sums (not a decree for the return of property on failure to pay money) and the plaintiff claims a preference over all the attachments served during the life of Mr. Kern and his creditors whose rights and liens were fixed by his death. It seems to us impossible to sustain such a bill and decree. The plaintiff has no decree to this day against William H. Kern, the principal garnishee, and yet, if the bill is sustained and a decree made as recommended, it comes in ahead of prior attachments by the creditors of the Baeder Glue Company and Howard R. Kern.

"As to the decree recommended by the master against the living defendants, Mabel E. Kern (now Gray), and James E. Salter, aside from their novelty, we are of opinion that they should be refused on the evidence.

"Mrs. Gray is the daughter of Howard H. Kern and the granddaughter of William H. Kern. Howard had an equity in certain shares of the American Coal Company, which were held by the estate of Sarah Burr, deceased, as collateral security for a claim of $10,000. Howard bought this equity from Mrs. Elizabeth C. Bloodgood for $1000 in 1889. The stock had an uncertain value because there was very little market for it, and it was doubtful whether it was worth the amount for which it was pledged. In March, 1890, William H. Kern bought this stock from Howard, subject to the pledge, for $1000, being the amount of a note held by William H. Kern against Howard R. Kern. The amount due on the stock, $10,000, was paid by William H. Kern, who afterwards gave the stock, or the greater part of it, to his granddaughter, Mrs. Gray. Subsequently she gave her promissory note to her grandfather for $10,000 in exchange for his note, and having been compelled to sell her stock to pay the note, she was allowed the amount of her note by the Orphans' Court and by the Supreme Court on appeal in the settlement of the estate of William H. Kern, deceased, reported in 171 Pa. 55, in which this transaction about the American Coal Company's stock underwent judicial scrutiny, with the result that it was decided that 'the stock was hers. As found by the learned Auditing Judge, it had been delivered to her by her grandfather and was, therefore, an executed gift.' The master should have found the same way on the evidence before him. Both cases having been decided by auditors and masters, they should agree in their findings. We may tolerate differences between juries, because we are no part of that arm of the Court, but findings of facts upon evidence, when made by Judges, should be as consistent as their decisions upon the law.

"William H. Kern had in his possession warehouse receipts for about twenty-two hundred barrels of glue which belonged to the Baeder Glue

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Company, and desiring to dispose of it, he transferred the receipts, ostensibly for $24,000, to James E. Salter, who was a member of the bar, now engaged in the plumbing business, and formerly a deputy sheriff under William H. Kern. In this matter Mr. Salter was serving Mr. William H. Kern, who was confined by sickness at the time. Salter sold the glue through the agency of Howard R. Kern to the Acme Glue Company, a corporation in which Howard was largely interested, for $32,494.42, or at the rate of about seven and a half cents a pound, but the sale was for the benefit of William H. Kern whose estate will be required to account for the proceeds, whether he received all the proceeds or not. Had Salter been in the glue business, or a broker, his vendor or principal would be the person responsible for the value of the glue to the Baeder Glue Company, yet, we have a decree recommended against Salter, which is in the nature of a penalty for assisting a sick friend in selling property. Decrees in equity, even when based upon frauds and conspiracies, are given for the amounts out of which the injured parties have been defrauded, and not for punitive damages, fines or penalties. Nor are double recoveries allowed; yet we have here a finding against the principal defendant for the assessed value of the glue in controversy to be released on payment of the plaintiff's claim, another finding against Mabel E. Gray for a large sum, to be released on like terms, and a third finding against Salter for less than the plaintiff's claim, to be released on the payment of a larger sum. But, for the reasons given above, the bill cannot be sustained against William H. Kern's estate. He is dead; the claims of attaching creditors outrank the plaintiff's claim in this suit, which is not yet in judgment, against William H. Kern's estate, and the plaintiff must rely on its attachment sur judgment, or take its place among the general creditors of the Baeder Glue Company and Howard R. Kern. It gained no preference by this suit. The bill cannot be sustained against Mabel E. Gray. The stock sought to be recovered by it is her property, and not the property of the Baeder Glue Company or Howard R. Kern. Nor can it be sustained against Salter, who was the mere agent or substitute for William H. Kern to sell the glue which belonged to the Baeder Glue Company, the full value of which will be charged against the estate of William H. Kern in the proceedings on the attachment suits.

"Therefore, we sustain the exceptions and dismiss the plaintiff's bill with costs."

The plaintiff took this appeal and filed numerous assignments of error, all of which, except the first, viz., that the Court erred in dismissing the bill, have become unimportant in view of the ground of the decision of the Supreme Court.

James Collins Jones, (*Lewin W. Barringer* with him), for appellant.

The bill in this case was improperly dismissed. It was not a bill under the Act of June 16, 1836. The prayers in a bill under that Act are substantially for a writ of scire facias and for an answer.

The prayers of the bill originally filed in the case at bar were substantially that the defendants be required to make discovery by answering the bill; that they be enjoined from disposing of the assets in question in the suit; that a receiver be appointed to take charge of the assets of the defendants in the judgment in the possession of the other defendants in the bill; that the defendants be required to account, and that the plaintiff be given general relief. By an amendment to the bill filed September 28, 1895, the leave of the Court having been first obtained, the plaintiff prayed for further relief as follows: "That the several defendants may be ordered and decreed to pay to the said plaintiff such sums of money as may be properly chargeable against them."

Not only is there this essential difference between the prayers in a bill under the Act of 1836 and in the bill in the case at bar, but the whole course of proceeding under the Act of 1836 differs from that which has been had in this case.

Under the Act of 1836 the defendants in the bill are required to appear and answer by virtue of a writ of scire facias, and issues of fact are raised by pleading to that writ, and they are determined at law by the verdict of a jury.

In the case at bar, the defendants were required to appear by the ordinary notice in equity endorsed on the bill; the pleading was by way of answer to the bill and replication to the answer, and the issues were tried according to the ordinary practice in equity, by having the testimony taken by an examiner and passed upon by a master.

The bill is a creditor's bill. The equity was fraud, which gives jurisdiction, even when there is a complete remedy at law.

Bisp. Princip. Eq., sec. 200.
Mortland *v.* Mortland, 151 Pa. 593.
1 Story's Eq. Jur., sec. 184.
1 Beach on Mod. Eq. Jur., sec. 64.

The jurisdiction in equity does not depend upon the plaintiff's having a lien on the property he seeks to reach by his bill.

Alden *v.* Gibson, 63 N. H. 12.
Lewis *v.* Shainwald, 48 Fed. Rep. 492.
Post *v.* Stiger, 29 N. J. Eq. 554.

The defendants not having demurred to the bill cannot raise the question at final hearing and impose costs on the plaintiff.

Adams's Appeal, 113 Pa. 449.

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Evans *v.* Goodwin, 132 Id. 136.
Harrington Bros. *v.* Florence Oil Co., 178 Id. 444.
Shillito *v.* Shillito, 160 Id. 167.
Houseman *v.* Grossman, 177 Id. 453.
People's Nat. Bank *v.* Loeffert, 184 Id. 164.

John G. Johnson, (*Bernard Gilpin* with him), for appellee.

The bill is a bill of discovery in aid of a judgment, under the Act of June 16, 1836, P. L. 755. Such bill must be accompanied by a scire facias and only from the service of the scire facias are goods and effects in the hands of the person upon whom service is made bound.

Bennett's Appeal, 22 Pa. 476.

The plaintiff had an adequate remedy at law in this case by means of an attachment execution on his judgment, which was entered August 22, 1891, but he has chosen the remedy by bill under the Act of 1836, which bill was not filed until January 25, 1892, and under which he now seeks to come in ahead of creditors who have secured liens on any fund that may be found in W. H. Kern's possession, by means of attachment sur judgment in which said W. H. Kern is garnishee.

As plaintiff has issued no scire facias, he has not acquired any lien under any construction of the Act of 1836.

Complainant also has an attachment in which William H. Kern is garnishee, which includes all but two of the notes upon which the present suit is based.

If, as complainant now claims, his bill is a creditor's bill, he is not entitled to the decree made by the master, because the decree must be warranted by the pleadings of the party in whose favor it is rendered, and relief should not be allowed on a theory different from that upon which the bill proceeds.

The prayers as to William H. Kern are, first, for an injunction preventing him from parting with any of the assets of the W. A. Baeder Glue Company, or Howard R. Kern; secondly, that W. H. Kern answer all the allegations of the bill, showing his transactions with H. R. Kern since January, 1889: and, thirdly, for an injunction preventing W. H. Kern from transferring the real estate mentioned in the bill.

There was nothing in this bill, which is framed in the very words of the Act of 1836, nor its prayers, which supported the decree recommended by the learned master, or, under the laws of this State, permitted plaintiff to secure a preference over creditors who have been more vigilant and have issued attachments.

The most that complainant could have asked against the estate of William H. Kern was an account for the assets of the William A. Baeder Glue Company in the hands of W. H. Kern, for by its bill it showed that it was a creditor of the Baeder Glue Company only, and that the execution returned nulla bona was against the company alone.

Dunphy *v.* Kleinsmith, 11 Wall. 610.

October 6, 1899. FELL, J. We see no reason for disturbing the decree entered in the Common Pleas, dismissing the plaintiff's bill. As originally filed, the bill was for discovery in aid of an execution. As afterward amended it took the form of a creditor's bill, and seems to have been proceeded with as such. As a bill for discovery for the purpose of obtaining evidence, and in aid of a legal right, it did not draw the whole case into equity. The jurisdiction was for discovery only, and ended with it. As a scire facias, provided for by the Act of June 16, 1836, was not issued, a lien was not acquired as against other attachments: Bennett's Appeal, 22 Pa. 476.

Considered as a creditor's bill it cannot be sustained. The plaintiff has a full and adequate remedy at law under the ordinary and long-established methods of procedure. It can levy on and sell the real estate as the property of the defendant in the judgment, purchase it if necessary for the protection of its interest, and bring ejectment. The attachment execution which it caused to be issued makes the garnishees, who are defendants in the bill, liable to account for all the property of the defendants in the judgment which is in their hands, and for debts due them. The Act of 1836 provides a method by which their rights may be further and more fully secured. The decision in Girard National Bank's Appeal, 13 WEEKLY NOTES, 101, cited in the opinion of the learned Judge of the Common Pleas, is conclusive of this question. Fowler's Appeal, 87 Pa. 449; Houseman *v.* Grossman, 177 Pa. 453, and Bank *v.* Loeffert, 184 Pa. 164, are cases in which the ordinary remedy at law would have been ineffectual, and they do not affect the established rule.

The contention that any objection to the jurisdiction of the Court to entertain the bill should have been raised by demurrer or answer, and that it comes too late after the report of the master, is without merit. The bill as filed was for discovery, and it was framed in the words of the Act of 1836. It presented no ground for objection to the jurisdiction of the Court, and it was not until after answer and after the testimony had all been taken that the intention to treat the bill as a creditor's bill was disclosed.

The decree is affirmed at the cost of the appellant.

H. B.

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Jan. '99, 81-85, 90. Supreme Court. March 30, 1899.

Merchants' & Manufacturers' National Bank v. Kern and Haughey, Defendants, and Kern, Garnishee.

Market & Fulton National Bank v. Same.

Townsend v. Same.

People's National Bank of Pittsburgh v. Same.

Allegheny National Bank v. Same.

Referee—Act May 14, 1874—Act May 4, 1889—Act June 16, 1836.

The award of a referee under the Act of June 16, 1836, can be excepted to only on the grounds, (1) that the referee misbehaved, (2) that he has committed a plain mistake of fact or law, (3) that the award was procured by corruption or undue means; and the corrective power of the Court is limited to a reference back.

Under the Act of 1889, where a reference is made in accordance with the provisions of the Act of 1874, the Court has power to confirm, alter, amend or reverse the referee's report or send it back for further proceedings; this includes the power to alter his findings of fact, and find the facts in accordance with the Court's view of the evidence.

Bruch *v.* Philadelphia, 181 Pa. 588, explained.

When the referee's finding of facts has been reversed by the Court, the Supreme Court will adopt the facts as found by the Court in the absence of a clear conviction that the Court has erred, especially where its finding agrees with a finding of the facts by a jury in another proceeding in which the same questions were raised.

Appeals of the Merchants' and Manufacturers' National Bank of Pittsburgh, the Market and Fulton National Bank of New York, Charles Townsend, the People's National Bank of Pittsburgh, and the Allegheny National Bank of Pittsburgh, plaintiffs, from judgments of the Common Pleas No. 4, for the County of Philadelphia, in proceedings by attachment execution against Howard R. Kern, who was sued with William A. Baeder and Louis C. Haughey, co-partners, now or late trading as the William A. Baeder Glue Company, defendants, William H. Kern (now Hood Gilpin, Esq., executor of the will of William H. Kern, deceased), garnishee.

The plaintiffs, having obtained several judgments against the defendants above mentioned, issued attachment execution thereon against W. H. Kern. Answers were filed and also a plea of nulla bona in each case. By agreement all the cases were referred, under the Act of 1836, to William Wynne Wister, Jr., Esq., as referee. Later the agreement was modified by striking out from the agreement in each case the words "Act of June 16, 1836," and substituting "Act of May 14, 1874."

The referee, after hearing, filed a separate report in each case. The reports, however, differed in results only in the amounts found to be due the particular plaintiff. They found the amount in the hands of the garnishee $43,289.90. Exceptions were filed by the garnishee, which were disposed of by the Court in an opinion by ARNOLD, P. J., as follows:

"In this case judgment was entered against Howard R. Kern on May 6, 1890, for $7213.33. On February 12, 1893, an attachment sur judgment was issued and served on William H. Kern, garnishee. There were several other attachments served on William H. Kern prior to this attachment, and several were served on his executors after his death, which occurred on April 8, 1893. All these attachments, some of which were brought in other Courts and transferred to this, were referred to William Wynne Wister, Jr., Esq., as referee, who has taken testimony and reported that there is in the hands of the garnishees $43,289.90, subject to the amount recovered by the Merchants' and Manufacturers' National Bank of Pittsburgh *v.* The Baeder Glue Co., in Common Pleas No. 2, March term, 1890, No. 440, and the amount payable under the previous attachment of the Allegheny National Bank of Pittsburgh *v.* Baeder et al., Common Pleas No. 3, June term, 1890, No. 561, and the Merchants' and Manufacturers' National Bank of Pittsburgh *v.* Baeder et al., Common Pleas No. 3, March term, 1890, No. 655, which is the claim now before us. We have in the case of the People's National Bank of Pittsburgh *v.* Howard R. Kern et al., Common Pleas No. 4, June term, 1891, No. 82, a bill in equity, decided that no preference could be obtained by bill in equity against the estate of William H. Kern. All his creditors will have to await the settlement of his estate by the Orphans' Court, and the attachments will bind any dividend awarded by the Orphans' Court to the Baeder Glue Company and Howard R. Kern, in case William H. Kern's estate should not be able to pay all his creditors in full: Bouslough *v.* Bouslough, 68 Pa. 495; Maurer *v.* Kerper, 102 Pa. 444.

"The main question in dispute and tried before the referee is the amount in the hands of the garnishees, which, as before said, the referee has fixed at $43,289.90. The reference originally was under the Act of 1836, but by agreement of the parties, it has been amended so as to make the reference under the Act of 1874 and its supplements, in order that we may review the testimony and enter such finding as we deem proper upon the evidence.

"The first item in dispute was the value of cer-

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tain glue in the hands of William H. Kern, but belonging to the Baeder Glue Company. The referee has charged the garnishees with the value of this glue at ten cents per pound, equal to $43,325.70. William H. Kern, as before said, had this glue in his possession, and, being anxious to dispose of it, he transferred the warehouse receipts for the glue, ostensibly for $24,000, to James E. Salter, who was a member of the bar, now engaged in the plumbing business, and formerly a deputy sheriff under William H. Kern. In this matter Mr. Salter was serving Mr. William H. Kern, who was confined by sickness at the time. Salter sold the glue through the agency of Howard R. Kern to the Acme Glue Company, a corporation in which Howard was largely interested, for $32,494.42, or at the rate of about seven and a half cents a pound, but the sale was for the benefit of William H. Kern, whose estate will be required to account for the proceeds, whether he received all the proceeds or not. As this appears to have been an actual sale of the glue, and William H. Kern received no further returns from it, we are of opinion he should be charged for it at the sum for which his agent, Salter, sold it to the Acme Glue Company, to wit, $32,494.42.

"William H. Kern recovered a judgment against the William A. Baeder Glue Company in New York, on which he realized the sum of $2090.20, for which he should be charged. He also received from the compromise of a claim of the William A. Baeder Glue Company against the Indianapolis Glue Company, the sum of $4000, and from certain commercial paper received from the William A. Baeder Glue Company, $9576.33. A prosecution was instituted in Pittsburgh against Louis C. Haughey, for some injury done to the Baeder Glue Company, of which he was a member, which prosecution was subsequently compromised, and out of the sum paid in compromise, after deducting expenses, William H. Kern received $3850, for which he should be charged. That he is responsible for this sum was decided in the case of the Merchants' and Manufacturers' National Bank of Pittsburgh *v.* The William A. Baeder Glue Company, 164 Pa. 1, the testimony in that case being before the referee in this. The total of these amounts is $52,010.95.

"Out of this sum the garnishees claim to retain the amount of the judgment held by William H. Kern against the William A. Baeder Glue Company in New York for $38,902.08. William H. Kern's right to deduct some amount is not disputed, but there was a dispute as to the amount to be allowed, and the referee has reduced the amount of the judgment to $26,722.87, upon the ground that the excess, about $12,000, represents individual indebtedness of Howard R. Kern and not indebtedness of the Baeder Glue Company, but the testimony shows that that sum of $12,000 went into the business of the Baeder Glue Company and was adopted by that company as an indebtedness by it. That a firm may make itself liable for such an indebtedness is undoubtedly true, and as the referee has found that the evidence unquestionably failed to establish a conspiracy between Howard R. Kern and William H. Kern to defraud other creditors, we think the referee erred in not allowing the judgment for the full amount. There is no proof that it was confessed for the purpose of hindering and defrauding creditors, and it undoubtedly was rendered for an actual sum of money due and owing. Even if it could have been impeached for fraud, that must have been done in the Court in which it was rendered; it cannot be done in a collateral proceeding: McClain's Estate, 180 Pa. 231; Thompson's Appeal, 57 Pa. 175. Taking the gross amount found to be in William H. Kern's hands, $52,010.95, and deducting from it the judgment held by William H. Kern for $38,902.08, we have a balance, which we find to be due by William H. Kern, of $13,108.87. This accords with the finding of the jury in the case of the Merchants' and Manufacturers' Bank of Pittsburgh *v.* The William A. Baeder Glue Co., 164 Pa. 1, in which the jury found that there was in the hands of the garnishees the sum of $15,657.18, the difference no doubt being made up of interest.

"The next question is whether interest should be charged upon this amount, and, on due consideration, we are of opinion that it should be so charged. Payment of the principal was not delayed by the litigation between the plaintiff and the defendant, the Baeder Glue Company, but by the litigation between the plaintiff and the executors of Mr. Kern, and we know of no reason why the rule of law which gives interest as damages for the delay should not be applied in this case. See Rushton *v.* Rowe, 64 Pa. 63; Jones *v.* The Bank, 99 Pa. 317. Interest will be allowed on the above amount from the dates set forth by the referee in his report. As this matter involves a calculation of interest, if the parties cannot agree upon the total of principal and interest, and the amounts due on the attachments, we will refer the matter to a competent accountant to make said calculation.

"As the estate of said William H. Kern has not been settled by the Orphans' Court, the attaching creditors of the Baeder Glue Company and Howard R. Kern must await the adjudication of that Court, for if William H. Kern's estate should prove to be insolvent, his creditors will be awarded a dividend only, which will be subject to the attachments: Bouslough *v.* Bouslough and Mau-

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rer *v.* Kerper, supra. We ascertain the indebtedness and the Orphans' Court ascertains the dividend.

"A similar finding will be entered in the other cases argued before us, to wit, Allegheny National Bank *v.* Kern, Common Pleas No. 3, June term, 1890, No. 561, now in this Court, September term, 1898, No. 1017; The People's National Bank of Pittsburgh *v.* Kern, Common Pleas No. 4, June term, 1891, No. 81; the two cases of The Market and Fulton National Bank of New York *v.* Kern, Common Pleas No. 3, March term, 1890, No. 306, now in this Court, September term, 1898, No. 1014, and Common Pleas No. 3, September term, 1890, No. 314, in this Court, September term, 1898, No. 1016, and Charles Townsend *v.* Kern, Common Pleas No. 4, March term, 1897, No. 758."

The plaintiffs took appeals, which were argued together.

James Collins Jones and *Charles E. Morgan, Jr.*, (with them *Henry C. Todd, Francis D. Lewis* and *Lewin W. Barringer*), for appellants.

The action of the Court of Common Pleas in setting aside the referee's findings of fact upon the evidence before him and substituting in place thereof different findings of fact, was beyond its power.

The Court, upon exception, is bound by the findings of fact of a referee precisely as it is by the verdict of a jury. Although it may set aside a verdict or a report, it cannot find facts. This is precisely what the learned Court below has attempted to do in this case. The referee found, on the evidence before him, first, that the transactions between the defendant and garnishee with reference to the disposition of the property given by the former to the latter as collateral security were of such a character as to render the garnishee accountable to the plaintiffs for its reasonable value; second, that the reasonable value of such property was $43,325.70; and, third, that there was due by the defendant to the garnishee $26,722.87, for which he was entitled to credit upon such accounting.

The Court of Common Pleas, however, upon the same evidence, while it sustained the referee's finding as to the character of the transactions referred to, and also as to the accountability of the garnishee for the reasonable value of the collateral so received and disposed of, disregarded the referee's findings both as to the value of this property, and as to the amount for which the garnishee was entitled to receive credit, and substituted therefor its own conclusions of fact, differing very substantially from those of the referee. That the Court in so doing erred, and assumed a power not vested in it under the law, is perfectly plain.

Bruch *v.* Philadelphia, 181 Pa. 588.

Although the case of Bruch *v.* Philadelphia was decided years after the passage of the Act of Assembly of May 4, 1889, P. L. 80, supplementary to the Act of 1874, which provides that the Court shall have power to confirm the report of the referee, or alter, amend, or reverse it, or send it back to the referee for further poceedings before him, it will, doubtless, now be contended, as assumed by the Court of Common Pleas in the case now before the Court, that this supplement gave to the Court of Common Pleas the power not only to alter, amend, or reverse the report of the referee upon exceptions raising questions of law, but also as to findings of fact. That the Supreme Court did not so construe the supplement is evident from the decision in Bruch's case. The rule, as we understand it, laid down by the Supreme Court in the cases prior to the passage of the Act of 1889, as to referees under the Act of 1874, was:

First, that the Court of Common Pleas had no jurisdiction in such cases, and referees' reports could be reviewed only by the Supreme Court on writ of error or appeal.

Second, that even the Supreme Court could hear and determine only questions of law involving the rulings of the referee upon admissions of evidence or upon his report; his findings of fact having always been treated as conclusive as the verdict of a jury.

See—

City *v.* Linnard, 97 Pa. 242.
Lee *v.* Keys, 88 Id. 175.
Brown *v.* Dempsey, 95 Id. 243.
Bradlee *v.* Whitney, 108 Id. 362.
Southern Maryland R. Co. *v.* Moyer, 125 Id. 506.

The Act of 1889 was only intended to provide for a review of the referee's findings of law. See—

Ridge Ave. Ry. Co. *v.* Philadelphia, 181 Pa. 592.

In this connection the attention of the Court is called to the Act of May 20, 1891, P. L. 101, which provides that the Supreme Court shall have power in all cases to affirm, reverse, amend, or modify a judgment, order, or decree appealed from, and to enter such judgment, order, or decree in the case as the Supreme Court may deem proper and just without returning the record for amending or modification to the Court below, and may order verdict and judgment to be set aside and a new trial had.

In Smith *v.* Times Pub. Co., 178 Pa. 481, the late Mr. Justice WILLIAMS pointed out (page 504) that no part of this section was new except the last clause. Notwithstanding the phraseology of the Act of 1891, it is now firmly settled that the Supreme Court has no power to review the findings of the Court when a case is tried by the

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Court without a jury under the Act of 1874.

Comm. v. Hulings, 129 Pa. 317.

And see—

Comm. v. Westinghouse Mfg. Co., 151 Pa. 265.
Eichman v. Hersker, 170 Id. 402.
Philadelphia Co. v. United Gas Improvement Co., 180 Id. 235.

It, moreover, is a fundamental principle of common law procedure that the witnesses in a case shall physically appear before the tribunal whose business it is to pass finally on questions of fact, unless there is some special reason for a contrary practice, and that their testimony shall be given before this tribunal.

John G. Johnson, for appellees.

October 6, 1899. FELL, J. The main contention of the appellants is that the Court of Common Pleas was without power to set aside the referee's findings of fact and to substitute different findings. The reference was made in accordance with the third section of the Act of June 16, 1836, and all matters of law were reserved for the decision of the Court: but it was agreed that the referee after reporting upon all matters of fact in controversy should report to the Court his conclusions as to the law governing the case, with a recommendation as to the form of judgment proper to be entered. Subsequently the agreement for reference was amended so as to bring it under the Act of May 14, 1874. The action of the Court in reviewing the findings of fact and entering different findings was based on the Act of May 4, 1889, which is a supplement to the Act of 1874.

The award of a referee under the Act of 1836 is given the same effect as a special verdict, and the only exceptions allowed to the award are: (1) That the referee misbehaved; (2) that he committed a plain mistake in matter of fact or matter of law; (3) that the award was procured by corruption or undue means. The power of the Court in the correction of errors is limited to a reference back "for such further or other proceedings therein as shall be expedient."

The Act of May 14, 1874, made no provision for hearing exceptions or otherwise reviewing or correcting the decision of the referee by the Court of Common Pleas. The appeal was directly to this Court. The writ of error brought up only questions of law, and for all purposes of review the judgment entered on the report of the referee was substantially the same as the judgment of the Court on a case submitted to it without a jury under the Act of April 22, 1874: Jamison *v.* Collins, 83 Pa. 359; Philadelphia *v.* Linnard, 97 Pa. 242; Southern Md. R. Co. *v.* Moyer, 125 Pa. 506.

The Act of May 4, 1889, makes a radical change in the practice in relation to the hearing of exceptions to the report of a referee. It provides that when exceptions have been filed with the referee his report and his action on the exceptions shall be reviewed by the Court of Common Pleas; and the Court is given power to confirm, alter, amend or reverse the report, or to send it back for further proceedings before the referee. The intention to establish by this supplemental Act a new mode of procedure, and to give the Court of Common Pleas full power of review, is very clearly expressed. The only basis for even a doubt upon the subject is found in Bruch *v.* Philadelphia, 181 Pa. 588, and there only in the fact that the decisions construing the Act of 1874 were applied to a reference made after the passage of the Act of 1889. There was no intention to construe the later Act, and the fact of its passage was overlooked. There was no reference to the Act in the briefs presented or in the arguments made, and the case was treated by counsel as coming under the Act of 1874, and was so presented to the Court.

The questions of fact involved in the case present unusual difficulties. The learned referee found that there had been no fraud on the part of the garnishee, but held him liable to account for value of merchandise which had been pledged with him as collateral security for a debt due him by the defendants, for the reason that he had negligently sold it for an inadequate price. The market value of this merchandise and the amount due the garnishee by the defendants were the main questions of fact in dispute. The referee found that the merchandise was worth $43,325.70, and that the garnishee's just claim against the defendants was $26,722.87. The Court found the value of the merchandise to be $32,494.42, and that the amount due by the defendants, because of the assumption by the partnership of a debt for money loaned one of the members which had gone into the partnership business was $38,902.08, and reduced the award accordingly.

An issue involving precisely the same questions that were raised before the referee was tried in the Common Pleas, and the testimony taken at that trial was used by the referee and was the basis of his findings of fact. The judgment entered by the Court, allowance being made for interest, corresponds with the verdict of the jury in that case. We have then in an issue in which, because of the conflict of testimony and the questionable conduct of some of the parties, the truth is peculiarly difficult of ascertainment, on the one hand the findings of a most careful and competent referee, and on the other the findings of the learned Judge of the Court, fortified by their correspondence with the verdict of a jury. Nothing but a clear conviction that the Court had erred would justify the setting aside or modification of

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its finding. A careful review of the testimony, while not removing all doubts as to the correctness of the conclusion reached, has not satisfied us that error was committed.

The judgment is therefore affirmed.

H. B.

Jan. '98, 278, 279, 280. Supreme Court. May 9, 1899.

Brownfield's Estate.
Brownfield's Appeal.

Will—Family settlement—Confidential relations —Increase in value of interest.

A. by his will devised land to his two sons, also naming them as executors, but desired them "to pay to each of my daughters Jane, Malinda, Elizabeth and Anna Crossland a sum of money equal to the sixth part of the value of the coal under all my lands; my executors to have power to carry out this provision of this my will, by selling if necessary the whole or any part of the said coal if they should consider that the best way to carry the same into effect, but this does not require them to sell the same unless they wish to do so":

Held, that this provision was not to give the daughters any estate or interest in the coal, but merely a money legacy the amount of which was to be determined by the value of the coal, and when that was liquidated in any valid way the coal ceased to be a factor in the matter.

A. died in September, 1890. Two months later his children met and made an amicable division of the personal property left them by the will, which had not at that time been admitted to probate, and four months later they met again and executed a formal sealed agreement of liquidation of the value of the coal so far as it affected the amount of the legacies to two of the daughters, who at the time had full opportunity to examine and consider the agreement before signing; the two sons advised their sisters as to the effect of the agreement, and also suggested that they obtain outside advice; they did not misrepresent the value of the coal, but one of them had information upon that subject which he did not communicate. Four years later, on the filing of the executors' account, the value of coal having greatly advanced in the meantime, the sisters attempted to set aside the settlement. The auditor held that such information had by the brother was essential to the safe entry into the agreement, and that the failure to communicate it, under the confidential and fiduciary relations between the parties, rendered the agreement invalid, and he surcharged the accountants with the increased valuation:

Held, that as the agreement was entered into as a family settlement and carried out without objection for four years, until the sale of the coal under an unprecedented rise in price made the objectors regret that they had not waited to realize on their legacies, and in view of the entire absence of fraud or any act of bad faith, and of the clear proof of knowledge by the objectors before execution, as well as of evidence that the valuation was then in fact a fair one, it was error to set aside the agreement of 1891.

Appeal of William W. and Isaac H. Brownfield, executors, and trustees under the will of Isaac Brownfield, deceased, from the decree of the Orphans' Court of Fayette County, confirming the report of an auditor upon the accounts of the said executors and trustees.

The facts are set forth in the syllabus and in the opinion of the Supreme Court, infra.

Edward Campbell, for appellants.

The rule that a trustee cannot act in the double capacity of seller and buyer of the trust property does not necessarily apply to all dealings with the person for whom he holds it and toward whom he bears the relation of trustee. He may purchase the property of such person in private dealing, as distinguished from public sales by the trustee; and if the whole transaction, and the circumstances under which it took place, are fair and open, the trustee buying openly for himself, and no advantage is taken by him over the cestui que trust, whether by positive concealment, misrepresentation, or omitting to state any important fact, and no undue influence is exercised, and the cestui que trust understands what he is doing, the contract will not be set aside because of the fiduciary relation of the parties.

Brown *v.* Cowell, 116 Mass. 461.
Farnam *v.* Brooks, 9 Pick. 212-231.
Perry on Trusts, § 195.
Bigelow on Fraud, pp. 318, 319.
Woodhouse *v.* Meredith, 1 Jacob & Walker, 222.

The transaction may, however, often be established by long acquiescence in the purchase, in the absence of actual fraud. If the cestui que trust, being under no disability, lie by for a considerable time, with full knowledge of the purchase by the trustee as a purchaser for his benefit, it will be considered a case of acquiescence in the sale, and the trustee will not be disturbed.

Bigelow on Fraud, p. 321.
Mason *v.* Martin, 4 Md. 124.
May on Fraud. Con. 2d Ed. 507, 508.
Kerr on Fraud and Mistake, 2d Ed. 332.

The question raised by the exceptants concerning the increase cannot be adjudicated in the present proceeding. An exception to the account of executors must make objection to the justness of the account, in charge or discharge of the accountant, and not merely seek the recovery of a demand from the estate.

Carey *v.* Monroe, 35 Atl. R. 456.
Robins's Estate, 180 Pa. 630.
Dundas's Estate, 73 Id. 474.

The law looks with favor upon agreements, the object of which is to promote domestic peace and harmony, where they are free from fraud or the suspicion of improper influence. Family compromises, especially if they are made in good faith and with full disclosure, are favored in equity and may be sustained by the Court, albeit, perhaps, resting upon grounds which would not have been

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satisfactory if the transaction had occurred between strangers.

Bispham's Equity, § 189.
Share *v.* Anderson, 7 S. & R. 62.
Barton *v.* Wells, 5 Wharton, 225.
Smith *v.* Warden, 7 Harris, 430.
Worrall's Accounts, 5 W. & S. 111.
Ackla *v.* Ackla, 6 Barr, 232.
Fulton *v.* Moore, 1 Casey, 476.
Walworth *v.* Abel, 52 Pa. 370-372.
Wistar's Appeal, 80 Id. 484.

Adequacy is immaterial.

Follmer's Appeal, 37 Pa. 121.
Wistar's Appeal, 80 Id. 484.
Johnson's Estate, 20 Phila. 22; 47 Leg. Int. 143.
May on F. Con., 276-278.
Pullen *v.* Ready, 2 Atk. 587.
Bisph. Eq., p. 243, pl. 189.

Nothing will invalidate them, except positive fraud, proved as in the case of any contract assailed at law.

Acquiescence in a transaction may bar a party of his relief in a very short period. Thus if one has knowledge of an act, or it is done with his full approbation, he cannot afterwards have relief.

2 Perry on Trusts, 4th Ed. § 870.
Musselman *v.* Eshleman, 10 Barr, 394.
Bruch *v.* Lantz, 2 Rawle, 418.
Ashhurst's Appeal, 60 Pa. 317.

George H. Lepper and *S. E. Ewing*, for appellees.

October 6, 1899. MITCHELL, J. The testator devised his land to his two sons, also naming them as executors, but desired them "to pay to each of my daughters, Jane, Malinda, Elizabeth and Anna Crossland a sum of money equal to the sixth part of the value of the coal under all my lands; my executors to have power to carry out this provision of this my will by selling if necessary the whole or any part of the said coal if they should consider that the best way to carry the same into effect, but this does not require them to sell the same unless they wish to do so." The effect of this provision, as correctly held by the learned auditor and Court below, was not to give the daughters any estate or interest in the coal, but merely a money legacy the amount of which was to be determined by the value of the coal. The moment that value was liquidated in any valid way, the coal ceased to be a factor in the matter. And the value was to be estimated as of the date of the will or of the testator's death, which was so soon after as to be for this purpose cotemporaneous. There was no direction to sell, or obligation on the part of the executors to do so. The power to sell was merely a tentative mode of fixing the value, suggested by the testator, but left entirely to the discretion of the executors.

The testator died in September, 1890. In November, the six children met and made an amicable division of the personal property which the will had left to them in equal shares, and in March, 1891, they met again and executed a formal sealed agreement of liquidation of the value of the coal, so far as it affected the amount of the legacies to Malinda Brownfield and Anna B. Crossland, two of the daughters. The validity of this agreement is the main question in the case.

The auditor found as facts that the agreement was executed by the two daughters now objecting with knowledge of its contents, that they had opportunity to examine and consider it before signing; that the accountants, the two sons, made no attempt to conceal the effect of the agreement from their sisters, but advised them to obtain outside advice; that they did not in any way misrepresent the amount of coal, but that one of them had information upon that subject which he did not communicate; and that such information being essential to the safe entry into the agreement the failure to communicate it under the confidential and fiduciary relations between the parties rendered the agreement invalid. He thereupon proceeded to take testimony as to the amount and value of the coal, and to surcharge the accountants with this valuation in place of that fixed by the agreement.

The relation of the parties was somewhat exceptional. The sons were devisees of the land, including the coal, and as the daughters had no estate, title or interest in the coal, but merely a claim for money against the executors depending upon the value of the coal, the sons, as owners of the land, occupied no fiduciary relation at all to their sisters, and were entitled to deal on this subject at arm's length. But the sons were also named by the testator as executors, though the will had not yet been proved, nor was it offered for probate till three years later at the instance of the purchaser of the coal. The reasons for this delay are not very clear but it was certainly in pursuance of an amicable family understanding if not of positive agreement. It is argued by the present appellants that not having yet taken out letters testamentary they were not in any relation of trust or confidence at all at that time. But the auditor was clearly right in holding that the parties dealt on the understanding that the will gave the sons as executors, the power and duty to ascertain and fix the value of the coal as the measure of the daughters' legacies, and they were therefore so far in a trust relation that the equity rules as to transactions between trustee and cestui que trust had a bearing on the case. But he erred in applying the rule too strictly. There was no purchase of trust property by the trustee, no strict relation of trust which gave

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either superior knowledge or power of moral coercion, but there was a confidential relation requiring entire good faith. Not only was this clearly present but the valuation is shown to have been a reasonably fair one, by that which the auditor himself arrived at. The agreement put the valuation at $13,000 for each share; the auditor, after full adverse investigation with the light of four years' subsequent development in the coal business, put it at $15,500, coupled with the admission that "this is a higher price than any of the coal in the neighborhood had sold for up to that time."

The agreement was entered into as a family settlement, was carried out without objection for four years and until the sale of the coal, under an unprecedented rise in price, made the objectors regret that they had not waited as the others had, to realize on their legacies. In the entire absence of fraud or any act of bad faith, and in view of the clear proof of knowledge by the objectors before execution, the double position of the appellants, one of which carried no duty at all of disclosure of facts, the very evenly balanced testimony whether or not the brothers had any undisclosed knowledge, the evidence that the valuation was in fact a fair one, and the very strong presumption in favor of a family settlement unimpeached for four years, it was error to set aside the agreement of 1891.

The facts of this case, as already said, are exceptional, and no close precedent has been found, but Grim's Appeal, 105 Pa. 375, is analogous, and the principles as applied there are applicable here.

The agreement of 1891, being valid and the proper basis of the account, the interest must of course be adjusted in accordance therewith and not at six per cent. prior to the sale, as the auditor calculated it.

The counsel fees claimed by the accountants appear to us moderate, but they have been slightly reduced by the auditor and the Court, and we are without evidence on which we can say there was error in this respect.

The decree is reversed and the account directed to be restated in accordance with this opinion. Costs to be paid by the appellees.

W. C. S.

Jan. '98, 273, 274, 275. Supreme Court. May 9, 1899.

Brownfield's Estate.
Crossland's Appeal.

Will of—Trust.

A will gave inter alia, a legacy to the appellant, equal to one-sixth the value of the coal under the land devised to his sons, and provided, "I direct my executors to invest in some safe way the bequest of my daughter Anna and to retain control of the same, allowing her the use of the same, or if the said investment should be an interest or dividend-bearing investment, to pay over to her semi-annually the interest thereof during her life, and if she should die without leaving lawful issue surviving her" then over, and if issue, then to hold until they should reach full age:

***Held*, that the trust thus imposed by the testator was not disturbed in any way by the agreement of the children in 1891 [see foregoing case], which was merely to liquidate the amount of the legacy which the will made dependent upon the value of the coal, and was in affirmance not in antagonism to the will, and in no way affected the trust.**

Appeals of Malinda Brownfield and Anna B. Crossland, from decrees of the Orphans' Court of Fayette County.

George H. Lepper and *S. E. Ewing*, for appellants.

Edward Campbell, for appellees.

October 6, 1899. MITCHELL, J. The only question involved in this appeal not discussed and determined in W. W. & I. H. Brownfield's Appeal, No. 279, opinion filed herewith, is raised by the assignment of error to the finding of the auditor that the legacy to appellant was not absolute but in trust.

The will of the testator gave, inter alia, a legacy to this appellant, equal to one-sixth the value of the coal under the land devised to his sons, and provided, "I direct my executors to invest in some safe way the bequest of my daughter Anna and to retain control of the same, allowing her the use of the same, or if the said investment should be an interest or dividend bearing investment, to pay over to her semi-annually the interest thereof during her life, and if she should die without leaving lawful issue surviving her" then over, etc., and if issue, then to hold until they should reach full age, etc.

The trust thus imposed by the testator was not disturbed in an way by the agreement of the children in March, 1891. It could not have been, for the will was not attacked in any way and its provisions are clear. But the agreement had no such object. It was merely to liquidate the amount of the legacy which the will made dependent on the value of the coal. This was in affirmance not in antagonism to the will, and in no way affected the trust.

Appeal dismissed at the costs of appellant.

W. C. S.

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Jan. '98, 118. Supreme Court. January 4, 1899.

Tapper v. Sunlight Oil & Gasoline Co.

Contract—Agent—Evidence—Erasure.

Where the instrument upon which an action is brought is the usual printed "blank" form adopted in similar transactions, the fact that certain words in the printed form had been erased will not invalidate the agreement if it appears that the erasure was the same in the duplicate copies of the agreement retained by each party at the time the contract was signed, unless it is proved that in making the erasure the agent of the defendant exceeded his authority.

Where a contract stipulates that one party shall furnish to the other certain quantities of a certain commodity and he fails to furnish as contracted, the other party has the right to go to the general market and buy sufficient of the commodity to meet the requirements of his business and he may recover for any excess he has to pay over the price named in the contract.

Appeal of the Sunlight Oil & Gasoline Company, from the judgment of the Common Pleas No. 3, of Philadelphia County, in an action of assumpsit wherein William E. Tapper was plaintiff.

This was an action to recover damages for the breach of a contract to supply plaintiff with gasoline during 1895 and to take back the empty barrels at agreed prices.

On the trial of the case, before FINLETTER, P. J., the facts appeared as follows: The plaintiff was a dealer in sundry domestic commodities and the defendant was a manufacturer of gasoline and burning fluids. One Wolf, an agent of the defendant called upon the plaintiff and handed him an agreement as follows:

Philadelphia, January 3rd, 1895.

We agree to furnish you your supply of 75 gasoline from to bbls. per week, for the year 1895, at 7 cents per gallon. Delivered at No. 428 No. 64th Street. Empties to be returned at 95 cents each.

SUNLIGHT OIL & GASOLINE CO.,
H. LIVEZEY, Mgr. & Treas.

Accepted.

The plaintiff had never dealt with Wolf, or with defendant, and knew nothing of the extent of Wolf's authority. At plaintiff's request, Wolf struck out the words "from to bbls. per week," and plaintiff signed the acceptance, Wolf leaving with plaintiff one copy, and taking away another copy of the writing.

The defendant objected to the admission of the contract in evidence. Objection overruled. (Third assignment of error.)

The plaintiff required and received twelve barrels of gasoline a week, and in the first week of June, 1895, he gave a second order for twelve barrels during the same week. The defendant refused to accede and showed the order in which the words: "from one to twelve barrels per week" appeared, and refused to deliver more than twelve barrels in any week, except at the market price. The market price at this time was twelve cents.

Plaintiff thereafter received from defendant twelve barrels of gasoline each week (except for a small portion of the year, during which time defendant ceased manufacturing by reason of the destruction of its works), and purchased from a rival manufacturer, at twelve cents a gallon, an average of about thirty-six barrels in each week. The plaintiff offered in evidence certain receipted bills for gasoline purchased by him from third parties. Objected to. Objection overruled. (Fourth assignment of error.)

The defendant asked the plaintiff on cross-examination to tell what his sales were in 1894. Objected to. Objection sustained. (First and second assignments of error.)

The plaintiff claimed to recover from defendant the difference in price he had to pay for the oil over and above seven cents a gallon, after defendant refused to furnish the additional amount in June, 1895. The defendant submitted the following points:

"1. That plaintiff was put upon notice by the form of the contract as submitted to him, that the quantity of gasoline was to be fixed and limited; and in order to recover, is bound to show that the salesman was authorized to strike out the limiting clause, or that defendant ratified his action in so doing; having failed to show such authority or ratification the contract is void as an altered contract, and your verdict must be for the defendant.

"2. The words 'your supply' must be construed to mean such supply as plaintiff was using or would reasonably need in the business then being carried on by him; and if he thereafter changed his business from a peddling or 'wagon' trade to a wholesale or 'by the load' trade, he cannot recover for the increase of supply thus caused.

"3. The plaintiff's own evidence shows that he deliberately speculated upon his chances of holding defendant to an unconscionable bargain. The law will not lend its aid or sanction to such a scheme and you are directed to find for the defendant." All of which were refused. (Ninth, tenth and eleventh assignments of error.)

Verdict and judgment for plaintiff, $1806.03. The defendant took this appeal and filed assignments of error, inter alia, as above indicated.

W. C. Rodman, for appellant.

It was the duty of the plaintiff to ascertain the extent of the salesman's authority.

Rice v. Jackson, 171 Pa. 89, 97.

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A party who avails himself of the act of an agent must, in order to charge the principal, prove the authority under which the agent acted. The burden of proof lies on him to establish the agency and the extent of it.

Hays *v.* Lynn, 7 Watts, 525.
Moore *v.* Patterson, 28 Pa. 512.
Ins. Co. *v.* Shultz, 82 Id. 51.
Refining Co. *v.* Bushnell, 88 Id. 91.
Underwriters' Asso. *v.* George, 97 Id. 241.

Where the terms of the promise admit of more senses than one, the promise is to be performed in that sense in which the promisor apprehended at the time the promisee received it.

Williamson *v.* McClure, 37 Pa. 402, 408.

E. W. Magill, (*R. Alexander* with him), for appellee.

October 6, 1899. McCollum, J. The contract in question is in the words and figures following, to wit: "Philadelphia, January 3rd, 1895, we agree to furnish you your supply of 75 gasoline for the year 1895, at 7 cents per gallon. Delivered at No. 428 N. 64th street. Empties to be returned at 95 cents each. Sunlight Oil & Gasoline Co., H. Livezey, Mgr. & Treas. Accepted W. E. Tapper." In the negotiations which resulted in the contract included herein the defendant was represented by its agent employed to sell its gasoline. The paper presented to the plaintiff by the agent of the defendant was not a completed contract, although it was signed by the latter. It was an offer to furnish to the former his supply of 75 gasoline for a time and on terms specified therein. There were two blank spaces in it through which spaces and five words in close proximity to them, a line was drawn by the agent. This was followed by an acceptance from the plaintiff of the offer as it then stood. If the action of the agent in drawing the line aforesaid was within the scope of his authority the plaintiff's acceptance of the offer constituted his contract with the defendant, and if the agent exceeded his authority in this particular and his act was ratified by his principal the result would be the same. As the defendant made no objection to compliance with the terms of the contract before there was an advance in the price of gasoline it may be fairly inferred that the real ground of its refusal to comply with its contract was the appreciation in the market value of the article it had previously agreed to furnish the plaintiff for the period of one year. It may be noted here that the contract was in duplicate, each party to it having a copy of it and knowledge of its terms. The uncontradicted testimony showing that the copies delivered to the parties by the agent of the defendant were precisely alike and there being no averment or claim of any alteration by him in either of them the inference is that the erasure of the line drawn by him as hereinbefore stated and the insertion of the words written over or above it was the work of his principal. Another noticeable fact in connection with the case is that the defendant has offered no evidence showing that its agent exceeded his authority, or produced on the trial the altered copy of its contract exhibited to the plaintiff in justification of its refusal to furnish the gasoline as it had agreed to do. To the facts already referred to herein we may add the further fact that the defendant did not notify the plaintiff of its intention to limit its sale of gasoline under its contract with him to twelve barrels a week, until June 5, 1895, when gasoline had advanced to 12 cents per gallon.

The only conclusion deducible from the uncontradicted evidence in the case is that the contract contained herein correctly expresses the agreement and understanding of the parties to it. By it the defendant was bound to furnish the plaintiff with the gasoline he might require in his business during the year 1895, and to pay to him 95 cents for each empty barrel returned. On the other hand the plaintiff was bound to return to the defendant each empty barrel at the price aforesaid, and to pay for the gasoline furnished him at the rate specified in the contract. The respective obligations of the parties were not impaired or in any wise affected by the rise or fall in the market of the price of the article to which their contract related and probably if there had been no change in the market value of the article each party would have been satisfied with the contract by which they were respectively bound.

We have carefully examined and considered all the specifications of error in the case and are of the opinion that there is nothing in either of them which would justify a reversal of the judgment.

Judgment affirmed.

W. D. N.

Superior Court.

Oct. '98, 8. Superior Court. October 14, 1898.

Clark's Estate.

Appeal of William J. McAuliffe, Guardian.

Bonds—Charge for procuring sureties upon—Act June 24, 1895, P. L. 248—Constitutional law—Constitution, Art. III., sec. 7.

The Act of June 24, 1895, P. L. 248, providing that any receiver, assignee, guardian, trustee, etc., required by law to give a bond as such, may include as a part of the lawful expense of executing his trust,

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such reasonable sum paid a *company* for becoming his surety is unconstitutional.

This Act discriminates between trustees, who have performed the same service and complied with all the requirements of the law, in that it allows to those who have a corporation for surety the amount paid the surety, in addition to their compensation for services as trustees, while it denies such additional allowance to those whose sureties are private citizens; it discriminates without reason, as between estates which have been administered in strict accordance with law, in that it subjects some to a charge from which others are exempt; and, finally, it makes a discrimination between equally qualified sureties, making the compensation of a corporation a charge upon the estate and denying that advantage to the compensation of an individual surety. This is not such a regulation of a business, under the police power of the State, as was sustained in Com'th *v.* Vrooman, 164 Pa. 306; the Act is therefore unconstitutional, being in violation of Art. III., sec. 7, of the Constitution.

Appeal of William J. McAuliffe, guardian, from the decree of the Orphans' Court of Philadelphia County.

The question involved in this appeal is the constitutionality of the Act of June 24, 1895, P. L. 248, allowing the payment of the surety fee to corporations by trustees in addition to their compensation. The Orphans' Court, HANNA, P. J., delivering the opinion, decided that it was unconstitutional.

Lincoln L. Eyre and *John G. Johnson*, (with them *Joseph Edward Murray*), for appellant.

George Henderson and *Thomas James Meagher*, for appellee.

July 28, 1899. W. D. PORTER, J. The appellant, as guardian of John Joseph Clark, a minor, filed an account of his trust in which he claimed credit for the sum of twelve dollars paid by him to the City Trust, Safe Deposit and Surety Company for becoming his surety upon the bond which he was by law required, as such guardian, to give. The Orphans' Court sustained an exception to said item and the credit was disallowed, which order of the Court the guardian now assigns for error.

The only question passed upon by the Court below and argued here was the constitutionality of the Act of Assembly of June 24, 1895, P. L. 248, as applied to bonds executed after the approval of the Act, and sums paid to sureties on such bonds and allowed by the Court in which the trustee is required to account. All other questions growing out of the facts in this particular case are to be taken as expressly waived. The Court below held the Act to be unconstitutional, and, in order to determine the soundness of that conclusion, we must consider the purpose, scope and effect of the legislation in connection with the conditions to which it applied. The legislation enacted, "That any receiver, assignee, guardian, committee, trustee, executor or administrator, required by law or the order of any Court to give a bond as such, may include as a part of the lawful expense of executing his trust, such reasonable sum paid a company, authorized under the laws of this State so to do, for becoming his surety, on such bond as may be allowed by the Court in which he is required to account, not exceeding, however, one per centum per annum of the amount of such bond." This Act applies only to cases where the guardian or other trustee is by law required to give a bond with surety to be approved by some court, to which the principal must account for the faithful execution of the trust. Originally only individuals were under the law competent to act as sureties in such proceedings, but the legislation of recent years has rendered certain corporations, commonly called surety or trust companies, eligible to serve in that capacity. The form of the obligation, the nature and extent of the liability assumed by and the manner of its enforcement against the surety have remained unchanged. The qualifications and responsibilities of individual sureties have been in nowise varied and the corporations have simply been admitted to the class of competent sureties. Prior to the legislation in question, individual and corporate sureties stood, in all respects, upon an equal footing. The bond and the sufficiency of the sureties were, and still are, subject to the scrutiny and approval of the court. The sureties, whether individuals or corporations, might, and still may, lawfully make a contract with their principal and receive from him a reasonable compensation for the responsibility incurred by the obligation. But it was decided, in Eby's Appeal, 164 Pa. 249, that the trustee could not charge the estate for the services rendered or time and money expended in procuring the bond which, as trustee, he was required to give. It was no doubt to escape the consequences of this decision that legislative aid was sought and the Act now under consideration was the result.

The bonds to which the legislation relates are important incidents in the collection, administration and distribution of estates; they are given to enable the principal obligor to hold a position of trust and to secure the proper performance of the duties which pertain to it. The Act only takes effect when the law positively requires that a bond with surety be given, or the court legally exercises the power to require such a bond, and when the trustee is required to account to the court. In other words, it only applies to bonds legally required in a judicial proceeding. It is not necessary in this case to consider whether or not the Legislature has the power to require

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that any function by law made necessary in any judicial proceeding shall be discharged by a private corporation, to the exclusion of citizens of the Commonwealth. The Act of June 24, 1895, did not attempt to exclude individual citizens from becoming sureties in such proceedings; it left them equally qualified with corporations. The form of the obligation, the liability thereunder and the mode of enforcement, as to the individual citizen and the corporation, remain the same. The sufficiency of the surety is still subject to the approval of the court. So far as the security of estates was concerned, there was absolutely no change wrought by this legislation.

The only effect of the legislation was to establish a distinction between individuals duly qualified under the law to become sureties and corporations so qualified. It made no pretentions to the protection of public interests or the preservation of estates. The Act simply provided that the trustee might include, as a part of the lawful expenses of executing his trust, a reasonable sum paid to a corporation for becoming his surety, while, if he paid a like amount to a duly qualified individual for performing the same service and incurring the same responsibility, he could not include it as a part of the lawful expenses of the execution of his trust. In short, this legislation left individual and corporate sureties upon an equal footing as to the qualification required and liability incurred, but it provided that if the corporation received payment for becoming surety, the amount should be taken out of the trust estate, as a part of the legal expenses of its administration, while if an individual, equally qualified to become such surety, lawfully received payment for so doing, no part of the amount so paid by the trustee could be taken out of the trust estate. In other words, money paid to a corporate surety is a part of the lawful expense of executing a trust, and may be taken out of the estate, while money paid to an individual surety is not such lawful expense and must come out of the pocket of the trustee. This Act discriminates between trustees, who have performed the same service and complied with all the requirements of the law, in that it allows to those who have a corporation for surety the amount paid the surety, in addition to their compensation for services as trustees, while it denies such additional allowance to those whose sureties are private citizens; it discriminates without reason, as between estates which have been administered in strict accordance with law, in that it subjects some to a charge from which others are exempt; and, finally, it makes a discrimination between equally qualified sureties, making the compensation of a corporation a charge upon the estate and denying that advantage to the compensation of an individual surety. This is not such a regulation of a business, under the police power of the State, as was sustained in Commonwealth *v.* Vrooman, 164 Pa. 306.

It is not a prohibition of an injurious business nor an attempt to regulate a lawful one. It is an undisguised attempt to give the corporations an advantage over the private citizens in an undertaking in which each is equally qualified under the law to engage, and that the business is closely connected with the administration of justice does not detract from the objectionable character of the statute. Had the Act allowed the reasonable charges of all duly qualified sureties, as a part of the legal expenses of execution of the trust, to be taken out of the trust estate, there could have been no doubt of its validity: Sayre Borough *v.* Phillips, 148 Pa. 482. This Act makes a discrimination between equally qualified parties, giving to one a privilege and advantage, in the judicial administration of trust estates, which is denied to the other. It is a discrimination made between those who are equal under the law. This is not protection to the public, but rank injustice to individuals. It is an arbitrary gift to one and an arbitrary denial to another, which cannot be upheld, for it offends against that clause of Art. III., sec. 7, of the Constitution of Pennsylvania, which forbids the General Assembly to pass any local or special law, "granting to any corporation, association or individual any special or exclusive privilege or immunity": Scowden's Appeal, 96 Pa. 422; Ayars' Appeal, 122 Pa. 266; Wyoming Street, 137 Pa. 494; Com'th *v.* Zacharias, 3 Pa. Super. Ct. 264, and 181 Pa. 127. The suggestion that this legislation may be sustained, upon the ground that the liability assumed by the modern surety company is different from that of an individual surety, has no foundation in fact; there is in Pennsylvania no difference in the liability of the two groups of qualified sureties. The bond is not a mere ordinary business transaction of the parties, the necessity for its execution grows out of the requirements of the law, which, having assumed control of an estate, proceeds to administer it through the Courts, an administrator or other officer, charged with the execution of the trust, is required to give bond with surety, the qualifications of the surety are fixed by law or order of the Court, and the surety, whether an individual or a corporation, must possess the qualifications required and assume the responsibilities imposed by law. Such sureties are entitled to equal privileges and immunities. The conclusion of the learned Court below seems unassailable.

Judgment affirmed. W. C. S.

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WEEKLY NOTES OF CASES.

VOL. XLIV.] *FRIDAY, OCT. 27, 1899.* [NO. 30.

Supreme Court.

Jan. '99, 210. Supreme Court. April 11, 1899.

In re Sugar Notch Borough. Appeal of Warrior Run School District.

Division of borough—Constitutional law of—Act June 1, 1887, P. L. 285.

Where a general title sufficient to cover all the provisions of an Act is followed by specifications of the particular branches of the subject with which it proposes to deal, the scope of the Act is not limited nor the validity of the title impaired, except as to such portions of the general subject as legislators and others could naturally and reasonably be led by the qualifying words to suppose would not be affected by the Act.

A title, "a further supplement to an Act for the regulation of boroughs . . . . providing for the adjustment of indebtedness and government of the boroughs, townships and school districts affected by changes of limits, of any borough in the Commonwealth," is sufficient to cover a clause authorizing the Court on the creation of a new borough out of part of an old one, to ascertain the value of the property retained by the old borough and that transferred to the new respectively, and to decree a money payment by the one having an undue proportion of the former joint property.

The restrictions of the Constitution as to special legislation, refer to direct legislation and not to the incidental operation of statutes.

The attitude of the Courts is not one of hostility to acts whose constitutionality is attacked, but on the contrary all the presumptions are in their favor and Courts are not to be astute in finding or sustaining objections.

An Act providing that where a borough, which is also a school district, is divided, the rights of the two divisions in school property, etc., may be ascertained and adjusted in a certain way, is not unconstitutional as regulating the affairs of certain school districts to the exclusion of others.

Appeal of the School District of the Borough of Warrior Run, from the judgment of the Superior Court affirming the decree of the Quarter Sessions of Luzerne County, adjusting the liabilities and property of said school district between the same and the school district of the borough of Sugar Notch, the borough of Warrior Run having been created out of part of the borough of Sugar Notch.

A petition was filed in the Court of Quarter Sessions for Luzerne county for the division of the borough of Sugar Notch. Proceedings under the Act of May 29, 1889, P. L. 393, resulted in a decree erecting out of a portion of said borough a new one, known as the borough of Warrior Run, whose boundaries were those which formerly comprised a village of the same name. On the same day that the decree was made the Court made the following order:

"Now, January 25, 1895, William C. Price is appointed auditor in above stated case to ascertain the existing liabilities of the borough of Sugar Notch and the school district thereof and the territory detached therefrom in above proceedings, to wit: The village of Warrior Run, the amount and value of the property owned by each and the amount and value of the property passing to or from each and the assessed valuation of all property liable to taxation for borough and school purposes, as shown by the last annual assessment in said borough of Sugar Notch and within the limits of the territory detached from said borough and to make report of the same to the Court with the form of a decree adjusting the liabilities for all indebtedness and the value of the property held or acquired by each and justly and equitably upon said borough and school district thereof and the part detached therefrom respectively, as provided by the Act of 1879, providing for the adjustment of indebtedness and government of the boroughs, townships and school districts affected by the changes of limits of any borough of this Commonwealth and its supplements, an Act approved June 1, 1887, P. L. 285. That four weeks' notice of time and place of meeting of the auditor be published in the Luzerne Legal Register and the Weekly Record of the Times."

The auditor thus appointed filed his report in accordance with the purposes of his appointment. Exceptions were filed by the school district of Sugar Notch, inter alia, as follows:

"1. The learned auditor erred in recommending a decree to be signed by the Court aforesaid that Sugar Notch school district shall pay to the Warrior Run school district the sum of $6169.74, because the Act of Assembly approved June 1, 1887, P. L. 285, is inoperative and void as to the school districts of Sugar Notch and Warrior Run borough, in so far as the Act requires a valuation of the school property, and an adjustment of said value among school districts formerly one school district. The subject of valuation of the property of school districts and the adjustment of the same to and among school districts at one time one school district is not expressed at all in the title of the Act, and the Act of 1887, as far as school districts are concerned, is not germane to the Act of April 3, 1851, or the Act of June 11, 1879, to which Acts the Act of 1887 is a supplement,

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thereby sinning against Art. III., sec. 3, of the Constitution of Pennsylvania, relating to legislation, which reads as follows: 'No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title.'"

This exception was sustained and the report was set aside so far as it related to the school districts of Sugar Notch and Warrior Run. The school district took an appeal to the Superior Court and filed the following assignments of error.

"1. The Court erred in holding that the Act of June 1, 1887, P. L. 285, is unconstitutional and void.

"*a*. Because the subject thereof is not clearly expressed in its title.

"*b*. Because it attempts to regulate the affairs of certain school districts in the Commonwealth to the exclusion of others.

"2. The Court erred in setting aside the auditor's report in so far as it related to the school district of the borough of Sugar Notch and the borough of Warrior Run."

The Superior Court affirmed the judgment of the Court of Quarter Sessions, and errors were assigned as follows:

"1. The learned Court erred in holding that the Act of June 1, 1887, P. L. 285, is unconstitutional: (*a*) in that the title fails fairly to give notice of the legislative purpose in that it does not refer to school districts; (*b*) it offends against the constitutional prohibition 'of any local or special law . . . . . regulating the affairs of . . . . school districts.'

"2. The learned Court erred in affirming the decree of the Court below."

S. J. Strauss, (*B. R. Jones* with him), for appellant.

William S. McLean, (with him *James H. Shea* and *George R. McLean*), for appellee.

July 19, 1899. MITCHELL, J. I. The title of the Act of April 3, 1851, P. L. 320, is, "An Act regulating boroughs." Nothing more general and comprehensive on that subject could have been devised. It included the entire range of borough affairs so far as they were within legislative control. When, therefore, the Act of June 11, 1879, P. L. 150, was entitled, "A supplement to an Act for the regulation of boroughs," it was so far as the title was concerned as broad as the original Act. It comprehended everything relating to boroughs that was or could be the subject of legislative action. The Act of June 1, 1887, P. L. 285, is entitled, "A further supplement to an Act, approved June 11, 1879, entitled a supplement to an Act for the regulation of boroughs," etc. If the title had stopped here it would have been beyond question, for it would have been as broad as that of the original Act and the first supplement. It would have included the whole subject of boroughs, and nothing germane to any aspect of that subject would have been beyond the limits of the title. But the title of the Act of 1887 did not stop at that point; it proceeded to specify the particular branches of the general subject which it intended to deal with, by the words "providing for the adjustment of indebtedness and government of the boroughs, townships and school districts affected by changes of limits of any borough in the Commonwealth." If we look beyond the title to the body of the Act of 1879, we find that it deals with changes of borough limits and therefore the subject of the Act of 1887 is not only within the limits of the title of the Act of 1879 but entirely germane to its enactments. The only question left, therefore, in regard to the title of the Act of 1887 is whether it is consistent with the body of the Act itself.

Where a general title sufficient to cover all the provisions of an Act, is followed by specifications of the particular branches of the subject with which it proposes to deal, the scope of the Act is not limited nor the validity of the title impaired except as to such portions of the general subject as legislators and others would naturally and reasonably be led by the qualifying words, to suppose would not be affected by the Act. This is the rule established by all our cases. It is an application of the maxim expressio unius exclusio alterius. The express enumeration of the specific subjects must be affirmatively misleading as to the intent to exclude others, or the title will not be made invalid by it.

The provisions of the Act authorizing the court to ascertain the value of the property retained by the old borough and that transferred to the new respectively, and to decree a money payment by the one having an undue proportion of the former joint property, or in brief, to determine the property rights of the two, are argued and were held by the learned Court below to be clearly outside of the subjects indicated in the title. In this view we cannot concur. The "indebtedness" which is to be adjusted clearly does not mean the borough debt in its relation to third persons. The Legislature would have no power, as it certainly has shown no intention, to interfere for the release of any of the debtors from their obligations to the common creditor: Plunkett's Creek Twp. *v.* Crawford, 27 Pa. 107. But the adjustment which is made necessary by their new situation is of their financial relations as between themselves. Nor can the word "indebted-

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ness" even as between themselves be taken in its exact ordinary meaning as argued by appellee, of unpaid debts existing immediately prior to the change of the borough limits. The Legislature, as already said, cannot impair the creditors' claim on all the debtors. The creditors will naturally look first to the one which retains the old name and, in the main, the old limits. But the old borough paying the debt in full will be entitled to contribution from the new, and this is the indebtedness which the statute means to have adjusted in advance. It is not really creating a new debt but only a new creditor for a proportion of the old debt which was formerly owed in common. This clearly was the view taken in Re the Incorporation of Sharon Hill Borough, 140 Pa. 250, and Darby School District's Appeal, 160 Pa. 79.

The word indebtedness then cannot be taken in its strict ordinary meaning, but must have a broader application as including financial obligations of all kinds, not only those existing previously, but those necessarily growing out of the separation. And when we consider that the adjustment is to be of "indebtedness and government," the enlarged sense of the word becomes still more clear. Government is a very comprehensive term, and one of the most important subjects included in it, is that of finances, including assets in property as well as in money. It was apparent to the Legislature that in the division of a borough there would be questions of the division of assets as well as of liabilities. The analogy of a dissolution of partnership suggested by appellant's argument is very apt and close. So long as the firm continues the partners may owe each other nothing, but when a dissolution is to be arranged a proper adjustment of rights and equities may make one a debtor to the other or entitle him to a larger share of the assets. This equitable result is what the Act intended to reach in the case of a divided borough. The auditor is to ascertain the liabilities of the boroughs, etc., affected by the change, the property owned by each, the property passing to or from each in the change, and the assessed valuation of taxable property in each and from these data he is to report to the Court a decree "adjusting the liabilities for all indebtedness and the value of property held or acquired by each." We do not think it can be said without hypercriticism that this equitable adjustment of matters necessarily growing out of the main subject of the Act, the separation of part of a borough from the rest, is not fairly to be included under the words of the title "adjustment of indebtedness and government." A reader of the title, as already said, finding it a supplement to an Act "regulating boroughs," would be warned that the entire subject of boroughs might be included. Reading further he would find that the special subject was changes in borough limits. He would be bound to know that such changes would naturally involve questions of division of property as well as of liability for debts, and the words of the title "adjustment of indebtedness and government" ought fairly to put him on notice that the whole subject of property and liabilities might come within the scope of the Act. That is all that the title is required to do.

It must not be lost sight of that the attitude of Courts is not one of hostility to Acts whose constitutionality is attacked. On the contrary all the presumptions are in their favor, and Courts are not to be astute in finding or sustaining objections. The evil at which the Constitution was aimed is thus stated with great clearness by the present Chief Justice, in Road in Phœnixville, 109 Pa. 44. "The design and scope of this constitutional amendment adopted in 1864 are readily understood when we consider the mischief which it was intended to remedy. Prior to that date the vicious practice had obtained of incorporating in one bill a variety of distinct and independent subjects of legislation. The real purpose of the bill was often and sometimes intentionally disguised by a misleading title or covered by the all comprehensive phrase 'and for other purposes' with which the title of many 'omnibus' bills concluded. Members of the Legislature, as well as the general public, were thus misled or kept in ignorance as to the true character of proposed legislation." This being the evil intended to be remedied, the constitutional requirement as to the title is not to be strained to apply to cases not really within its reasonable intent.

II. But it is also argued and was so held that the Act is unconstitutional as a special and local Act regulating the affairs of school districts, within the prohibition of sec. 7 of Art. III., of the Constitution.

This objection is even less tenable than the other. The primary subject of the Act is not school districts, but boroughs, and its application to the former is only an incident of its provisions in regard to the latter, a necessary incident because previously existing legislation had united the two in such manner that a change of the borough limits involving the creation of a new borough also creates a new school district. It is by no means clear that a regulation of the affairs of school districts in this incidental way, even though it should apply to less than all the districts in the State and thus be in a sense local, is therefore unconstitutional. The restrictions of the Constitution upon legislation apply to direct

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legislation, not to the incidental operation of statutes, constitutional in themselves, upon other subjects than those with which they directly deal.

But we need not rest the case even partially on this ground. The Act of 1887 is neither special nor local. It is the settled law since Wheeler *v.* Phila., 77 Pa. 338, that classification based on genuine and substantial distinctions is within the constitutional power of the Legislature, and an Act which applies to all the members of the class is general and not special. The Act of 1887 applies to all the members of a distinct class of school districts, to wit, those specially affected by changes in the limits of the boroughs with which by previous laws they are made coterminous. As to all such districts the Act makes certain regulations affecting, it should be noticed, not their school affairs strictly so called, but their financial, business and quasi governmental affairs necessarily involved in changes of property, assets and liabilities. It makes no changes in the school laws, the powers and duties of school directors and other officers of the system, or any of the internal affairs and management of the districts themselves except the adjustment of property rights made necessary by the changed territorial limits. Such districts may well constitute a distinct class, marked by peculiar conditions which may at any time become applicable to any district in any borough in the State.

It was thought by the Court below that the Act was special because there were some school districts in the State, those in townships and cities, which are not included in its provisions. As to townships it is clear that as boroughs may from time to time be formed out of them the Act will at once apply, and even if that were not so the fact of classification is a sufficient answer to the objection as regards townships as well as cities. There is no constitutional objection to the classification of school districts any more than of cities. Both are included in the same clause of the Constitution prohibitory of local and special legislation, and there is no argument against classification of one that is not equally forcible against the other. But classification may become as necessary for school districts as for cities. The needs and the capabilities of school districts may differ as substantially, if not as widely as those of cities. They already differ in the number and authority of the school officers, the extent and mode of assessing and collecting school taxes, etc. It would be a most unfortunate clog on the improvement of our school system if Philadelphia, Pittsburgh, Allegheny and other cities could not have their high schools, their manual training or industrial schools, or even their kindergartens without the necessity of imposing the expense of a similar establishment on every borough and sparsely populated township in the State.

There is nothing contrary to these views in Chalfant *v.* Edwards, 173 Pa. 246, so much relied on by appellee. In that case a sub-school district in the city of Pittsburgh undertook to issue bonds which it was claimed would increase the debt of the whole district beyond the legal limit. Pittsburgh for school purposes was under the local Act of 1869, but the Legislature of 1895 repealed the Act of 1869, and on the same day passed another Act for the regulation of schools in cities of the second class. The Court below on a taxpayers' bill declared the latter Act unconstitutional, but sustained the former. The main question in this Court and the one on which the judgment was reversed, was the validity of the repealing Act. It was held that while the repeal of a local Act was not prohibited by sec. 7 of Art. III. as a regulation of the affairs of a school district, yet it was local within the meaning of section 8 and required publication of notice in the locality to be affected. On the other question the Court below was affirmed on the ground that the Act of 1874 classified cities solely with reference to strictly municipal functions, and schools under the general school law of 1854 and its supplements could not as yet be considered a branch of the municipal government. Much of what was said by our late brother WILLIAMS, on this subject was by way of historical review of our school system, rather than of discussion of constitutional powers. Whether some of the expressions did not go beyond what the case called for, and farther than can be ultimately sustained, we need not now consider. The utmost that the case can be even claimed to be authority for is not that the Legislature may not classify school districts with reference to cities, but that it has not yet done so.

We have given this case more extended consideration than usual, as was due to the learned Courts from whose conclusion we have been compelled to differ. In conclusion it is not inappropriate to direct attention to the fact that the Act of 1887 has been in operation for twelve years, has been twice previously before this Court, and has been the ground of action many times before other Courts without objection to its constitutionality. It is rather late now to question it. While these circumstances are not conclusive in its favor, yet they are a strong argument that it is not so plainly repugnant to the Constitution as it must be to require a Court to overturn an Act of the Legislature.

Judgment reversed and procedendo in accordance with this opinion awarded. W. C. S.

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Jan. '98, 294. Supreme Court. January 19, 1899.

Myers v. Southwestern National Bank.

Banks and banking — Forgery — Negligence — Duty of depositor.

When a bank, on settlement of depositor's bank book, returns the checks it has paid to the depositor, it is his duty to examine them, and if he find any checks which are not his to return the same to the bank within a reasonable time. If he do not do so, he cannot, after a lapse of considerable time, hold the bank responsible for the payment of forged checks, which were amongst those returned to him by the bank.

A neglect of a depositor to disown a signature to checks may have the effect of recognizing it, so that the bank paying other checks with the same signature may be held harmless.

A. deposited in a bank; all his banking business was attended to, for a number of years, by a confidential clerk. The clerk forged two checks, which on settlement of bank account were returned to him for A. by the bank. These checks the clerk destroyed, and he also falsified A.'s accounts by false additions, so as to make the apparent balances in the check book and deposit book correspond. He afterwards forged several checks and covered his tracks in the same way. A., receiving from his clerk only the genuine checks, inspected them, but did not discover that certain checks necessary to make up the real though not the forced balance were missing. Two and a half years after the first forgeries, during which time there had been some twelve settlements of A.'s bank book, A. discovered the forgeries. In an action by A. to recover from the bank the amount paid upon the forgeries:

***Held*, (*a*) that the delivery of the checks by the bank to the clerk was a delivery to A., and not receiving the checks back the bank was justified in believing they were all checks of A.; (*b*) that while A. was not chargeable with the knowledge of his clerk, that the latter had committed forgery, he was responsible for the acts and omissions of his clerk in the line of his duty, viz., to receive the checks from the bank, take them to A.'s office, compare the amounts thereof with the amounts in the bank book and check book, etc.; (*c*) that after the first settlement the bank had a right to presume that the signature to the two forged checks was genuine, and hence to honor it in future; (*d*) that the checks being destroyed and there being no evidence of the character of the forged signature, there was no evidence of negligence on the part of the bank; (*e*) that the plaintiff could not recover.**

Appeal of Jacob Myers, plaintiff, from the judgment of the Common Pleas No. 1, for the County of Philadelphia, in an action of assumpsit against the Southwestern National Bank.

This was an action to recover the sum of $13,090, deposited by plaintiff with defendant, and which plaintiff alleged, was paid out by it on unskillfully executed forgeries of checks and notes by plaintiff's bookkeeper, without a careful examination of the signatures thereto, because of its acquaintance with and confidence in the forger. Plaintiff further averred that the forger abstracted and destroyed the forged checks and notes, and falsified plaintiff's books and accounts so as to make the apparent balance in the deposit book and check book the same, and that this falsification of the accounts was so skillfully done as to deceive not only plaintiff, who carefully examined the returned checks and notes and verified the balances, but deceived also two expert accountants employed by him to go over the notes and accounts. He further averred that as soon as the fact was discovered the forger was arrested, convicted, and sentenced, and the defendant at once notified of the loss, but declined to pay any part thereof.

Defendant pleaded non assumpsit, payment with leave, etc., and set-off.

On the trial, before BIDDLE, P. J., the plaintiff gave in evidence the following case:

Plaintiff opened an account in the defendant bank, signing his name in the signature book in the usual form. During the course of two and a half years he deposited $622,040.63. He had in his employ as bookkeeper one J. Edward Simpson, who often deposited his money for him, and was at times made the payee of checks drawn by plaintiff for the purpose of paying his employés. Simpson was not an expert penman, had never imitated the handwriting of others, or attempted to forge plaintiff's signature, until the very day of the first forgery. From March, 1891, to November, 1893, he forged checks and notes to the extent of $13,090, which were paid by defendant. To conceal these forgeries he falsified all the books, and by misadditions and missubtractions —not made at the time checks were drawn, but weeks afterwards and about the time the bank account was about to be balanced—forced the balance in the check book so as to make it agree with the bank balance. During the period named the deposit book was balanced twelve times, $500 of forged checks being included in the first settlement and $350 in the last, and the rest of the forgeries being included in the intermediate settlements. When the bank book was balanced Simpson would get the cancelled checks and notes, abstract and destroy the forged ones, and deliver to plaintiff only the genuine ones. It was Simpson's duty to verify the account as made up by the bank and report to plaintiff the result thereof. This he did, reporting the balances correct. In addition, however, plaintiff himself took the checks actually received by him, examined them as to their genuineness, compared them with the entries on the check stubs, and verified the balances in the deposit book by the balances in his own books. The balances always agreed, except where genuine checks were outstanding,

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and then the difference would be only the amount of those checks. The deposit book when thus returned by the bank simply showed the deposits on one page and opposite thereto entries, crowded together, of alleged credits, without any reference to payees, dates, amounts of individual checks, or even anything showing whether the alleged credits were of checks or notes.

So skillfully were plaintiff's books falsified that one expert accountant spent several months in examining them, and reported them all right. A second expert, after weeks of examination, discovered the forger's system, and then the whole matter was soon made plain. Neither plaintiff nor the experts ever saw the forged checks or notes.

Plaintiff at once arrested the forger and he was convicted and sentenced. The bank was also at once notified, but denied all liability.

The plaintiff having closed, the Judge directed a verdict for defendant.

Verdict accordingly and judgment thereon.

The plaintiff took this appeal and filed the following specification of error:

"The trial Judge erred in charging the jury as follows:

"Gentlemen—In this case I find it is my duty to give you a direction as to your verdict. I, therefore, direct you to find a verdict for the defendant.' "

Alexander Simpson, Jr., (*Francis Shunk Brown* with him), for appellant.

First. Aside from the main issue hereafter to be discussed this judgment should be reversed, because it took away from the jury's consideration the question as to whether or not the bank's officers exercised due care in the inspection of the checks before paying them. If they did not, even the authorities relied upon by appellee hold that there may be a recovery though there were no examination of the accounts when returned settled by the bank.

Leather Manufacturers' Nat. Bank *v.* Morgan, 117 U. S. 96.
Robb *v.* Penna. Co., 186 Pa. 456.

Bank officials are held to the highest degree of care and skill in the matter of signatures.

Levy *v.* Bank, 1 Binn. 27.
Bank *v.* Fort Pitt Nat. Bank, 159 Pa. 46.

Second. The main question in the case is, Was appellant so negligent in the performance of his duty to the bank, on the settlement of his bank book, as to debar him of all right to recover for their wrongful payments, except on the basis of their want of due care as above set forth.

At one stage in this case it was alleged that appellant was debarred because his bookkeeper abstracted and destroyed the forged checks, and because that bookkeeper, whose duty it was to examine the account as returned, knew of its inaccuracy, and appellant was affected with that knowledge. Outside of this State there is authority for that position, but it seems now to be set at rest adversely to appellee's claim, by—

Gunster *v.* Scranton Heat and Power Co., 181 Pa. 327.
United Security, etc. Co. *v.* Central Nat. Bank, 185 Id. 586.
American Surety Co. *v.* Pauly, 170 U. S. 133.
Henry *v.* Allen, 151 N. Y. 1.

Even though an innocent party making the examination could have discovered the facts.

The settlement of the bank book does not estop plaintiff.

Mechanics Bank *v.* Earp, 4 Rawle, 384.
Bank *v.* Haldeman, 1 P. & W. 161.
W. P. Bank *v.* Green, 3 Pennyp. 456.
Williams *v.* Dorrier, 135 Pa. 445.

The good faith of the holder of a check, or of the bank that pays it, is of no moment, even in the case of the alteration of the body of the check or note, unless it is so negligently drawn as to allow of an addition without any erasure, crowding, or other perceptible change.

Garrard *v.* Haddan, 67 Pa. 82.
Brown *v.* Reed, 79 Id. 370.

A forgery is incapable of ratification.

Shisler *v.* Vandike, 92 Pa. 447.
Lyon *v.* Phillips, 106 Id. 66.
Howard *v.* Turner, 155 Id. 357.

There can be no ratification without full knowledge of the facts appertaining to the act intended to be ratified. Here there was absolutely no knowledge.

Zoebisch *v.* Rauch, 133 Pa. 532.
Railroad *v.* Gazzam, 32 Id. 340.
Essick *v.* Buckwalter, 1 Mona. 209.

John G. Johnson, (*Frank P. Prichard* with him), for appellee.

First. After a bank has paid checks purporting to be issued by its depositor, it is its duty, under long established banking custom, to deliver those checks to the depositor as vouchers in its account in order that the credits therefor entered upon its books may be allowed by the depositor. Upon such presentation to the depositor, his duty is precisely the same as the duty of a drawee of a draft, or a person to whom his own commercial paper is presented for payment or acceptance, namely to examine, and accept or reject the signatures and return the rejected checks within a reasonable time. A failure on the part of the depositor to do this prevents him from disputing the bank's credits on account of the checks.

Leather Manuf. Bank *v.* Morgan, 117 U. S. 96.
Iron City Nat. Bank *v.* Fort Pitt Nat. Bank, 159 Pa. 46.

Second. It being the duty of the depositor to promptly examine and accept or reject within a

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reasonable time his commercial paper thus presented to him to be honored, he cannot delegate that duty to an agent without becoming responsible for the acts of omission or commission of such agent in the performance of such duty.

Bank *v.* Allen, 100 Ala. 476.

Third. Where the depositor has failed within a reasonable time to examine and reject the signatures to his commercial paper thus presented, and return the rejected paper, he cannot recover from the bank the payment made by it, and the Courts will not go into the speculative question as to what might or might not have been the pecuniary results from an earlier discovery of the fraud.

Leather Manuf. Bank *v.* Morgan, 117 U. S. 96.
United Security, etc., Co. *v.* Bank, 185 Pa. 586.

October 6, 1899. STERRETT, C. J. The only testimony introduced on the trial of this case was that of the plaintiff himself and his witnesses; none was offered by the defendant bank. When plaintiff closed his case, the learned trial Judge instructed the jury "to find a verdict for the defendant," which was accordingly done, and judgment was afterwards entered on the verdict. The binding instruction under which the jury acted constitutes the only specification of error.

The averments of fact on which the plaintiff's claim was based are fully set forth in his statement and need not be recited here at length.

This suit was brought to recover $13,090, deposited by him in the defendant bank, and paid out by it, as he alleged, on unskillfully executed forgeries of checks, made by his confidential clerk and bookkeeper, without a careful examination, by the proper bank officers of the signatures thereto, because of their acquaintance with and confidence in the forger. He further substantially alleged that said forged checks were abstracted and destroyed by said clerk who also falsified his (plaintiff's) books and accounts so as to make the apparent balances in the check book and deposit book correspond, and that said falsification was so skillfully done as to deceive not only the plaintiff but also expert accountants employed by him to examine his books, checks and accounts. He further averred that as soon as the fraud was discovered the forger was arrested, convicted and sentenced, and the defendant bank was forthwith notified of the loss, but it declined to pay any part thereof.

It was shown on the trial that in March, 1891, the defendant bank opened an account with the plaintiff as a depositor in the usual form, and from that time, for the period of over two years and a half, his deposits, made in the ordinary way, aggregated over six hundred and twenty-two thousand dollars. During all that time, as well as before, plaintiff had in his employ said confidential clerk and bookkeeper, to whom he specially entrusted the business of attending to his bank accounts. That duty included making deposits, occasionally handing in the bankbook to be written up and balanced, and, when that was done, the further duty of receiving the cancelled checks, etc.,—with the payment of which the bank had credited itself—and delivering the same to the plaintiff for examination, approval, etc. In the same connection, it was the duty of the clerk to verify the bankbook, as the same was written up and balanced, from time to time, by the bank and report the result to the plaintiff. This he professed to do, but, in fact, he falsely reported that the balance, etc., were correct.

From March, 1891, to November, 1893, the clerk forged checks to the amount of the claim in this case, which were paid by the bank and charged to plaintiff in his bankbook. For the purpose of concealing these forgeries, he falsified his employer's books, and, by misadditions and missubtractions forced the balances in the check-book so as to make them agree with those in the bank-book. During the period above mentioned plaintiff's bank-book was balanced twelve times. The first settlement included two forged checks —one $300 and the other $200. The last settlement included a $350 forged check. The other forgeries were respectively included in the intermediate settlements. At each settlement the amount of each check, not previously settled and cancelled, was entered on plaintiff's bank-book by the bank as a charge against him, and the book, together with the checks was delivered to his clerk for the purpose of examination and verification. If, at the time of each settlement, the forged checks had been examined by the plaintiff, or, if the number and the aggregate amount of the checks had been compared with the number and amounts of the checks separately entered in the bank-book, or, if the checks had been compared with the stubs of the check-book, or, if the additions of the deposits, and checks on the check-book had been examined, the forgery would have been discovered. Neither of these was done, for the reason that plaintiff's unfaithful clerk, who was deputed by him to receive the checks, etc., from the bank, take them to the office and compare the amounts, etc., with the bank-book, abstracted and destroyed the forged checks, and failed to call his employer's attention to the discrepancies which undoubtedly would have resulted from a proper comparison and examination. He did this because he himself was the forger. The result was that, for more than two years and a half, after the first forged checks

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were paid, no complaint was made and no notice of any error in the settlements was given to the bank. It was not the bank's fault that the first forgeries were not promptly discovered and notice thereof given. If plaintiff's duty to the bank had been performed at the proper time the fact would have appeared that the bank had charged plaintiff, on his bank-book, with the payment of two items ($300 and $200) for which no vouchers appeared among the checks handed to him by his clerk. These vouchers—the two forged checks—had been abstracted and destroyed by the latter. No objection having been made at the time of the first settlement the bank had a right to assume that everything was correct, including the two checks, purporting to be signed by him. His silence was tantamount to a declaration to that effect; and, in afterwards honoring checks signed by the same person, the bank had a right to consider the fact that these signatures had been at least tacitly recognized by the plaintiff as genuine.

While the plaintiff was not chargeable with the knowledge of his clerk, that the latter had committed the forgery, he was clearly responsible for the acts and omissions of his clerk in the course of the duties with which he was intrusted, viz., to receive the checks from the bank, take them to his employer's office, compare the amounts thereof with the amounts in the bank-book and check-book, etc.

In view of the uncontradicted evidence as to the foregoing facts, it cannot be doubted that as between the bank and the plaintiff, the latter alone should be held responsible for the consequences resulting from the failure to examine the checks in question and approve or reject them within a reasonable time. In contemplation of law, the delivery of the checks to plaintiff's clerk was a delivery by the bank to the plaintiff himself, as the basis on which its credits were claimed. The bank was therefore entitled to have them examined and, if rejected, returned within a reasonable time. That was not done, and because of plaintiff's failure to perform his duty, in that regard, he should not be permitted to recover. Any other rule would be inconsistent not only with general and long established custom, but also with well settled principles of law on the subject: Bank *v.* Morgan, 117 U. S. 96, 107; United Security, etc., *v.* Bank, 185 Pa. 586.

We find no evidence that required submission of the case to the jury. There was no conflict of testimony as to the failure of the plaintiff to perform the duty which, under the undisputed evidence, he owed to the defendant; nor was there any evidence of negligence, on the part of the bank, that should have been submitted to the jury. The checks, purporting to be signed by the plaintiff were destroyed, and of course they were not produced. There was not a particle of evidence that the signatures were not such complete fac similes of plaintiff's signature as to be impossible of detection, even by an expert. As correctly stated by witness to question put by plaintiff's counsel, he was not an expert penman, and he had never before had any experience in forging other people's names, but he was not asked, and did not say, that the signatures were not made—either by the use of tracing paper or otherwise—so like the originals that they could not be detected by an ordinary inspection. On this point, negligence is not to be presumed, and hence the presumption must be in favor of the bank. In the absence of any evidence, from the signatures themselves, or from witnesses, that there was any difference, between them and plaintiff's signature, which could be detected by the eye, it must be assumed that the forgery was of such a character that the bank acting with due care and caution was deceived by it. In fact, there was no evidence from which the jury would have been warranted in drawing the conclusion that the bank in honoring checks, acted negligently.

After a careful consideration of the evidence, our conclusion is that there was no question of fact that should have been submitted to the jury, and hence there was no error in directing them to find for the defendant.

The judgment is therefore affirmed.

H. B.

Oct. '98, 73. Supreme Court. November 4, 1898.

Nelson v. Steen.

Evidence—Proof—Non-suit—Trespass.

Insinuations and suspicions are not evidence and have no place in it, and certainly do not constitute a proper basis for a verdict in accordance with them; so, where a miner brings an action of trespass against his employer for using false weights on the scale by which the plaintiff's compensation is determined, not only the falsity of the weights must be proved, but also that defendant fraudulently used them knowing them to be so.

Where the evidence is short of this, a non-suit is properly entered.

Appeal of George Nelson, from the judgment of the Common Pleas No. 3. of Allegheny County, in an action of trespass wherein Thomas D. Steen was defendant.

The facts of the case are set forth in the opinion of the Supreme Court.

On motion of the defendant, the Court entered a compulsory non-suit, and subsequently dis-

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charged a rule to take the non-suit off, which action was assigned as error.

Rody P. Marshall, (*T. M. Marshall* with him), for appellant.

A party defrauded in a bargain, on discovering the fraud may either rescind the contract and demand back what has been received under it, or he may affirm the bargain and bring suit and recover damages for the fraud.

Pearsoll *v.* Chapin, 44 Pa. 9.
Cooley on Torts, page 503.
Masson *v.* Bovet, 1 Denio, 69.
Herrin *v.* Libbey, 36 Me. 350.
Cook *v.* Gilman, 34 N. H. 556.
Wright *v.* Pete, 36 Mich. 213.
Hammond *v.* Stanton, 4 R. I. 65.

If one, by means of a false warranty is enabled to accomplish a sale of property, the purchaser may have his remedy upon the contract of warranty, or he may bring suit for the tort.

Deen *v.* McLean, 48 Vt. 412.

A breach of duty in the employment under a contract would give rise to an action either in contract, or in tort, at the plaintiff's election.

Govett *v.* Radnidge, 3 East, 62.
Heastings *v.* McGee, 66 Pa. 384.

J. Charles Dicken, for appellee.

October 6, 1899. McCollum, J. This suit is based on an alleged fraud of the defendant upon his employés engaged in mining coal under an agreement which allowed to each employé 69 cents for every 2200 pounds of screened lump coal which he mined. It was understood by the parties to this agreement that no more than 2200 pounds of coal, when screened, should be placed on any car or pit wagon of the defendant used in bringing the coal, when mined, to the surface, and that if more coal was loaded into such car or pit wagon the miner would not receive pay for the excess. The 2200 pounds was the limit of the weight of the scales, which when in use were open to the inspection of any person interested in the operation of them. The amount due each miner for his labor under the agreement was paid every two weeks and he then gave his receipt for it. The miners made no complaint to the defendant of inaccuracy in weights and it was never intimated to him that there was such inaccuracy until July 5, 1894, when Lattimer, the miners' check weigher, alleged that he had discovered an inaccuracy in the weights prejudicial to the interests of the defendant's employés. Upon this allegation, James Blick, the mine inspector whose duty it was to inspect the scales, was sent for. He promptly responded to the call and upon examination and inspection of the scales he found them to be correct. About two weeks after his first examination, he was called by Lattimer to make another inspection which resulted in their conclusion that the scales were incorrect.

The plaintiff in the case under consideration instituted an action of trespass for the recovery of twenty-five hundred dollars to compensate him for the loss he claims to have sustained by the alleged fraudulent act of the defendant. What he would have been entitled to if he had sustained the action instituted as above stated was 69 cents on every 2200 pounds of coal which he had mined and had not been paid for. If his own account of the work he had done for the defendant in mining coal from the last of May, 1893, until the 24th of July, 1894, is accepted as true, the amount due him from the defendant for the coal he mined in excess of the coal he was paid for would be less than ninety dollars, and probably not more than half that sum. His testimony relating to this subject was unsatisfactory because he was unable to furnish any memorandum or data in corroboration of it, or to specify from recollection what portion of the time between the last of May, 1893, and the 24th of July, 1894, he was engaged in mining coal for the defendant and during what portion of it he was out of employment.

When the testimony on the part of the plaintiff was closed, a motion was made for a compulsory non-suit on the ground that it was not shown that the defendant knowingly and fraudulently made use of false weights. The non-suit was granted and the Court upon full hearing and consideration refused to take it off. It is obvious that under the pleadings in the case, there could be no recovery of the sum which the plaintiff alleged was due to him from the defendant without clear and satisfactory evidence that the latter knowingly and fraudulently used false weights with intent to cheat and defraud him and his co-employés. In the absence of such evidence it was the plain duty of the Court to enter and affirm the non-suit.

Insinuations and suspicious are not evidence, and strictly speaking they have no place in it. They certainly do not constitute a proper basis for a verdict in accordance with them. In this case, however, they appear to have been regarded by the plaintiff and his supporters as important factors and influential aids in the prosecution of his claim. That the miners employed by the defendant during the period defined in the plaintiff's statement were suspicious that their employer was cheating and defrauding them by the use of false weights while they were regularly receiving from him full payment of the amounts they supposed they were respectively entitled to for their work the two preceding weeks and expressed no dissatisfaction with the treatment they re-

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ceived, is, to say the least of it, a singular circumstance. Another circumstance worthy of note is that this suit was not brought by the plaintiff until two years and four months after the defendant ceased to employ him. Aside from these and other circumstances mentioned herein, a careful examination of the evidence has convinced us that the Court did not err in entering the nonsuit.

Judgment affirmed.

W. D. N.

Jan. '98, 200. Supreme Court. January 9, 1899.

Orne's Estate.

Decedent's estate—Audit of account—Questions of fact—Life tenant—Pledge of stock.

Where exceptions depend almost wholly on questions of fact passed upon by the Court below, and these facts are found against the appellants, the appellate Court assumes them to be as found, and will not reverse.

J., the testator, was the son of L., of Springfield, Mass., who died in 1887, leaving a will of which she appointed her son J. executor, and wherein, after specific bequests, she gave to him all the residue of her estate for life, and at his death provided that it should go to his children C., L. and J. At her death, L., with other stock, owned seventy-six shares of stock of the H. company, which was part of her residuary estate, and which at the time of her death was pledged for a loan of $12,000 borrowed on her promissory note from a savings institution. J., as executor, gradually paid off this loan, so that in about four years after L.'s death the debt was entirely extinguished and the collateral was returned and became part of her residuary estate ih the hands of her son and executor, in which he was entitled by the terms of the will to a life interest. Soon after he began to borrow from the same bank, pledging this stock as collateral until the sum for which the stock stood pledged at the time of his death amounted to $9100, the notes being signed by him individually and as executor of L. The money borrowed was used, according to his own statement to P., made when he asked him to permit the insertion of his name as one of the executors of his will, partly in carrying on his business in Philadelphia and partly in the purchase of bonds of the H. Co., for which stockholders had the right to subscribe. At his death, he had in his possession these bonds to the value of $9850, which the executor sold and applied the proceeds to the payment of the notes, thus releasing the seventy-six shares of stock from pledge. The life estate of J. in this stock terminated by his death, the executor delivered it to the executor of L. for J.'s children, to whom it had been bequeathed by his mother, L. The appellants claimed that the stock was pledged by L. in her lifetime for her own debts, which in substance, through all the subsequent renewals, continued the same debt until J.'s death:

***Held,* that there was no evidence that after the release of the stock J. borrowed one dollar upon it for his mother's estate, but on the contrary that he borrowed for himself, and used the money for his own purpose to the amount of $9100, which debt was unpaid when he died. This being the case, it was the duty of his executor to pay this debt, and then hand over the seventy-six shares of stock to the executor of L. to be disposed of as her will directed. These bonds were unquestionably J.'s bonds, and the executor had the right to sell them for this debt.**

Appeal of Emily V. Hamilton, formerly Orne, and The Union Trust Company, guardian of the minor children of James D. Orne, deceased, from the decree of the Orphans' Court of Philadelphia County, dismissing exceptions to auditor's report.

The facts are set forth in the opinion of the Supreme Court.

John G. Johnson, (with him *George Frederick Keene* and *Charles C. Lister*), for appellants.

John Cromwell Bell, (*Henry K. Fox* with him), for appellee.

October 6, 1899. DEAN, J. James D. Orne, of Philadelphia, died on the 31st of July, 1894, leaving a will, of which he appointed Dwight Pratt, his nephew, of Springfield, Massachusetts, and Henry S. Lee, executors. Lee having declined to accept, Pratt acted as sole executor. The testator left to his widow Emily such share of his estate as would pass to her under the intestate laws, and the remainder to his three children. For some years before his death, he had been a manufacturer of hosiery in a small way, and the stock and capital in this business made up the larger part of his estate. One James H. Millhouse had been employed by him to assist in conducting his business. The executor filed an inventory of the assets of the business, amounting to $13,347.47; against this there were outstanding bills of over $6000, leaving the net value $6695.56. There being considerable unworked material on hand, and the executor being of opinion that the business would sell better if kept up as a going concern, with the assistance of Millhouse, and with the consent of the widow, he continued the business for nearly a year after the death of the owner; then sold the entire assets, stock on hand, machinery and book accounts to Millhouse for $12,000. The proposition to purchase at that figure came from Millhouse, and was only accepted after a conference with the widow, who had first indicated a desire to purchase herself, but afterwards declined. During the whole period of conducting the business by the executor, all the accounts were kept with the Real Estate Title Insurance and Trust Company, of Philadelphia, which company was surety for the executor, he being a non-resident of this State. These accounts, although bank accounts, nevertheless showed fully all the receipts and payments in the business. What were properly in the executor's accounts, had been destroyed by an accident, but

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substantially they were supplied by the books of the trust company.

The executor having filed his first and final account, many exceptions were filed thereto by the widow and children. An auditor was appointed to hear and decide on exceptions and make distribution. It was sought, in the hearing before him, to surcharge the executor with the difference between the inventory filed and the price accepted on the sale to Millhouse, $1347.47. Also, an alleged profit of $7000 in the business while it was carried on between the death of testator and the sale; a claim paid Millhouse of $706 for salary; the costs of audit; certain railroad traveling expenses the executor had taken credit for; it was further claimed, that $1944.37, commission charged by the executor, should be stricken from the account; and further, that he should be charged with the sum of $9850, the proceeds of certain bonds sold by him and appropriated to the payment of a note of $9100, made and delivered to Springfield Savings Institution by testator: and for which he had pledged as collateral, seventy-six shares of the capital stock of the New York, New Haven and Hartford Railroad.

The auditor, after a full hearing, overruled all the exceptions, and his report was confirmed by the Court. We now have this appeal by the exceptants, who prefer thirty-seven assignments of error, grouping them in their argument in five propositions.

Except as to the fifth, we find nothing calling for notice or discussion by us; not that the first four embrace nothing of merit, or that they are wholly groundless, but because they depend almost wholly on questions of fact passed upon by the auditor and the Court below. These facts are found against the appellants; whether correctly or not, there was sufficient evidence to sustain them; assuming them to be as found, the legal and equitable conclusions drawn from them by the auditor ought to follow; and were there nothing further, we might well affirm the decree on the clear and convincing opinions of the auditor and the Court below; but the answer to the question raised by the fifth proposition of appellants, was not, at the argument, nor on a first perusal of the paper books, so obvious as that of the preceding four; therefore, we have given it further examination and notice. That proposition is as follows:

"The seventy-six shares of New York, New Haven and Hartford Railroad Company stock, which at the decease of Orne stood in the name of the Springfield Savings Institution as collateral security for a note of $9100, signed by Orne individually and as executor, should have been used, in the first instance, in liquidation of that note, and should not have been delivered to the three children who took under the will of Orne's mother clear of the pledge."

It appears that James D. Orne, the testator, was a son of Lucy G. Orne, of Springfield, Mass. She died in 1887, leaving a will of which she appointed her son James executor; by this will, after specific bequests, she gave to her son all the residue of her estate for life, and at his death, directed it should go to his children, Clara, Lucy and James. At her death, the mother, along with other stock, owned seventy-six shares of the New York, New Haven and Hartford Railroad Company stock, which was part of her residuary estate; she had borrowed on her promissory note, from the Springfield Savings Institution, $12,000, and had pledged the seventy-six shares as collateral for the loan, which at her death was unpaid. James D., as executor, gradually paid off this loan, so that, in about four years after his mother's death the debt was entirely extinguished; the collateral, being thus discharged from the lien of the pledge, at once became an unencumbered part of the residuary estate of the mother in the hands of her son and executor; he was entitled by the terms of the will to a life interest in the stock, and it went into his possession as executor. Then, immediately after, he commenced borrowing from the same bank on notes, pledging the stock as collateral; at his death, he owed the bank $9100, for which the stock stood pledged; the notes were signed by him individually and as executor of Lucy G. Orne; the money borrowed was used, according to his own statement to Mr. Pratt, made when he asked him to permit the insertion of his name as one of the executors of his will, partly in the purchase of bonds of the New York, New Haven and Hartford Railroad Company, for which stockholders had the right to subscribe. At his death, he had in his possession these bonds to the value of $9850, which the executor sold and appropriated the proceeds in payment of the note, thus again releasing the seventy-six shares of stock from pledge. The life estate of Orne in this stock having terminated by his death, the executor delivered it to the executor of Lucy G. Orne for his, James's, children, to whom it had been bequeathed by his mother.

The claim made by appellants before the auditor and here, in effect is, that the stock was in fact pledged by Lucy G. Orne in her lifetime for her own debts; which in substance, through all the subsequent renewals, continued the same debt until James D. Orne's death. Apparently, in the face of the papers, this contention is plausible. The same seventy-six shares, first pledged by her, remained in the possession of the same bank with

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a transfer to it as collateral; the note after the mother's death was signed James D. Orne, executor of Lucy G. Orne, and by James D. Orne. But the papers are the subject of explanation. Henry S. Lee, treasurer of the savings institution, and one of the executors of Lucy G. Orne, testifies positively, with the books of the bank before him, that her note of $12,000 was paid off gradually by her executor, James D. Orne, the last payment of $50 being made on the 5th of June, 1892, more than two years before James D. Orne's death. The evidence does not show from what source the money came to pay the note, but as it was a debt of Lucy G. Orne, as her estate was a considerable one, as she owed no other debts at her death, and as it was paid by her executor, the presumption is, it was paid with money belonging to her estate. Being released, the stock at once passed into the possession of the executor, James D. Orne, who individually, by his own mother's will, had in it a life estate, which would at least equal the income from the stock. With the title to the stock in that situation, and he having the possession, he at once commenced pledging it for loans to himself, and continued so to do until his death. There is no evidence that he thereafter borrowed one dollar upon it for his mother's estate; on the contrary, there is the evidence of his own admissions, that he borrowed for himself, and used the money for his own purposes to the amount of $9100, which debt was unpaid when he died. It is wholly immaterial that he had no authority as executor, or as a life beneficiary, to thus pledge the stock, or that the bank had no authority to accept it as a pledge, as against the children to whom it was bequeathed by their grandmother; that is not the point now. The learned auditor, on ample evidence which he fully sets out, has found the debt for which the stock was pledged at the death of James D. Orne, was solely his debt; this being the case, it was the duty of his executor to pay this debt, as he did do, and then hand over the seventy-six shares of stock, as he did do, to the executor of Lucy G. Orne, to be disposed of as her will directs. That the executor of James D. sold the railroad bonds to pay this debt, is not material; they were unquestionably his own bonds, and the executor had a right to make that use of them. That they were not included in the inventory, was a mere mistake, which at the suggestion of the executor himself, was corrected.

All the assignments of error are overruled, and the decree of the Court below is affirmed at costs of appellants.

W. C. S.

Jan. '98, 416. Supreme Court. March 23, 1899.

Mintzer v. Hogg et al., Trustees.

Negligence—Repair of footway—Duty of owner and municipality—"Reasonableness and watchfulness."

It is the primary duty of an owner of property to keep the sidewalk of a public street in front of his premises in repair; he is not relieved from this duty by the fact that the premises are leased to a tenant.

The request to permit the jury to be taken to the place of accident and inspect the pavement which caused the injury was an appeal to the sound discretion of the Court, and the refusal would not justify the finding that such discretion was improperly exercised.

Appeal of William Greenough and Catharine L. Hogg, trustees under the last will and testament of William Hogg, Jr., defendants, from a judgment of the Common Pleas No. 3, for Philadelphia County, in an action of trespass by Laura V. Mintzer.

On the trial of this cause, it appeared that the defendant was injured by falling at night into a hole in the pavement in front of either 1902 or 1904 East York avenue; the houses were adjoining and were both owned by the estate for which defendants were trustees. Evidence was given by the defence that 1902 had been rented to a tenant, one Kelly, and had been in his possession continuously from February 4, 1889, until after the accident, which occurred October 3, 1896. The hole was filled in immediately after the accident. It was alleged that at the time of trial the new bricks showed where the hole had been, and the defendants requested the Court to allow the jury to view the place. This the Court refused. (Second assignment of error.)

The Court (FINLETTER, P.J.,) charged the jury in the following language:

"This action is brought by the plaintiff to recover from the defendants damages arising from an injury which she has suffered in consequence of the negligence of the defendants. There are two questions to be determined by the jury. First, were the defendants negligent; and, secondly, was the plaintiff negligent in such a way as contributed to the injury? No matter how negligent the defendant may have been, if the plaintiff in any degree contributed to the accident she cannot recover.

"The alleged negligence is that the defendants did not keep the sidewalk of their property in a reasonably good and safe condition. Negligence is simply the absence of that care which the circumstances of the case required. That, so far as the defendants are concerned, did the defendants omit to do anything which contributed to the in-

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jury to the plaintiff; and, on the other hand, did the plaintiff herself exercise reasonable care and watchfulness, such as the circumstances required.

"It was the duty of the defendants to keep their pavement in reasonably good repair. It was the duty of the plaintiff to exercise reasonable watchfulness under all the circumstances of the case. The questions which the jury are to consider are, first of all, was the brick pavement out of repair; that is to say, were the bricks removed and was there a hole created by the removal of the bricks, or any other matter, touching the want of repair. You will understand that property owners are not responsible for the ordinary unevenness of a brick pavement, but only when the pavement itself is out of repair, or, in other words, when portions of a brick pavement are removed, or when there exists such a condition as is complained of here.

"Again, if you find that the brick pavement was out of repair, you will determine from the evidence whether it was dangerous or not. You will also determine from the evidence whether the want of repair in the pavement caused the injury complained of by the plaintiff. In this connection it is important for you to consider what knowledge the plaintiff had of the pavement itself—its condition, and its surroundings, and the general locality or neighborhood.

"If you are satisfied from all the evidence in this case—and I mean the evidence of the defendants as well as for the plaintiff—that the defendants were negligent, then the question arises, was the plaintiff herself negligent? In considering this question the jury will consider, first, her knowledge of the locality, of the pavement itself and of the hole, and its want of repair. Again, the jury are to take into consideration a very important thing, and that is the time—whether it was daylight or night, or whether there was sufficient light, or what quantity of light was thrown upon the hole itself by the reflection of light in and about the place. Again, the jury will take into consideration all the difficulties and circumstances which might have entered into a consideration of the safety or danger of crossing that pavement in the plaintiff's mind, such as the darkness of the night, and the obscurity of the light, and all the attendant circumstances. In this connection I have also to say that the greater the difficulty in seeing clearly renders the greater care on her part. The wayfarer is bound to consider the difficulties of seeing clearly, as he passes along, just as in ordinary circumstances he will consider any question which involves his safety. In this connection it is my duty to say to you that the plaintiff was not bound to exercise extraordinary care. She had a right to assume that the pavement was reasonably safe, and that by the ordinary use of her eyes she could safely walk upon it. Care, under all the circumstances, is all that the law enjoined upon her to exercise. If you are satisfied that the defendants were negligent, and that the plaintiff was not negligent in anything that contributed to the injury, then the question of damages arises. She would be entitled to compensation for the pain and suffering, and that is a question in which the jury must always, necessarily, have great difficulty. All I can say to you upon the question is that you must consider the nature and character of the injury itself, and the necessary treatment which it required at the hands of the physician or otherwise. Because it is the only way in which the jury can ascertain, where we have not suffered such injury, what amount of suffering could reasonably be expected from such an injury. In considering this question you must exercise very great care, in order that you may arrive at a safe and proper conclusion upon the question of compensation for the pain and suffering. In addition to that, she would be entitled to compensation for any loss of time which was the result of this accident, and compensation of that kind usually is easily ascertained, because it is simply a question of time and earning capacity of the person at the time the accident occurred. It appears from her evidence, and it is not contradicted, that she was earning about one dollar a day as seamstress, and she said she had reasonably full employment as such. She has added to that, in addition to her daily compensation of one dollar a day as seamstress—she had other means or capacity for earning money—so that she earned about $300 a year. I must say, in my experience, that does not seem to be an extraordinary allowance for a dressmaker; but it is entirely for you to determine, from the evidence, how much she could have earned if this injury had not occurred, and the length of time she might have earned it. The most important portion of her case is her claim for permanent injuries. As I understand that, one of the doctors said that up to the present time the injuries she then received interfered with her dressmaking. In considering the question, both as to the time she lost and the amount of earnings, if you determine this to be a permanent injury, it perhaps would not be fair to the defendants to assume or estimate her damages at $300 per year, or six dollars per week, because it is evident she might earn something even in her present condition, or in the event of this injury being permanent, so that she could not work at her business as a dressmaker.

"A person who claims for injuries, either permanent or otherwise, must satisfy the jury that

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he or she is not in a condition to earn anything at all, and in the absence of such evidence the jury have a right to infer that she has a capacity to earn something, and it is for the jury to say what the amount should be, and that much should be taken from what she claimed to be her yearly earnings. The jury should never allow damages for permanent injuries unless they are satisfied from clear evidence that the injury is permanent. If the doctors have said that this is a permanent injury, there is no reason why you should disbelieve that, because it is their duty to understand such matters, and instruct the court and jury upon such matters, and wherever a responsible physician says an injury is permanent, the jury are bound to consider it is permanent. If a physician qualifies this in any way, and don't say absolutely that it is a permanent injury, then the jury should take that into consideration, because if it is a matter of doubt to a physician as to the permanency of the injury, it is not satisfactory evidence from which the jury should conclude that the injury is permanent. The plaintiff is bound to satisfy the jury of the permanency of the injury, and if there is any doubt about it, the jury have no right to consider it.

"In a matter of this kind, it is your duty, under all the evidence of the case, to render a just and fair verdict between the parties. If you find for the plaintiff, she is entitled to a fair and just compensation, under the suggestions I have made to you. It has been properly said by her counsel that the jury may be just as extravagant in making the verdict too little as too large.

"I have the utmost confidence that you will endeavor to reach a fair and just and proper conclusion in your determination of the matters in dispute between the parties."

The Court below refused the following points of the defendant:—

"1. If the accident for which this suit is brought occurred by reason of the defect (described in the evidence) in the sidewalk of the public highway in front of a house occupied by a tenant, the landlords of the house are not liable therefor to the plaintiff." (Third assignment of error.)

"2. An owner out of possession, whose house is in the actual occupation of a tenant, is not required to keep a constant supervision of such house and of the highway in front of it; and if a defect occurs in the sidewalk during such occupation by a tenant, by reason of which a person walking on the street is injured, the landlord is not liable to the person injured, unless knowledge or notice of such defect is traced to him." (Fourth assignment of error.)

"3. An owner out of possession, whose house is in the actual occupation of a tenant, is not liable for an accident from a defect in the sidewalk arising during the occupation by the tenant unless he have formal notice from the city to repair the defect." (Fifth assignment of error.)

"5. If the jury believe that the hole in which the plaintiff claims to have fallen was in front of property 1902 York street, under the pleadings and evidence the plaintiff cannot recover." (Sixth assignment of error.)

"6. The defendants, being merely trustees of a legal title, are not responsible in the first instance to plaintiff for her injury from an accident occurring by reason of a defect in the public highway unconnected with the building, no notice having been given them to repair. The responsibility in the first instance is on the city of Philadelphia." (Seventh assignment of error.)

"7. The evidence on behalf of plaintiff showing that at the time 1904 was leased to the tenant in possession at the time of the accident, the defect in the highway was a very minor one, and the hole having been rendered dangerous by sweeping dirt out of it, making it deeper and loosening the bricks, the responsibility is upon the tenant and not upon the trustees defendant." (Eighth assignment of error.)

"8. It appearing in plaintiff's evidence, if believed, that the defect was an obvious one; that it was near an electric light, and that the sidewalk was not obstructed, she is guilty of contributory negligence, and the verdict should be for the defendants." (Ninth assignment of error.)

"9. Under all the evidence the verdict should be for the defendants." (Tenth assignment of error.)

Verdict for plaintiff $7500, and judgment on filing remittitur for all above $4000. The defendants took this appeal and filed assignments of error, inter alia, as above indicated, and that "the Court erred in entering judgment for plaintiff, inasmuch as her statement . . . set out no cause of action but purports to be a breach of duty in failing to keep a part of the highway in repair, whereas there is no duty in law incumbent on defendants or any of them to keep the highway in repair." (First assignment of error.)

J. Howard Gendell, for appellants.

An abutting owner is not liable to one injured on a sidewalk from failure to keep the same in repair or free from snow or ice, although an ordinance required such owner to remove such snow.

Thomas's "Negligence, Rules, Decisions," ed. 1895, 1142.
Fulton *v.* Tucker, 3 Hun, 529.
Noonan *v.* City of Stillwater, 33 Minn. 198.
City of Hartford *v.* Talcott, 48 Conn. 525.
Lord *v.* Mobile, (Ala.) 21 So. Rep. 366.
Flynn *v.* Canton Co., 40 Md. 312.

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Hoyt *v.* Danbury, 69 Conn. 341.
Keokuk *v.* Independent Dist., 53 Iowa, 352.
Eustace *v.* Jahns, 38 Cal. 3.
Jansen *v.* City of Atchison, 16 Kansas, 358.

The tenant only, and not the landlord, is responsible for damages caused during his term by reason of dilapidations arising during the term. The rule is thus laid down in all the text books and the decisions in this State are numerous.

Bears *v.* Ambler, 9 Pa. 193.

Certain cases cited against us in the Court below are in our favor. The landlord was held liable, but the Court was careful to place the liability on the ground that the defect existed at the time of the demise. This would be unnecessary if the landlord were always responsible for the condition of his house. This explains, among others, the following:—

Wunder *v.* McLean, 134 Pa. 334.
Knauss *v.* Brua, 107 Id. 85.
Reading City *v.* Reiner, 167 Id. 41.

Now, both she and her witnesses claim that the hole was directly in the middle of the sidewalk: that it was fully half a yard in its smallest diameter, and about a foot deep. There was an electric light at the corner, not more—certainly not much more—than forty feet distant. It is claimed that the light was dim, but one witness, Mamie Kress, saw her nearly a square away, and another saw her fall when he was on the the other side of the street. She could and with reasonable care should have seen a hole so large and deep. It was at least as prominent and easily seen as the obstruction on the footwalk forming the cause of action in—

Robb *v.* Connellsville Borough, 137 Pa. 42.

A. T. Freedley, (*Franklin Swayne* with him), for appellee.

There is no bill of exceptions in this case. The notes of trial do not disclose that any request was made to reduce to writing and file of record the charge and answers to points. The notes simply show that defendant asked for an exception.

The law and approved practice relating to bills of exception and stenographers' notes have been fully and recently stated by this Court in—

Rosenthal *v.* Ehrlicher, 154 Pa. 401.
Connell *v.* O'Neil, Id. 582.
Hill *v.* Egan, 160 Id. 121.
Com'th *v.* Arnold, 161 Id. 327.
Woodward *v.* Heist, 180 Id. 163.

And for these reasons this appeal should be quashed.

The appellant argues that under extracts from text writers and decisions of other States, the owner of property is not liable for any injury sustained by a citizen by reason of the dangerous and improper condition of the sidewalk in front of the owner's property, and that the citizen's sole remedy is against the municipality. Even if these cases and citations were law in Pennsylvania they are not applicable to the facts of the present case. This is not a mere casual or temporary want of repair. The negligence consisted in suffering a dangerous hole in the pavement and permitting it to so remain for months to the damage of the passers-by. It was an existing nuisance and obstruction to travel.

Lohr *v.* Philipsburg, 156 Pa. 249.
Duncan *v.* Phila., 173 Id. 554.
Brown *v.* Weaver, 17 WEEKLY NOTES, 230.
City of Pittsburgh *v.* Fay, 8 Pa. Super. Ct. 275.

Many cases exist in Pennsylvania in which, after recovery from the municipality, the latter has successfully recovered over from the property owner on account of the breach of his primary duty to keep the sidewalk in a safe condition. Such were the cases of—

Reading *v.* Reiner, 167 Pa. 41.
Brookville *v.* Arthurs, 152 Id. 334; Id. 130 Pa. 501.

An owner of property cannot escape liability for an existing nuisance thereon by demising it to a tenant and putting him in possession.

Wunder *v.* McLean, 134 Pa. 334.
Reading City *v.* Reiner, 167 Id. 41.

The question of contributory negligence was carefully submitted to the jury by the trial Judge, and the jury found in her favor. The case is on all fours with—

Bruch *v.* Phila., 181 Pa. 588.

May 31, 1899. STERRETT, C. J. While the manner in which the defendants sought to perfect their appeal, etc., after the record was sent up here, is irregular and unsatisfactory, we all agree that in view of the special circumstances of the case—especially the illness of the learned trial Judge, etc.—the motion to quash the appeal should not prevail, and the motion is therefore denied.

Without unnecessarily consuming time in referring here to the evidence relied on by the parties respectively, it is sufficient to say that our examination of the record has not disclosed any error in the proceedings, leading up to and including the judgment, that would justify us in sustaining any of the specifications.

In view of the evidence, all of the nine points for charge presented by the defendants, except the fourth, were rightly refused by the learned trial Judge. In affirming their fourth point, he properly instructed the jury in the words thereof, thus: "A person walking along the highway is required to exercise a reasonable watchfulness over his feet, and if the jury believe that this plaintiff, at the time of the accident, did not exercise such watchfulness, she cannot recover."

Viewed in the light of this instruction, the

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verdict in plaintiff's favor necessarily implies a finding by the jury that she did exercise such "reasonable watchfulness" in walking on the pavement in front of defendants' house on the east side of York street, the point at which she was injured, and hence she was not guilty of contributory negligence.

The question of defendants' neglect of duty, in not keeping the pavement in front of their "house in such order and condition as to permit persons traveling over and along said pavement, ... to do so safely," etc., was fairly submitted to the jury with instruction so full and adequate that no just exception can be taken thereto.

The subject of complaint in the first specification is that "the Court erred in entering judgment in favor of the plaintiff, inasmuch as her statement . . . . sets forth no cause of action, but purports to be a breach of duty in failing to keep a part of the highway in repair; whereas there is no duty in law incumbent on defendants or any of them to keep the highway in repair."

If this is intended to apply to the sidewalk on which plaintiff was injured, it is not correct as a legal proposition. It is the primary duty of property owners along a street to keep in proper repair the sidewalk in front of their respective properties: Lohr *v.* Philipsburg, 156 Pa. 249; Duncan *v.* Philadelphia, 173 Pa. 554; Pittsburgh *v.* Fay, 8 Pa. Super. Ct. 275; Pittsburgh *v.* Daly, 5 Pa. Super. Ct. 532. Hence it is that, owing to this primary liability, many cases exist in this State, in which, after recovery from the municipality, the latter has successfully recovered over from the property owner on account of the breach of his primary duty to keep the sidewalk in a safe condition. Among these are: Reading *v.* Reiner, 167 Pa. 41; Brookville *v.* Arthurs, 152 Pa. 334; Same *v.* Same, 130 Pa. 501. Several statutes in this State also recognize the duty of the property owner to keep his sidewalk in a safe condition. By Act of March 25, 1805, sec. 5, 4 Smith's Laws, 233, councils were authorized by ordinance to compel property owners to pave the footwalks; and by the Act of April 10, 1826, sec. 2, P. L. 326, it was made the duty of property owners to pave the footway in front of their respective properties, and to keep the same in repair.

To the same effect are the following Acts: April 16, 1838, sec. 3, P. L. 626; April 16, 1840, sec. 9, P. L. 412; and March 22, 1865, sec. 1, P. L. 562.

The averments in plaintiff's statement are quite sufficient to entitle her to recover, and the evidence tended to sustain all that were material to her case.

The second and last specification, complaining of the refusal of the Court to permit "the jury to be taken to the place in question and inspect the pavement," cannot be sustained.

The request of defendants was an appeal to the sound discretion of the Court, and there appears to be nothing whatever in the record that would justify us in saying that the discretion vested in the Court below, in that regard, was improperly exercised.

We find nothing in any of the assignments of error that requires further notice. They are all overruled, and the judgment is affirmed.

W. C. S.

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WEEKLY NOTES OF CASES.

VOL. XLIV.] *FRIDAY, NOV. 3, 1899.* [NO. 31.

Supreme Court.

Jan. '98, 316. Supreme Court. March 7, 1899.

Bonebrake v. Summers et al.

Deeds—Charge on land—Construction of—Lien—Judicial sales—Public sale by assignee for benefit of creditors—Act February 17, 1876—Discharge of liens.

Where the habendum in a deed reads as follows: "Nevertheless the maintenance of Daniel Bonebrake and Rebecca his wife, during their natural life, is a part of the consideration herein mentioned, therefore this title does not become clear of all encumbrance until at the death of the said Daniel Bonebrake and Rebecca his wife," the maintenance of said Daniel Bonebrake and wife, the grantors, is charged upon the premises conveyed as a continuing lien.

The grantee, under the above mentioned deed, made an assignment of all his property for the benefit of creditors and the assignee obtained an order of Court, under the Act of February 17, 1876, to sell said premises at public sale; at the sale public notice was given of the above stipulation, and the deeds to the purchasers were made subject to the rights contained therein. After this sale Daniel Bonebrake's widow removed from the premises and subsequently brought a bill in equity, praying for a decree requiring the purchasers to pay to her a certain sum annually for her maintenance and support. The answer denied this right, claiming that under the Act of February 17, 1876, the purchaser at the sale took the premises discharged from "all liens except first mortgages, ground rents and purchase money due the Commonwealth":

***Held*, (1) All that was intended by said Act of February 17, 1876, was to put a public sale by an assignee upon the same plane as a judicial sale; (2) by such an enactment it is not to be presumed that the Legislature intended to make any innovation upon the common law further than absolutely required; (3) by analogy from the decisions under a judicial sale, this lien was not discharged, as it was one that was incapable of being actually computed and the deeds of the purchasers were made expressly subject to the same.**

Appeal by Benjamin Summers et al., from the judgment of the Superior Court affirming a decree of the Common Pleas of Franklin County, in favor of Rebecca Bonebrake.

The cause was heard on bill and answer, before STEWART, P. J., and his findings of law and fact are fully set out in the report of the case as determined by the Superior Court. (See 43 WEEKLY NOTES, 568; 8 Super. Ct. Rep. 55). The lower Court entered a decree in favor of the complainant, and this was affirmed by the Superior Court in an opinion by BEAVER, J.

From this last decree the present appeal was taken.

O. C. Bowers, (with him *W. U. Brewer* and *William Alexander*), for appellants.

W. Rush Gillan, (*Walter K. Sharpe* with him), for appellee.

October 6, 1899. DEAN, J. After the concise and clear findings of fact by the learned trial Judge in the Common Pleas, a restatement of them here is wholly unnecessary.

The Court held, that these words in the *habendum* of the deed: "Nevertheless the maintenance of Daniel Bonebrake and Rebecca, his wife, during their natural life, is a part of the consideration herein mentioned, therefore this title does not become clear of all encumbrance until at the death of the said Daniel Bonebrake and Rebecca, his wife," expressly charged upon the premises conveyed, a maintenance for the grantors, and intended this charge to be a continuing lien. We think this clause is susceptible of no other interpretation. This being so, is the intention defeated by conclusions of law from the undisputed facts? At the date of the deed, there were prior liens against the grantors which bound the land, and which their grantee assumed. Other liens were entered subsequent to the deed, and the grantee made an assignment for benefit of creditors. Public sale was made of the land by the assignee for the benefit of creditors. Not only was the deed embodying the continuing charge of record, but public notice to bidders was given at the sale, that the land was sold subject to this charge; further, the purchasers accepted their deeds with the express stipulation in them, that the land is subject to it. That parties may make such a charge, is held in Hiester *v.* Green, 48 Pa. 101, by this Court on a review of all the authorities. This was reiterated in Strauss' Appeal, 49 Pa. 358. But, then, it has also been settled by Luce *v.* Snively, 4 Watts, 397, and many subsequent cases ending with Rohn *v.* Odenwelder, 162 Pa. 352, that the purchaser at a judicial sale, shall hold the land free from all liens for the debts, not only of the one whose land is sold, but of the debts of previous owners, from or through whom he derived title. To this rule, however, there are exceptions, such as the lien of first mortgages, and those liens which are incapable of computation because of uncertainty; in this last is placed a charge upon land for the maintenance of one or more persons during life. This certainly includes the charge in question, because it is incapable of computation, and although a debt in favor of the previous owner, it was not

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discharged by this sale, and the Court properly so held. It will be noticed the purchase money was in excess of the liens existing at the date of the deed creating the charge.

But it is urged, that under the Act of February 17, 1876, relating to sales of land by assignees, this sale being under that Act, the purchaser, by the express words of the Act takes the land discharged from all liens except first mortgages, ground rents and purchase money due the Commonwealth; that this class of judicial sales stands by itself, and must be controlled, not by the decisions of the Courts, but by the words of the only Act authorizing the sale. We do not think the Act should have the interpretation put upon it by the learned counsel for appellant. The Act of 1876, only, excepts from discharge the very liens excepted by the Act of April 6, 1830; and while literally, the general words could be applied to cover this lien, yet such legislative intent is far from manifest. In fact, to ascertain the amount of this lien is utterly impracticable. We will not assume, that the Legislature intended to do that, which in most cases, would work gross injustice. Nothing more was intended by the Act than to turn an assignee's sale of property, for the benefit of creditors, into a judicial sale. It was not its purpose to abrogate any part of the law as it then stood, applicable to judicial sales generally, and place the purchasers at such assignees' sales in a more favorable situation than those at sheriff's sales. Legislative enactments are to be expounded as near to the use and reason of the prior law as may be; it is not to be presumed, the Legislature intended to make any innovation upon the common law further than absolutely required: Cadbury *v.* Duval, 10 Pa. 265. This Act was passed to remove doubts in mind of purchasers, and place titles on the same footing as those at other judicial sales, the rights of purchasers at which sales had been settled by the prior law; and this is all that was intended.

We concede, that on this last point, the case is a very close one and we are not unanimous. But as a majority concur in the opinion of the Common Pleas, which has been affirmed by the Superior Court, we affirm the judgment. We can add nothing of value to what has been said by the learned Judge of the Common Pleas and by the Superior Court. There is nothing of merit in the other assignments, and the judgment is affirmed on the opinion of the Court of Common Pleas.

W. M. S., Jr.

Jan. '99, 164. Supreme Court. May 2, 1899.

Easton v. Jones.

Contract—Severable or entire.

The distinction between entire and severable contracts is based on difference in intent; the severable nature of the subject may assist in determining the intent but will not overcome the intent to make an entire contract when that is shown.

A contract may be severable from one point of view and entire from another, as where it is entire as to the work to be done but severable as to payment by instalment.

Where a contract provides for the delivery of a certain number of logs which are to be paid for at a certain sum per thousand feet "when loaded on cars," the contract partakes of the double character above indicated; so that while a failure in ability or intention to deliver the whole number will be a good defence even to an action for the payment stipulated to become due when a certain portion is loaded on cars, yet a refusal to make such payment, without that or other legal excuse, is such a breach of contract as will entitle the plaintiff to rescind the contract and recover pro tanto for the portion delivered.

Plaintiff undertook to deliver 800,000 feet of lumber on cars, to be paid for as each carload was delivered; he delivered 284,000 feet and sued to recover the price thereof, and excused his failure to deliver the full quantity on the ground that the defendant had failed to pay for the lumber as it was loaded on the cars:
***Held*, a case for the jury.**

One who disables himself to perform an entire contract cannot recover for part performance, unless his disability was with the defendant's consent.

Appeal of M. D. Easton and A. W. McQueen, to the use of M. D. Easton, plaintiffs, from the judgment of the Common Pleas for Potter County, in an action of assumpsit in which L. M. Jones was defendant.

This was an action to recover the sum of $1748.73 for 284,065 feet of lumber sold by plaintiffs to defendant.

On the trial of the cause, before Morrison, J., the plaintiffs gave in evidence the following contract:

"Articles of agreement made this third day of February, 1894, by and between M. D. Easton and A. W. McQueen, of Genesee township, Potter county, Pa., parties of the first part, and L. M. Jones, of Elkland, Tioga county, Pa., party of the second part, Witnesseth:—

"For and in consideration hereinafter mentioned, the said parties of the first part or their heirs or assigns agree to sell, transfer and deliver unto the party of the second part or his heirs or assigns eight hundred thousand feet of good merchantable hemlock lumber—culls out—to be well manufactured and delivered as follows:—Said

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lumber to be square edged, surfaced and trimmed, the shake to be cut off; to be sawed into 6-8-10 and 12 inch stock boards 10-12-14-16-18 and 20 feet long; to be surfaced plump seven-eighths and one-thirty-second inch thick or to be manufactured as said second party or his agent may direct from time to time, said lumber to be manufactured in the spring and summer of 1894, said lot of logs known as the M. D. Easton lot to be manufactured into the above described lumber; the longest logs now cut and all coarse logs not to be manufactured into the above described lot; said lumber to be piled each and every length and width separate with an air chamber of about 4 inches between each and every tier—also each and every pile to be piled 3 to 4 feet apart and to be piled with plenty of pitch or slant on good substantial bottoms, the front bottom to be at least six inches higher than the back one, the distance between the front and the back sticker to be about 2-3 the length of the board; said lumber to be well covered as soon and as fast as each pile is piled; said lumber to be loaded on cars on tracks of the W. C. & P. C. R. R. in the township of Genesee, Pa., in a good workmanlike manner when well seasoned or as soon thereafter and as fast as said second party or his agent directs, provided that if said second party procures orders a portion may be loaded green or partly green.

"In consideration of the faithful performance of the foregoing agreement by the parties of the first part, the party of the second part agrees to pay the said parties of the first part the sum of seven dollars and twenty-five cents per thousand feet for all good merchantable surfaced and trimmed hemlock lumber when loaded on cars as above stated, and all is to be shipped and cleaned up within one year from the time of sawing the same.

"Provided that a payment or advance of one hundred dollars is to be made upon the signing of this agreement and one hundred dollars at a time when the above first parties commence sawing the lumber as above mentioned.

"Provided that said second party is not to call upon the parties of the first part to draw lumber when the roads are impassable by muddy roads.

"A. W. McQueen,
"M. D. Easton,
"L. M. Jones."

The plaintiffs then showed that they had delivered 284,065 feet of lumber; that defendant failed to pay their instalments of money when due; that plaintiffs' mill having been burned, one of the plaintiffs saw defendant and said that they would have to have some money in order to fulfill the contract, "being the mill had burned and everything, and all the trouble coming on, that we could not fulfill the contract unless we had some money; he said he would look around and see if he could get some money, and he would let me know in about a month; in about a month he came back and said I would have to let Mr. Crandall have some of the lumber; and I let him have about five hundred thousand." And the plaintiffs testified that the sale to Crandall was with defendant's assent. At the conclusion of the plaintiffs' case the Court, on motion, entered a compulsory non-suit, which the Court in banc refused to take off. The plaintiffs then took this appeal.

A. S. Heck, (with him *N. J. Peck* and *Stone*), for appellant.

The contract in this case is severable, as the consideration is severable.

Lucesco Oil Co. *v.* Brewer, 66 Pa. 351.
Rugg *v.* Moore, 110 Id. 236.
Quigley *v.* De Haas, 82 Id. 267.
Gill *v.* Lumber Co., 151 Id. 534.
Miller *v.* Blessing, 41 Leg. Int. 253.
McLaughlin *v.* Hess, 164 Pa. 570.
Pratt *v.* Campbell, 24 Id. 184.

Contracts are always construed by the Courts so as to give all parties their just dues, if possible. By construing this contract to be severable, each party will receive his just due. Easton will receive the value of his lumber shipped. Jones, if damage has been occasioned him by any default of Easton, may set it off against the amount he may be owing for lumber received.

Fessler *v.* Love & Powell, 43 Pa. 313.

It is but a fair presumption that the parties, when they entered into this contract, intended this to be their relation, and it ought not to be construed differently unless an intention to have it so appears clearly from the contract and surrounding circumstances.

John Ormerod, (*Dornan* with him), for appellee.

The contract is entire. The fact that the subject of a contract is sold by weight, or measurement, and the value is ascertained by the price according to weight or measurement, will not render the contract severable.

Mining Co. *v.* Jones, 108 Pa. 55.
Pallman *v.* Smith, 135 Id. 189.
Shinn *v.* Bodine, 60 Id. 182.
Harris *v.* Liggiet, 1 W. & S. 301.
Shaw *v.* Badger, 12 S. & R. 275.
Fessler *v.* Love, 43 Pa. 314.
Quigley *v.* De Haas, 82 Id. 267.

October 6, 1899. Mitchell, J. After very elaborate specifications of what was to be done by the plaintiff, the contract between the parties provides that in consideration thereof, the defendant is to pay "the sum of seven dollars and twenty-five cents per thousand feet . . . . when loaded on cars as above stated." Language could

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not be more explicit or show more clearly the intention of the parties. It meets exactly the suggestion of SHARSWOOD, J., in Shinn *v.* Bodine, 60 Pa. 182: "What would have been simpler than to have said each cargo to be paid for on delivery, if that had been the intention of the parties?" Whether the contract was technically entire or severable is of comparatively little importance, for no classification of the contract can be permitted to defeat the intent of the parties. The distinction itself between entire and severable contracts is based on the difference in intent. As was said in Shinn *v.* Bodine, supra: "The entirety of a contract depends on the intention of the parties, and not on the divisibility of the subject. The severable nature of the latter may often assist in determining the intention but will not overcome the intent to make an entire contract when that is shown." See also Quigley *v.* De Haas, 82 Pa. 267. The rule adopted in Lucesco Oil Co. *v.* Brewer, 66 Pa. 351, and the cases which have followed it, was in aid of the discovery of the intent.

The contract in the present case, in its general features, is entire. A substantial failure to perform the whole without legal excuse would prevent the plaintiff from recovering at all, except upon showing compliance with the specific agreement as to times and conditions of payment. But as to this feature the contract partook of a severable character. That it may have such double aspect is illustrated by Gill *v.* Johnstown Lumber Co., 151 Pa. 534, where it was held that a contract to drive logs to defendant's boom was severable as to the payment for the number and kinds of logs delivered, but was entire as to the delivery of each log, and there could be no recovery for logs that had only been driven part way to the boom or for those that had been carried to and through it by the great flood of 1889, the Court likening the contract in this respect to that of a common carrier whose right to compensation is dependent on delivery at the designated place, and who cannot recover pro tanto for carriage over part of the route. There is nothing to prevent parties, even in entire contracts, from agreeing to partial payments pending the full performance, and that is what was done in the present case. The agreement in this respect is very analogous to the familiar cases of contracts for building. There can be no question that in nearly all of such cases the contract is entire, yet nearly all provide for advances or payments at stipulated stages of the work, the avowed object being to enable the contractor to complete the whole. While plaintiff's failure in ability or intention to complete the work will be a good defence, even to an action for a payment stipulated to become due on a state of progress shown to be reached, yet a refusal to pay such an instalment without that or other legal excuse, is such a breach of the contract as will justify a rescission and entitle the plaintiff to recover pro tanto for the work done. This was expressly decided in Rugg et al. *v.* Moore, 110 Pa. 236, a case very similar in its general features to the present.

The appellant claimed to recover for 284,000 feet of lumber delivered on the cars. His contract was for 800,000 feet, and he excused his failure to deliver the full quantity by alleging a rescission of the contract because defendant failed to make the payments due. On this he should have been allowed to go to the jury. It appeared also by plaintiff's own testimony that he had sold over one-half the lumber covered by the contract to one Crandall, and thereby clearly disabled himself from fulfilling his agreement. If he did this before the rescission and without defendant's consent, the contract was so far entire that he could not recover on it at all. He however claimed that the sale to Crandall was with defendant's consent, and therefore this was also a question for the jury.

Judgment reversed and procedendo awarded.

H. B.

Oct. '98, 47. Supreme Court. November 1, 1898.

Rushton v. City of Allegheny et al.

Negligence — Municipality — Sidewalks — Coal chutes—Contributory negligence.

A plaintiff in an action for damages for injuries received by the turning of a grating in a sidewalk, cannot maintain the suit without proof of the negligence charged in the statement of his claim, and if the evidence falls short of being such as would authorize a jury in finding the material facts as alleged, the Court must enter a non-suit.

Where the sidewalks of a city contain coal chutes duly authorized by the municipality, compliance with the regulations relating to them is all that is required.

Appeal of Mary Rushton and Henry Rushton, from the judgment of the Common Pleas No. 3, of Allegheny County, in an action of trespass wherein the City of Allegheny and Albert S. Shields and Lennetta his wife, H. H. Ferrall and Mary his wife, all of Columbiana, Ohio, Marshall W. Shields and Jennie his wife of Baltimore, Md., W. A. Dinker and Alice P. his wife, Charles Shields and Sarah his wife, Amelia Shields, William H. Graham and Sarah K. Graham and W. F. Scott, administrator of R. E. Scott, deceased, were defendants.

The facts of the case, appearing at the trial, before MCCLUNG, J., were as follows: The plaintiff, Mary Rushton, about dark on the evening of

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May 4, 1895, was passing on the sidewalk in front of the property owned by some of the defendants in Federal street, and a coal chute covered by a grating was in the centre of the sidewalk. As Mrs. Rushton stepped upon it the grating tilted in such a way that she fell astride of it, seriously and, as she claimed, permanently injuring her.

This lid was not in perfect condition at the time of the accident and immediately after this it was more securely fastened by wire.

The Court entered a compulsory non-suit and dismissed the motion to take it off, which action was made the subject of the first and second assignments of error.

S. J. Graham, for appellant.

If the plaintiff was guilty of contributory negligence, that was a question for the jury.

Maryland *v.* Phillipsburg, 158 Pa. 78.

The owners of the property are liable for maintaining a dangerous nuisance on their property.

Reading City *v.* Reiner, 167 Pa. 41.
Wunde *v.* McLean, 134 Id. 334.
McNerney *v.* Reading City, 150 Id. 611.
Dillon on Municipal Corporations, 3d Ed. § 1032.

A compulsory non-suit should not have been entered. The case should have been allowed to go to the jury.

Johnston *v.* Bruner, 61 Pa. 58.
Schwen *v.* Millvale, 159 Id. 257.

Elliott Rodgers, (with him *W. A. Stone* and *W. P. Potter*), for appellee.

October 6, 1899. McCollum, J. The plaintiff, Mary Rushton, claims thirty thousand dollars as damages for an injury she received in May, 1895, by a fall into a coal hole or chute in the centre of a sidewalk on Federal street in Allegheny City, and her husband, Henry Rushton, claims ten thousand dolars to compensate him for the loss or impairment of her services, for medical treatment provided for her, and for the extra help required because of her disability. The evidence descriptive of the injury received is not disputed, and the only question to be determined is whether the evidence in the case is sufficient to charge the city, the owners of the property abutting on the sidewalk at the point of the casualty, the lessee in possession of the same, or either of them, with negligence. At the close of the evidence on the part of the plaintiffs the defendants moved for a compulsory non-suit and their motion was sustained. The non-suit was followed by a motion of the plaintiffs to take it off, which motion upon due consideration of it by the Court, was denied.

It is a circumstance worthy of note that the defendants in the suit are the city, the owners of the property abutting as aforesaid, and the lessee of the owners. The joinder of the city with the owners of the property and their lessee as defendants shows that the plaintiffs were not able to specify the party chargeable with the alleged negligence, and that it had its origin in their hope of establishing negligence on the part of at least one of the several parties thus united.

We agree with the learned Court below that the plaintiffs cannot maintain their suit without proof of the negligence charged in the statement of their claim. The evidence to sustain the charge must be such as would authorize a jury in finding the material fact as alleged, and evidence which falls short of this does not meet the requirements of the law. If, therefore, the evidence in the case at bar is not sufficient to support the controlling charge, it was the plain duty of the Court, on motion of the defendants, to enter a compulsory non-suit and to deny the plaintiffs' motion to take it off.

The coal holes or chutes in the sidewalks of Allegheny City are authorized by the municipal authorities, and compliance with the regulations relating to them is all that is required of the owners or tenants of the abutting properties. The coal hole or chute in question is in its location and construction like the great majority if not all of the coal holes or chutes in said city. It was familiar to Mrs. Rushton, and according to her own testimony she passed over it at least twice a week during a period of five years immediately preceding her fall. None of the hundreds of pedestrians who passed over it daily before and after the occurrence in question, received any injury from it or complained at any time to any of the defendants or other persons of a defect in it. All the undisputed facts in the case are opposed to the plaintiffs' contention and the testimony submitted by them on the trial was clearly insufficient to sustain the charge of negligence against either of the defendants. A careful perusal and examination of all the testimony warrants this conclusion. It follows that the Court below did not err in entering or refusing to take off the non-suit.

Judgment affirmed.

W. D. N.

Common Pleas.

No. 3, J. '99, 1039.

Speese v. Railroad Company.

Eminent domain—Title acquired by R. R. Co.—Overhead crossing—Act Feb. 19, 1849, P. L. 79—Act April 16, 1838, P. L. 462.

Where a railroad company condemns land for railroad purposes and the damages for such taking have been assessed and paid, the railroad acquires a com-

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plete title in the nature of a base or conditional fee, (terminable on the cesser of the use for railroad purposes) in the surface of the land, and so much of the land beneath the surface as may be necessary for support of the surface; and coupled with that interest it acquires the right to exclusive possession of the land so taken and to deal therewith within the limits of railroad uses as absolutely and as uncontrolled as an owner in fee.

The owner in fee of land which has been condemned for railroad uses retains in the land taken only such interest and rights as have not been acquired by the railroad company by virtue of such condemnation.

Where a strip of land taken by the exercise of the right of eminent domain completely severs a lot of ground into two portions, the owner of the two parts thus divided is entitled, under the Act of February 19, 1849, P. L. 79, to a convenient mode of access from one part to the other across the railroad, and where accordingly the owner and the railroad company have agreed upon a grade crossing, the owner will be enjoined from subsequently erecting an overhead crossing.

Sur motion for preliminary injunction.

The facts are stated in the opinion of the Court.

Henry N. Wessel, for complainant.

Where one's land has been crossed or intersected by a railroad, it is the policy of the law to prevent railroads, in so far as possible, from interfering with the use of the premises by the owner of the fee.

Act of February, 1849, P. L. 84.
Dubbs *v.* Railroad, 148 Pa. 66.
Port *v.* Railroad, 168 Id. 19.
Act of April 12, 1851, P. L. 518.

The right which a railroad company secures by a condemnation proceeding is only an easement in the land, or a right of way or passage over it. The fee remains in the original owner, and he may use the land for every purpose not incompatible with the use to which it has been appropriated by the railroad.

10 Am. & Eng. Ency. of Law, 1197.
R. R. Co. *v.* Lawrence, 10 Phila. 604.
R. R. Co. *v.* Johnston, 59 Pa. 290.
Hoffman's Appeal, 118 Id. 512.
Imp. Co. Appeal, 54 Id. 361.
Lance's Appeal, 55 Id. 16.
Spear *v.* Allison, 20 Id. 200.
R. R. Co. *v.* Livermore, 47 Id. 468.
R. R. Co. *v.* Bruce, 102 Id. 23.
Mayor *v.* R. R. Co., 26 Id. 360.

The grantor of an easement of a passageway over his land has a right to build over the alley or passageway.

Stevenson *v.* Stewart, 7 Phila. 293.
Patterson *v.* Rwy. Co., 8 Pa. C. C. 186.
Hartman *v.* Fick, 167 Pa. 18.

In Hasson *v.* R. R. Co., 8 Phila. 556, a railroad company was enjoined from preventing the owner from laying a pipe line under the railroad.

Pemberton *v.* Dooley, 43 Mo. App. 176.
Woodring *v.* Township, 28 Pa. 355.
Perley *v.* Chandler, 6 Mass. 454.

William B. Linn and *William H. Addicks*, for defendants.

The title acquired by a railroad company taking land by eminent domain is more than an easement; it is a conditional fee, with exclusive possession for railroad use; terminable on the cesser of such use.

Pa. Schuylkill Val. R. R. Co. *v.* Reading Paper Mills, 149 Pa. 18.
Railway Co. *v.* Peet, 152 Id. 488.
Reading City *v.* Davis, 153 Id. 360.
City of Phila. *v.* Ward, 174 Id. 45.
Northern Cent. Ry. Co. *v.* Ry. Co., 177 Id. 142.
Hilt *v.* Railroad Co., 43 WEEKLY NOTES, 429.
Railroad Co. *v.* Holton, 32 Vt. 43.
Griswold *v.* Railroad Co., 3 Del. Co. 549.
Railroad Co. *v.* Potter, 42 Vt. 265.
Brainard *v.* Clapp, 10 Cush. 6.
Presbrey *v.* Railway Co., 103 Mass. 1.
Peirce *v.* Railroad Co., 141 Id. 481.
Railroad Co. *v.* Clark, 121 Mo. 171.
Railroad Co. *v.* Greve, 17 Minn. 299.
Railway Co. *v.* Combs, 51 Ark. 324.
Henry *v.* Railroad Co., 2 Iowa, 288.
Reichert *v.* Keller, 78 N. W. 381.
Paxton *v.* Railroad Co., 24 So. Rep. 536.
Wilmot *v.* Railroad Co., 24 Id. 701.
Olive *v.* Railroad Co. 33 S. W. 139.
Railroad Co. *v.* Comstock, 60 Conn. 200.
Hollingsworth *v.* Railroad Co., 63 Iowa, 444.
Hayden *v.* Skillings, 78 Me. 415.
Act of April 16, 1838, P. L. 462.
Junction Railroad *v.* Boyd, 8 Phila. 224.

October 18, 1899. McCARTHY, J. Briefly stated, the facts and circumstances which have occasioned the present application for an injunction are as follows:

In 1883 the Schuylkill River East Side Railroad Company, in the exercise of the right of eminent domain, condemned for the uses of its railroad a certain strip of ground sixty feet in width, running entirely across the westernmost portion of a lot of ground situate in the Seventh ward of the city of Philadelphia, fronting upon the east bank of the Schuylkill river and adjoining the South street bridge to the northward, of which lot of ground one Frank K. Ward was the owner in fee simple. A jury of viewers appointed in the proceeding, by a report filed therein on July 14, 1887, assessed the damages payable to the said owner for the condemnation of the strip of land taken by the railway, and the amount so awarded was afterward paid by the railroad company.

As the strip of land so taken completely severed the lot of ground into two portions, the owner of the two parts thus divided by the railroad was entitled, under the provisions of the Act of Assembly of February 19, 1849, sec. 12, P. L. 79, to a convenient mode of access from one part to the other across the railroad, and accordingly such crossing at grade appears to have been fixed by agreement between the owner and

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the railroad company, and now exists in accordance with that agreement.

In June, 1899, the plaintiff became by purchase the owner of the said lot of ground, the conveyance being expressly made under and subject to the right of way of the said railroad company across the western portion of the said premises, as then constructed, to the width of sixty feet. The plaintiff uses the property for the handling and storage of coal and wood. In the prosecution of this business he at present makes use of the crossing at grade over the railroad above referred to between the two parts of his lot of ground, but is desirous of acquiring a second crossing over the railroad, not at grade, but by means of a structure elevated in the air, the lowest portion of which is designed to be at an elevation of at least twenty-two feet in the clear from the tops of the rails forming the tracks of the railroad. It is not the purpose of the plaintiff, however, to abandon the use of the crossing at grade; it is his desire and intention to make use of both crossings. Shortly after acquiring the ownership of the property, the plaintiff caused plans to be prepared for the construction of his desired overhead crossing, and subsequently entered into a contract with a firm of bridge builders to erect the overhead structure. He also communicated with the railroad company with the view of securing their approval to the construction and their assent to the crossing over the railroad. The railroad company have expressed a willingness to agree to the overhead crossing desired by the plaintiff on condition that his crossing at grade is vacated, but they are unwilling to concede to him both of these crossings, and they have notified the plaintiff in writing that they cannot permit any temporary or permanent work to be done upon their right of way until an agreement shall be duly executed between the plaintiff and the company, stating the terms upon which the proposed overhead structure shall be erected. This notification bears date September 14, 1899. Prior to this time the approaches to the desired overhead crossing on either side had been put up by the plaintiff's contractors. In order to bridge over the gap between these approaches and effect the overhead crossing, the plaintiff's contractors, on September 15, 1899, entered upon the plaintiff's grade crossing over the railroad and began to construct scaffolding, or "false work," as it is called, but shortly after, on the same day, a gang of men, in charge, apparently, of some official of the railroad company, drove away those employed at this work and tore down the portion of it which they had already erected.

Thereafter the plaintiff filed his bill in this cause setting forth, inter alia, the forcible interruption just mentioned and praying for an injunction to restrain the defendants from interfering with the construction and erection of the said overhead crossing over the roadbed of the defendants, and from interfering with the plaintiff in hereafter operating and using the said overhead crossing for the purposes of his business.

It is a self-evident proposition that the owner in fee of land which has been condemned for railroad uses retains in the land taken such interest and such rights as have not been acquired by the railroad company in virtue of such condemnation. The vital question in this case, therefore, is, what interest and rights does a railroad company acquire in the land which it takes by reason of condemnation proceedings? This question arose in the Pennsylvania Schuylkill Valley Railroad Company's case, and in delivering the opinion of the Supreme Court therein, Mr. Justice MITCHELL, after referring to the ownership by the railroad company of a certain wedge-shaped piece of land, continues in the following language: "This wedge the complainant has acquired by condemnation for railroad uses, the damages having been assessed and paid. The title of complainant is therefore complete. Such title is sometimes called an easement, but it is a right to exclusive possession, to fence in, to build over the whole surface, to raise and maintain any appropriate superstructures including necessary foundations, and to deal with it within the limits of railroad uses as absolutely and as uncontrolled as an owner in fee. There was no such easement at common law, and it may well be doubted if it is not a misnomer to extend to this newly-invented interest in land the name of easement, perhaps appropriate enough to the railroad's ordinary right of way for its tracks. It would seem to be rather a fee in the surface, and so much beneath as may be necessary for support, though a base or conditional fee, terminable on the cesser of the use for railroad purposes. But whatever it may be called, it is in substance an interest in the land special and exclusive in its nature": Penna. Schuylkill Valley R. R. Co. *v.* Paper Mills, 149 Pa. 18, 20.

The language of this opinion, as it appears in the foregoing extract, is cited with approval by Mr. Chief Justice PAXSON, in delivering the opinion of the Court in the subsequent case of Pittsburgh, Fort Wayne & Chicago Railway *v.* Peet, in which the contention was that the railway company was not entitled to recover the strip of ground in controversy in an action of ejectment for the reason that it had not acquired a fee in the ground by virtue of its condemnation proceed-

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ings, but only an easement, and ejectment will not lie for a mere right of way. In answering this contention, the learned Chief Justice says: "The vice of this argument consists in treating the plaintiff's right as a mere easement or right of way. It is a great deal more than a right of way. It has the actual possession of the property, and that possession is exclusive at all times and for all purposes, except where a way crosses it. The estate acquired by a railroad company by a condemnation of land is often spoken of as an easement, but the term is used in a loose way for the purpose of distinguishing it from a fee." And he then proceeds with the quotation from the Schuylkill Valley Railroad Company's case as above cited: Railway *v.* Peet, 152 Pa. 488, 492.

In the case of Reading City *v.* Davis, the municipality had condemned and taken a part of Davis's farm for the purposes of a pumping station, and compensation therefor had been awarded and paid to him. A temporary road or lane ran over a portion of the lot condemned, over which the defendant under a claim of right, drove wagons to and from what remained of his farm adjoining the lot condemned. These acts of defendant did not interfere with the city's use of the plant or of the lot of ground, but his act being regarded as a technical trespass, although only occasioning nominal damages, action was brought by the city to determine whether the right acquired by her in virtue of the condemnation proceedings was exclusive of any right in the defendant to enter upon or use the land without her authorization. The opinion of the Supreme Court, delivered by Mr. Chief Justice STERRETT, first quotes the defendant's requests for charge, which set out the defendant's contention substantially that he remained the owner of the property which had been appropriated by the city, with the right to use it or any part of it provided such use in no manner interfered with or obstructed the use of the property for the purposes for which it had been condemned, and that as his acts in no wise interfered with or impaired the full, free, and ample enjoyment of the said property by the plaintiff, for the purposes for which it had been appropriated, he was entitled to a verdict. The learned Chief Justice then continues: "These points clearly indicate the difference between the defendant's contention and the rulings of the learned trial Judge. We have no doubt the latter was right in holding that under and by virtue of the condemnation proceedings the city acquired the right of exclusive possession and enjoyment of the property in question. The character of the city's title is similar to that acquired by railroad and other corporations invested with the power of eminent domain. It is sometimes called an easement, but that does not adequately express the nature and extent of the title thus acquired." He then proceeds to quote the language of Mr. Justice MITCHELL, in the Schuylkill Valley Railroad case as hereinbefore cited: Reading *v.* Davis, 153 Pa. 360, 365.

In the comparatively recent case of Philadelphia *v.* Ward, 174 Pa. 45, decided in 1896, Mr. Justice GREEN cites with approval and follows the three foregoing cases. It may be therefore taken as the well-settled law of this Commonwealth that where a railroad company condemns land for railroad purposes and the damages for such taking have been assessed and paid, the railroad acquires a complete title in the nature of a base or conditional fee, terminable on the cesser of the use for railroad purposes, in the surface of the land and so much of the land beneath the surface as may be necessary for support of the surface, and coupled with that interest it acquires the right to exclusive possession of the land so taken and to deal therewith within the limits of railroad uses as absolutely and as uncontrolled as an owner in fee.

But it may be said, conceding this rule of law to be sound, that ownership in fee of the surface of land—which at common law conveys with it as a necessary incident the ownership of all the space above the surface "even to the heavens"—has no such effect in the case of the base or conditional fee acquired by railroads, but that the extent of their ownership of the overlying space is restricted by the limitation that their rights must be exercised within the limits of railroad uses, and that as the plaintiff in the present case proposes only to erect his overhead crossing at such an elevation as to be beyond the limit of the overlying space required for railroad uses, his action will be within a region of the overlying space the right to use which remains to him and has not been acquired by the railroad company.

In the Northern Central Railway Company's cases, wherein a street railway company sought to cross a railroad by spanning the same with an overhead bridge or viaduct, one hundred feet or more in length by about twenty-two feet above the tracks, at a point where the railroad was not crossed by any public highway, the application of the railroad for a perpetual injunction against the street railway company was granted by the Supreme Court of this State. The decision was based, among other things, upon the position that the plaintiff had a substantial property interest in its right of way which the street railway company was bound to respect, and that that interest had some of the incidents of an estate in land; that whether the proposed crossing was overhead

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or underground the general and controlling question would be practically the same in both cases. In either case there would be an unauthorized occupation of the plaintiff's property, and that the operation of the crossing under the most favorable circumstances would occasion an appreciable increase of the danger to the railroad and the public traveling thereon: Railway Co. *v.* Electric Co.; Id. *v.* Harrisburg Railway Co., 177 Pa. 142, 155.

In Junction Railroad Company *v.* Boyd, the facts were that the company had located their railroad upon the line of Thirty-second street, in the city of Philadelphia, as laid out upon the plan, but not opened, from a point north of Market street to a point about 75 feet south of Chestnut street, the location being in a deep cut, which between the points named is arched over and two or three feet of soil placed above the crown of the arch, thus transforming the cut in appearance and effect into a tunnel, across which the travel upon Market and Chestnut streets, where the same intersect the line of Thirty-second street, now passes. The city of Philadelphia, by ordinance, having authorized Boyd to erect a temporary wooden chapel on Thirty-second below Chestnut street, that is to say, over the railroad and above the arch just described, the railroad company applied for an injunction to restrain this erection, and it was contended that they were not entitled to the equitable relief prayed for, not being owners of the fee and having but an easement in their property. Judge PAXSON, delivering the opinion of the Court, however, sustained the application for injunction because the use by a railroad company of the land taken by them for their road "is practically an exclusive one and permanent in its nature. And herein it differs essentially from the case of land taken for an ordinary highway. For a railroad company must, from the very nature of their operations—for the security of life and property—have the right to the exclusive use of the road for themselves and workmen, and to exclude all concurrent occupancy by former owners in any mode or for any purpose. . . . . The company first made a deep cut, and then arched over their track, and placed two or three feet of soil over the crown of the arch. It is in effect a mere covered way, and the building complained of rests, not upon the surface soil, but upon the structure placed there by the company. . . . . If the principle contended for here be correct, it is difficult to see where it would stop, and the road of the company might be built upon its entire length by merely leaving room enough for the passage of the trains. Such a view is entirely inconsistent with that exclusive control over their road which, from the nature of things, a railroad company must possess. But the very act which the defendant has attempted is expressly prohibited by law. Sec. 11, of the Act of April 16, 1838, provides that 'no person shall construct any building, wharf, platform, switch, sideway, lateral railroad, or crossing place, or make or apply any device whatsoever on the ground set apart for, or belonging to, or forming part of, or on the banks or excavation of any railroad as aforesaid, without permission given under the authority of the managers of the proper railroad company, which permission shall only be given in writing by a person duly authorized for that purpose' ": Junction Railroad Co. *v.* Boyd, 8 Phila. 224.

The facts of this case are very instructive. By placing over its right of way so permanent a structure as a brick archway covered over with earth so as to obliterate from above all appearance of a railroad, the company would certainly seem to have declared that it had no use for railroad purposes of the space lying above and beyond the arch, and yet their right to exclude anyone else from occupancy or use of that space in any mode or for any purpose is recognized and upheld. So also, in construing and applying the Act of 1838 to the facts of that case and thus in effect holding that the building therein sought to be erected, although virtually at all points elevated far above the tracks of the railroad lying at the bottom of the deep cut underneath, was nevertheless a building on the ground set apart for or belonging to or forming part of the railroad, the learned Judge has established an interpretation which would control the point to be decided in the present case, inasmuch as what the plaintiff seeks to construct is both a platform and a crossing place and therefore plainly within the letter of the Act of 1838. The conclusion seems irresistible, therefore, that whether in consequence of the statutory prohibition just alluded to or of the exclusive right of possession and user attached by law to the interest acquired by the railroad company, the plaintiff in this action has no right either to construct or maintain an overhead bridge across the railroad at any elevation without the prior consent of the company and against its protest.

The views thus expressed render it unnecessary to consider in detail the testimony offered at the hearing. It is only just to the parties, however, to remark that the evidence shows on the part of the plaintiff a laudable disposition to erect and to maintain the crossing he desires in such manner as to meet the approval of the company and to secure the least risk of danger to the operation of the railroad, while on the part of the defendants, it appears that their refusal to concede

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what the plaintiff desires is not a captious opposition, but proceeds from a conscientious discharge of their duty to safeguard the interests and security of the traveling public, and to reduce to a minimum the risks of accident which inevitably attach in a greater or less degree to all railroad crossings. With such a spirit of fairness manifested on both sides of the controversy, it would seem that there ought to be no difficulty in the parties reaching an agreement to their mutual satisfaction.

As in the judgment of the Court the plaintiff has not shown any right, legal or equitable, which has been infringed or interfered with or endangered, it follows that he is without standing to maintain his present application, and therefore the injunction is refused.

No. 4, June, '98, 1304. January 3, 4, 1899.

Fodell v. Royal Arcanum.

Beneficial society—Conflict of laws—Law of Massachusetts—Equity—Beneficiary—Creditor—Widow.

The question who may take as a beneficiary under a certificate issued by a beneficial society incorporated by another State is to be determined by the law of that State.

Under the law of Massachusetts a creditor of a member of a beneficial society cannot take under the description of a "dependent friend" of a member. M. was a member of the R. A., a beneficial society incorporated in Massachusetts but having lodges in Pennsylvania, of one of which M. was a member; he became indebted to F., and to secure him procured an issue by the R. A. of a beneficial certificate in favor of F., by the name of a "dependent friend." F. was not in any way related to M. or dependent upon him for support. After the issue of the certificate F. paid M.'s dues to the R. A. for some sixteen years, at the expiration of which time M. died. The fund due upon the certificate was claimed by M.'s widow and by F.:

Held, that F. could not take under the certificate as "dependent friend," but as he had in good faith paid M.'s dues and so raised the fund which was before the Court, equity required that he should be reimbursed the amounts paid by him with interest from the dates of the several payments to the time the fund became payable by the R. A.

Hearing on bill and answer.

The bill in this case set forth as follows:—That one E. G. Miller was a member of the Philadelphia Council of the Royal Arcanum, a beneficial society, whose objects were as follows, as set forth in the constitution of the order:

"1. To unite fraternally all white men of sound bodily health and good moral character, who are socially acceptable, and between twenty-one and fifty-five years of age.

"2. To give all moral and material aid in its power to its members, and those dependent upon them.

"3. To educate the members socially, morally and intellectually; and to assist the widows and orphans of deceased members.

"4. To establish a fund for the relief of distressed and sick members.

"5. To establish a widows' and orphans' fund from which, on the satisfactory evidence of the death of a member of the order, who has complied with all the lawful requirements, a sum not exceeding three thousand dollars shall be paid to his family, or those dependent upon him, as he may direct."

That the defendant, the supreme council of the Royal Arcanum, was a corporation of the State of Massachusetts, and the supreme ruling power of the aforesaid Royal Arcanum; that on July 26, 1880, the said defendant corporation made and issued to the said Edward G. Miller a benefit certificate as follows:

No. 14439. $3000.

ROYAL ARCANUM BENEFIT CERTIFICATE.

This certificate is issued to Edward G. Miller, a member of Philadelphia Council, No. 293, Royal Arcanum, located at Philadelphia, Pa., upon evidence from said council that he is a contributor to the Widows' and Orphans' Benefit Fund of this order; and upon condition that the statements made by him in his application for membership in said council, and the statements certified by him to the medical examiner, both of which are filed in the supreme secretary's office, be made a part of this contract, and upon condition that the said member complies, in the future, with the laws, rules and regulations now governing the said council and fund, or that may hereafter be enacted by the supreme council to govern said council and fund.

These conditions being complied with, the supreme council of the Royal Arcanum hereby promises and binds itself to pay out of its Widows' and Orphans' Benefit Fund, to William P. Fodell, dependent friend, a sum not exceeding three thousand dollars, in accordance with and under the provisions of the laws governing said fund, upon satisfactory evidence of the death of said member, and upon the surrender of this certificate; provided that said member is in good standing in this order at the time of his death; and provided also that this certificate shall not have been surrendered by said member, and another certificate issued at his request, in accordance with the laws of this order.

In witness whereof the supreme council of the Royal Arcanum has hereunto affixed its seal, and caused this certificate to be signed by its supreme regent, and attested by its supreme secretary, at Boston, this 26th day of July, A. D. 1880.

A. E. KEYES,
Supreme Regent.

Attest:
W. O. ROBSON,
Supreme Secretary.

I accept this certificate on the conditions named herein. E. G. MILLER,
(Signature of member.)

Witnessed and delivered in our presence.
CHARLES A. DOERR, Regent,
OWEN D. ROBERTS, Secretary,
Of Philadelphia Council No. 293, R. A.

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That the William P. Fodell described in the said certificate as dependent friend was the plaintiff; that the certificate was issued under the following circumstances: Miller was in 1880, and had for a long time previous been an employé of the Northern Liberties Gas Works, a corporation of the State of Pennsylvania, as superintendent of the works, and had become indebted to the said gas works in the sum of $6532.48, for which sum he confessed judgment to the said gas works and, being so indebted and unable to pay the said amount, he desired to secure the eventual payment of some portion thereof to the said corporation; he accordingly proposed to have revoked, in accordance with the laws of the Royal Arcanum, a certificate held by him in the sum of $3000 from the supreme council thereof, and to procure the issue of another in the said sum for the benefit of the said corporation, his creditor. The offer was accepted, and plaintiff was selected as the person to be designated by the said Miller as the beneficiary in the certificate to be issued by the said supreme council. Miller accordingly, on July 23, 1880, surrendered the benefit certificate by him thus held, and directed the issue of the certificate above set forth at length, neither the plaintiff nor the Northern Liberty Gas Works in any way interfering, by suggestion or otherwise, with the steps necessary to the issue of the said certificate; that after the issue of the said certificate, plaintiff paid to the Royal Arcanum, with funds furnished to plaintiff by the Northern Liberties Gas Works, sums of money, for the dues of the said Miller, and assessments levied upon him by the order of the supreme council of the Royal Arcanum, amounting in all to $614.54, the payments being made as follows: Notices of assessments and bills for dues were sent to the office of the Northern Liberties Gas Works, from whose employment Miller had been discharged, addressed to Miller, and were paid by plaintiff, generally by his own check, directly to the collector for the Royal Arcanum.

That Miller died November 1, 1896, a member in good standing of the Philadelphia council of the Royal Arcanum, without having surrendered the above-recited certificate, and without having reduced his indebtedness to the gas works; and due proof of the death of the said Miller was made by plaintiff, and demand made for the payment of the sum called for by the certificate.

That the said Miller left surviving him a widow, the defendant, Mary C. Miller, who, plaintiff was informed, claimed that the sum payable by the supreme council of the Royal Arcanum was payable to her; that the supreme council of the Royal Arcanum refused to pay to plaintiff the sum payable by virtue of the term of the certificate.

Plaintiff admitted that his possession of the benefit certificate and claims thereunder, were as trustee for the Northern Liberties Gas Works, to which Miller was, and to which the estate of said Miller was still indebted; and which had paid out on account of the said Miller, for the purpose of keeping alive the contract contained in the certificate aforesaid, the sums of money before shown.

The bill prayed: (1) That the said defendant, the supreme council of the Royal Arcanum, pay unto the said W. P. Fodell, as trustee for the Northern Liberties Gas Works, the sum of $3000, payable by the term of benefit certificate No. 14439, with lawful interest thereon; (2) that the defendant, the said Mary C. Miller, be enjoined from setting up any claim by action or suit, to the said sum of $3000, payable by the terms of the benefit certificate No. 14439 aforesaid; (3) further relief.

The answer of the supreme council of the Royal Arcanum set up that it was incorporated under Chap. 115, sec. 2, of the Public Statutes of Massachusetts; that sec. 8 of said chapter provided that a corporation under its provisions might for the purpose of assisting "the widows, orphans or other persons dependent upon deceased members" provide in its by-laws for a payment of a fund on the death of a member; that by Act of 1882 the words "or other relatives of deceased members" were inserted after the word "orphans" in the above Act; that by Act of 1888, ch. 429, sec. 8, it was provided that the corporation might provide a payment of a sum to a beneficiary in such amount and manner as might be written "in the benefit certificate issued to said member and payable to the husband, wife, children, relatives of, or persons dependent upon, such member; but no contract under this Act shall be valid or legal which shall be conditioned upon an agreement or understanding that the beneficiary shall pay the dues and assessments or either of them, for said member;" that the Acts of Legislature (set out in the bill and all subsequent in date to the above) defined the classes of persons to which certificates could be issued and did not include creditors; that the amount of the benefit due on Miller's death was part of the widows' and orphans' fund established by authority of the foregoing legislation and the payment thereof to the plaintiff or for the purpose for which he claimed to recover it as trustee, would be in conflict to the same; that the supreme council had no authority to create a fund for any other persons than those described in its articles of incorporation and the laws of Massachusetts;

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or to make a legal contract to pay any part of the benefit fund to any other person than one falling within the classes described by said laws.

Mrs. Miller filed a separate answer, setting up that a benefit certificate had on September 8, 1879, been issued to the deceased Miller, in which she, Mrs. Miller, was named as beneficiary; that after Miller's death she learned, for the first time, of its surrender and the issue of the certificate in favor of the plaintiff; that there was at no time any dependency of the plaintiff or of the Northern Liberties Gas Works on Miller and no relationship between them by blood or marriage, and that she was entitled under the laws of Massachusetts and the laws of the Royal Arcanum, to the amount of $3000 payable on Miller's death.

Henry Budd, for plaintiff.

The contract in this case was made in 1880. The law then in effect in Massachusetts was Pub. St. ch. 115, sec. 8. The Acts which it is claimed expressly prevent such a contract as it is claimed by plaintiff was entered into in this case, date from 1884 and 1888.

The law governing the contract, as to the designation of beneficiaries, is that in force at the time it is made.

I Biddle on Ins., sec. 61.

We do not find in the words of the statute any prohibition of such a contract as the present, which, it is admitted, if made after 1884 would have been illegal. It is therefore submitted that the case falls within Maneely *v.* Knights of Birmingham, 115 Pa. 305, and that the contract should be upheld. The widow has no equity whatever as against the plaintiff. Instead of stripping her husband of his property in the exaction of its rights, the plaintiff company indulged him and paid his dues and assessments for many years. If the decree shall be in favor of the widow, the plaintiff will have paid a large sum for her benefit without having received any consideration from her or her husband and simply increased the loss suffered by the company which had employed him.

Horace L. Henderson, for Mrs. Miller, and *William Hichman Shoemaker*, for the Royal Arcanum.

The designation of beneficiaries must be exercised strictly within the limitations of the charter and by-laws.

Bacon on Benef. Soc., sec. 224.
Ballou *v.* Gile, 50 Wisc. 614.

Under chap. 115, sec. 8, it is held that the mother of the member, if she did not live with him as a member of his family, cannot be a beneficiary:

Elsey *v.* Relief Ass'n, 142 Mass. 224.

that a member cannot nominate by will a beneficiary not within the class defined by the statute, even if the terms of the certificate permit it:

American Legion of Honor *v.* Perry, 140 Mass. 580.

that a fiancée cannot be regarded as a dependent:

Daniels *v.* Pratt, 143 Mass. 216.

that a creditor is not a dependent, even taking into consideration the enlargement of the class by the statute of 1882.

Skillings *v.* Mass. Benefit Ass'n, 146 Mass. 217.
Briggs *v.* Earl, 139 Id. 473.
Rindge *v.* N. E. Mut. Aid Soc'y, 146 Id. 286.

On the naming of an incompetent beneficiary, the contract is not void, but the executor of the member is entitled to the money for the benefit of those who at the time the contract was made were entitled to be named as beneficiaries.

Clarke *v.* Schwarzenberg, 162 Mass. 98.
Britton *v.* Royal Arcanum, 18 Atlan. 675.

In such case upon an Arcanum certificate, the widow is entitled.

Ballou *v.* Gile, 50 Wisc. 614.

The present certificate was issued to Miller on the representation that Fodell was a "*dependent* friend;" this was a material representation, and the truth should have been declared. The contract was to pay a dependent friend. There was no dependency, therefore no contract to pay.

Britton *v.* Royal Arcanum, supra.
Palmer *v.* Welch, 132 Ill. 144.

The whole proceeding was an attempt to get the order to do what it had no power to do—secure a debt of a member. C. A. V.

October 25, 1899. ARNOLD, P. J. We are of the opinion that the plaintiff, who is trustee for a creditor of Edward G. Miller, is not a person dependent upon him within the meaning of the constitution of the society defendant and the laws of Massachusetts under which it was incorporated. But the plaintiff paid $614.54 to the society to keep Miller in good standing in the society until his death on November 1, 1896, whereby the beneficial fund of $3000 was saved from forfeiture, and equity demands that the amount so paid by the plaintiff, with interest from the time the several payments were made to the time the fund of $3000 became due by the society, should be repaid to the plaintiff. The residue of the beneficial fund must be paid to Mary C. Miller, widow of Edward.

It is therefore adjudged and decreed that the sum of $614.54, with interest from the time the several payments were made to the time the fund of $3000 became due by the society, be repaid to the plaintiff, and the residue of said fund be paid to Mary C. Miller. The record costs to be paid out of said fund, and each party to pay his own printing and other costs.

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WEEKLY NOTES OF CASES.

VOL. XLIV.] *FRIDAY, NOV. 10, 1899.* [No. 32.

Supreme Court.

Oct. '98, 415; Jan. '99, 51, 72. March 27, 1899.

Kelly's Estate.

Appeal of The Fidelity Insurance Trust & Safe Deposit Co., Trustee, under the Will of Joseph Kelly.

Appeal of The Fidelity Insurance Trust & Safe Deposit Co., Trustee, under the Will of Edward P. Kelly.

Appeal of Mary A. Kelly.

Wills—Construction of—Trusts—Survivor.

A. died, leaving a will by which, inter alia, he devised and bequeathed to the F. Co. in trust for the benefit of his brother, E., and his sister, M., all his estate whatever, to collect the income therefrom and pay over the same into the hands of his said brother and sister or their duly authorized agent or attorney; also declaring as follows, viz.: "I hereby declare it is my will that my brother . . . . and my sister . . . . shall receive the income of my said estate absolutely, and the survivor of them, with power to them or the survivor of them, to devise by any last will and testament they or either of them may choose to make." Said company, which was also named as executor in the will, filed its account, and the balance of the estate was awarded to it as trustee, for the purposes declared in the will. The trustee thereafter collected the income and divided it between the brother and sister until the death of the former, who left a will devising and bequeathing to his nephew the residue of his estate, including any property over which he had testamentary power under the will of above testator. Upon an adjudication of the account of the trustee, thereafter filed:

***Held,* (1) A legal estate was created in the trustee for the lives of the brother and sister and the survivor of them, and they thereby had an equitable joint life estate during their joint lives, and the entire income should go to the surviving sister; (2) that such sister had a power of appointment by will as to one-half of the estate and that upon her death the other half would go as already appointed by the will of the deceased brother.**

Separate appeals by the Fidelity Insurance, Trust & Safe Deposit Company, trustee, under the will of Joseph Kelly, by the same company as executor under the will of Edward P. Kelly, deceased, and by Mary A. Kelly, from a decree of the Orphans' Court of Philadelphia County, in re the distribution of the estate of Joseph Kelly, deceased.

Upon the audit of the account of the Fidelity Insurance, Trust & Safe Deposit Company, trustee, under the will of Joseph Kelly, deceased, before HANNA, P. J., the following facts appeared:

The testator died abroad on April 16, 1882, leaving a will, executed in Paris, and after his decease duly proved in the register's office in Philadelphia, the first clause of which provided as follows:

"I do give, bequeath and devise to the Fidelity Insurance, Trust & Safe Deposit Company of the city of Philadelphia, in trust for the benefit and behalf of my brother, Edward P. Kelly, and my sister, Mary A. Kelly, all my estate, real, personal and mixed of every kind whatsoever, and I hereby direct the said Fidelity Insurance, Trust & Safe Deposit Company to collect and receive the income of my estate and upon the receipt thereof to pay over the same into the hands of my said brother, Edward P. Kelly, and my sister, Mary A. Kelly, or their duly authorized agent or attorney. I hereby declare it is my will that my brother, Edward P. Kelly, and my sister, Mary A. Kelly, shall receive the income of my said estate absolutely and the survivor of them, with power to them or the survivor of them to devise by any last will and testament they or either of them may choose to make."

The testator also appointed the Fidelity Insurance, Trust & Safe Deposit Co., whom he had named as trustee, to be his executor, and upon the adjudication of its first account in 1884, the balance therein stated was awarded to the trustee for the purposes named in the will.

The testator's brother, Edward P. Kelly, and his sister, Mary A. Kelly, both survived him, and the trustee continued to collect and divide the income from the trust estate between them equally until the death of the brother, Edward P. Kelly, which occurred July 22, 1898.

Edward P. Kelly left a will dated December 18, 1897, and duly admitted to probate, by which he appointed the Fidelity Insurance, Trust & Safe Deposit Co. his executor. By this will Edward P. Kelly further declared: "And I do declare that this will is to operate and be effectual upon all estate that may belong to me, and particularly upon any estate coming to me or over which I may have the power of testamentary disposition under the will of my brother, Joseph Kelly."

Mary A. Kelly survived Edward P. Kelly's death and is still living. On August 4, 1898, the Fidelity Insurance, Trust & Safe Deposit Co. filed, in the Orphans' Court of Philadelphia County, its second account as trustee under the

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will of Joseph Kelly, in which the balance of principal, consisting of cash and investments, was stated to be $59,861.70.

Counsel for the accountant contended that under the will of Joseph Kelly each of the two cestuis que trustent had a power of appointment over one-half of the estate, but that the will of either must be postponed in its opearation until after the death of the surviving cestui que trust; that the will of Joseph Kelly intended that no disposition of the principal of the trust fund was to be made until after the death of both cestuis que trustent, and that the corpus of the fund should be awarded to it to be retained still as trustee for Mary A. Kelly during her life.

Counsel for the executor of Edward P. Kelly claimed that the words "survivor of them," in Joseph Kelly's will, referred to the period of Joseph Kelly's death; and that Edward P. Kelly, having survived Joseph Kelly, and having, as contended, an absolute power of testamentary appointment under Joseph Kelly's will as to one-half of the trust estate, that, therefore, one-half of the principal thereof should be awarded to the executor of Edward P. Kelly's will, to distribute in accordance with its terms.

Counsel for Mary A. Kelly made three contentions: first, that the power of testamentary appointment given by Joseph Kelly's will was in effect to the survivor alone of the two beneficiaries, and the will of Edward P. Kelly, who died first, could, therefore, have no effect upon any part of the estate; and, second, that even if Edward P. Kelly did have any power of testamentary appointment over the trust estate during the lifetime of Mary A. Kelly, it was only a power to unite with Mary A. Kelly in making a joint will, and this power not having been validly exercised by him in making his individual will of December 18, 1897, that will could have no effect upon the trust estate; and that, under either of these two constructions, Mary A. Kelly was entitled to the income of the whole of the trust estate by virtue of having survived Edward P. Kelly and having thus become the "survivor of them," mentioned in the will; and the power of testamentary disposition as to the whole estate having vested in Mary A. Kelly, the trust was become a dry one and should be declared executed; and, third, that even should effect be given to Edward P. Kelly's will in disposing of one-half of the estate, that by reason of the entire income having been given to the "survivor of them" Edward P. Kelly's will could not take effect until after the death of the "survivor of them," Mary A. Kelly, and that in the meantime Mary A. Kelly was entitled to the income of that one-half for life as being the "survivor of them," and that as to the other one-half of the estate, the trust, by reason of Edward P. Kelly's death, had become a dry trust, and should be declared executed by awarding to Mary A. Kelly that one-half absolutely.

The auditing Judge found that the testator intended the income to be divided equally between the brother and sister as long as they continued to live, and that on the death of either the survivor should take the whole income for life; that the brother, Edward P. Kelly, and the sister, Mary A. Kelly, were each given by the testator power to devise the fund held in trust for them—viz., one half—but that the will of one should not take effect as to the trust fund until the death of the other, upon which event the wills of both should become operative. He therefore awarded the whole trust fund, amounting to $59,581.70, to the accountant, to be retained by it as trustee for Mary A. Kelly for life.

Exceptions to this adjudication were filed by the executor of Edward P. Kelly, on the ground that the learned Judge erred in not awarding one-half of the fund in the hands of the accountant to the exceptant. Exceptions were also filed by Mary A. Kelly, on the grounds, inter alia, that the learned Judge erred in not awarding the whole fund to Mary A. Kelly absolutely; and also that he erred in not awarding one-half of the fund to Mary A. Kelly absolutely.

After hearing on these exceptions, the Orphans' Court, on December 31, 1898, entered a decree, modifying the adjudication of the auditing Judge, by awarding one-half of the balance of principal in the hands of accountant—viz., $29,790.85—to Mary A. Kelly absolutely, and confirming the rest of the adjudication by awarding the other one-half of the principal to the Fidelity Insurance, Trust & Safe Deposit Co., in trust, to collect and pay the income thereof to Mary A. Kelly during her life, and at her death to distribute the principal thereof under the will of Edward P. Kelly.

The Fidelity Insurance, Trust & Safe Deposit Co., executor of the will of Edward P. Kelly, took an appeal from this decree; and thereafter Mary A. Kelly, in her own right, and the Fidelity Insurance, Trust & Safe Deposit Co., in its capacity as trustee under the will of Joseph Kelly, each appealed from the decree.

Richard C. Dale, for the executor of E. P. Kelly.

From the scheme of the will the testator's primary intent appears to have been:

(*a*) That his brother Edward and his sister Mary should each receive the income of the estate during their respective lives.

(*b*) That by the death of one the rights of the survivor should not be changed.

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(*c*) That the brother and sister should have the right by will to make disposition of the principal, of which during life they had received the income.

(*d*) That the death of one without exercising the power should not impair the power of the survivor in this regard.

It is true that the language used is somewhat involved, and it would seem that the words "and the survivor of them" in the clause relating to income, and "or the survivor of them" in the clause giving power to devise, were words inserted after the main thought had been expressed. This will be perceived when it is noticed that if these words had not been inserted, there would have been only a gift of the income to the brother Edward and the sister Mary without qualifying words. This would have imported an equal division between the two. The succeeding sentence, omitting the insertion above referred to, would read as follows: "I hereby declare it is my will that my brother Edward P. Kelly and my sister Mary A. Kelly shall receive the income of my estate absolutely with power to them to devise by any wills and testament they, or either of them, may choose to make." Had the testator been satisfied with these words, no one would doubt that the will contemplated an equal division of the estate between the brother Edward and the sister Mary, each respectively during life receiving the income with a power in each to will the one-half. It is probable also that there being no gift over, the words would have been sufficient to have passed the fee to each respectively for the one-half of the estate. The question, therefore, is does the insertion of the words, "and the survivor of them" in the clause relating to receiving the income, and the words "or the survivor of them" in the clause relating to the power to devise, indicate a purpose on the part of the testator to enlarge the interest of the survivor in the one-half of the estate of which the brother or sister first dying received the income? We would suggest that the more natural interpretation to be given to the words "and the survivor of them" in the clause relating to receiving the income, is not that the testator intended that the survivor should receive the whole income, but to indicate that notwithstanding the death of one, the survivor should continue to receive from the trustee the same income as he or she had previously received, the title to which had been vested in such survivor by the first sentence of the clause. The words "and the survivor of them" were interposed to exclude the conclusion that upon the death of either the survivor was to lose the share of the income which the testator had just declared that his brother Edward and his sister Mary, naming them jointly, should receive. This interpretation is strengthened when we come to consider the effect of the words "or the survivor of them," referred to in the power clause, the language of the will being, "with power to them or the survivor of them to devise." The testator's thought evidently was that it might be contended if the words rested simply with power to them to devise, that the failure of the one first dying to make testamentary disposition would exclude the power of the one surviving, and these words were therefore inserted to exclude the conclusion.

This line of construction is presented to the Court as one devoid of artificial reasoning—as a construction which gives full effect to the language used, and which can also be made operative without doing violence to any rule of law.

Silas W. Pettit, (*Pierce Mecutchen* with him), for Mary A. Kelly, appellant.

Mary A. Kelly having survived her brother is entitled to the whole of the estate free of any trust.

Taafe *v.* Conmee, 10 H. of L. Cas. 64.
Haddelsey *v.* Adams, 22 Beaven, 266.

A right of survivorship may be annexed to a tenancy in common where the testator's intention to do this is shown by the terms of his will.

Arnold *v.* Jack, 24 Pa. 57.

The power to make a will, given "to them or the survivor of them," was only a power to make a joint will. Upon a failure on their part to do this the survivor had power to dispose of the whole estate.

H. H. Piggott, for the Fidelity Insurance, Trust & Safe Deposit Co., trustee under the will of Joseph Kelly, appellant.

The whole fund should have been awarded to the trustee under the will of Joseph Kelly for the following reasons:

1. Because it was clear that testator intended the trust should continue during the lives of both legatees.

Barnett's App., 46 Pa. 392.

2. The trust was an active one and hence could not become executed in part during the time fixed for its duration.

3. Because the estate is to be held for the joint benefit of the legatees and distribution is thereby postponed until the death of the survivor.

Aubert's Appeal, 119 Pa. 48.
Du Plaine's Estate, 185 Id. 332.
Erwin's Estate, 5 Mont. Co. R. 18.
Morison's Estate, 5 Id. 155.

4. Because the legatees took under the will an equitable life estate in joint tenancy, which could not merge in the legal remainder that went to them as tenants in common.

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McLaughlin v. Id., 30 Atl. Rep. 607.
Clark v. Parsons, 39 Id. 898.
Hemphill's Estate, 180 Pa. 95.

5. Because the trust being an active one, there could be no merger of the interest in remainder with the life interest.

Lewis's Estate, 3 Misc. Rep. (N. Y.) 164.
Asche v. Asche, 113 N. Y. 232.
Martin v. Pine, 79 Hun, 426.

6. Because the trust for Mary A. Kelly being in the nature of a spendthrift trust the interest of the testator would be defeated by an award of any portion of the fund to her.

Vaux v. Parke, 7 W. & S. 19.
Fisher v. Taylor, 2 Rawle, 33.

October 6, 1899. DEAN, J. Joseph Kelly died April 16, 1882, leaving a will made two years before, of which this provision became the subject of disputed interpretations:

"1. I do give, bequeath and devise to the Fidelity Insurance, Trust & Safe Deposit Company of the city of Philadelphia in trust for the benefit and behalf of my brother, Edward P. Kelly, and my sister, Mary A. Kelly, all my estate, real, personal and mixed of every kind whatsoever. And I hereby direct the said Fidelity Insurance, Trust & Safe Deposit Company to collect and receive the income of my estate and upon the receipt thereof to pay over the same into the hands of my said brother Edward P. Kelly and my sister Mary A. Kelly or their duly authorized agent or attorney; I hereby declare it is my will that my brother Edward P. Kelly and my sister Mary A. Kelly shall receive the income of my said estate absolutely and the survivor of them with power to them or the survivor of them to devise by any last will and testament they or either of them may choose to make."

Both beneficiaries survived the testator; up to July 22, 1898, the trustee paid to the brother and sister, each, one-half the income; the brother, Edward P. Kelly, then died, having first made his will, by which, among other bequests, he gave the residue of his estate to his nephew; this bequest would pass to the nephew, whatever remaining interest he had under the will of his brother in that estate. At the date of Edward's death, the trustee has in its hands as principal of the fund, bequeathed to the brother and sister, after deducting all expenses, $59,581.70, and income accrued at the death of the brother, $219.34. The learned auditing Judge HANNA was of opinion, that the true intent of testator, as shown by his will, would be effected by the trustee retaining the whole fund, and paying to the sister, Mary A. Kelly, for life, the entire income; that she had the appointment by will, as to one-half, and the other half would then go as already appointed by the will of Edward, the brother; that half the small balance of income, at the death of Edward, should be paid his executor. The Fidelity Company, executor of the will of Edward, filed exceptions to the adjudication of the auditing Judge, alleging a misinterpretation by him of the will of Joseph Kelly, in not giving one-half the fund to Edward's executor absolutely. Mary A. Kelly, the sister, also filed exceptions, claiming that under the will of Joseph, she was entitled to the whole fund absolutely on the death of Edward; but if this were not the case, then she was entitled to one-half the fund absolutely.

The Court, on hearing, was of the opinion, that by the death of Edward, the purpose of the trust as to the other, the sister's half, had been fulfilled, and therefore, she was entitled to this half absolutely; as to the half, the principal of which had been disposed of by Edward's will, she was entitled during life to the income of that half, and as to it, the trust continued until her death, the principal then passing by the will of Edward to his legatees; the decree of the auditing Judge was modified accordingly. Three opinions come up to us from the Court below, which certainly demonstrate that the case has been most carefully considered. We admit, it is a doubtful one, but a majority of us concur in the interpretation put upon the will by the auditing Judge. There is no technical rule of construction which defeats the intent of the testator, if that intent be manifested by his words. We think the auditing Judge has shown in his opinion: (1) That the testator intended to create a legal estate in the trustee for the lives of the brother and sister and the survivor of them, and they thereby had an equitable joint life estate during their joint lives; (2) that he intended a remainder to the appointee by will of each one's share of the principal of the joint estate, and that there is nothing in the will which ends the trust as to the income of the estate or any part of it, and necessarily, therefore, none as to the principal during the life of the survivor. As all the opinions concur in holding the trust as an active, valid one, it follows, that it would be inconsistent with the purpose of it, to hold that it ended as to any part of the principal during the life of the surviving beneficiary.

We can add nothing of moment to what has been so well said by the learned auditing Judge. The decree of the Court below, in so far as it modifies the decree suggested by him is reversed, and the decree made by him is adopted by this Court and affirmed, costs of this appeal to be paid out of the fund.

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APPEAL OF MARY A. KELLY.

Eo die. DEAN, J. This is an appeal from the same decree, as that appealed from by the Fidelity Insurance, Trust & Safe Deposit Company, in which opinion has this day been handed down. For the reasons therein stated, the decree of the Court modifying the decree of the auditing Judge is reversed; the decree of the said auditing Judge is adopted and affirmed as the decree of this Court. As those entrusted with the execution of the will, because of its susceptibility to different interpretations, could not safely execute it without a judicial decree, it is directed that the costs of this appeal be paid out of the fund.

W. M. S., Jr.

Jan. '99, 170. Supreme Court. May 10, 1899.

Baily v. Fayette Gas Fuel Company.

Corporations—Discrimination.

It is an implied condition of the grant of all corporate franchises of even quasi-public nature, that they shall be exercised without individual discrimination in behalf of all who desire to avail themselves of the company's services.

A corporation chartered under the Act of May 29, 1885, P. L. 29, for the purpose of supplying natural gas for heat, light or other objects, has no right to make a difference in the price of gas according to the use to which it is put by the consumer, and a Court of equity will issue an injunction against an attempt to exact a greater price for the gas when put to one use from that charged for it when put to another, the cost of supplying the gas being the same in each case.

Appeal of George M. Baily, plaintiff, from the decree of the Common Pleas of Fayette County, in a proceeding in equity, in which the Fayette Gas Fuel Company was defendant.

The plaintiff filed a bill setting out that the Fayette Gas Fuel Company was a corporation doing business at Uniontown, Pa., chartered under the Act of May 29, 1885, for the incorporation and regulation of natural gas companies, etc., that ever since its incorporation it had been in the business of supplying natural gas for the production of both heat and light; that plaintiff had been a consumer using the gas for both purposes; that it was supplied to him through one system of pipes and one meter at one price, he furnishing the pipage from the street curb and making use of it for either purpose to suit his convenience; that it had been generally supplied to the public in the same way at the rate of 25 cents per 1000 cubic feet; that September 26, 1898, he was notified by the company of a regulation compelling its customers to arrange two sets of service pipes and to allow the company to place two meters, one for gas to be used in the production of heat and the other for gas used to produce light, the same rate to be continued for the gas used for heat, but six times as much, viz., $1.50 per 1000 cubic feet to be paid for gas used to furnish light; that on October 3, 1898, he was notified that if he would not agree to this agreement his gas would be shut off. Plaintiff further averred that this regulation was unreasonable and the proposed discrimination as to his use of the gas purchased by him unjust, and prayed for a preliminary injunction restraining the company from any interference with his gas supply until his rights in the premises could be finally determined and that the defendant be permanently enjoined from any such interference based on plaintiff's refusal to accede to discrimination in price based solely on his, the consumer's, use thereof after its delivery into his service pipes by the defendant company.

A preliminary injunction was granted, which the defendant moved to dissolve, and the case came on for hearing, before REPPERT, J., who filed the following opinion:

"The Fayette Gas Fuel Company was incorporated October 21, 1887, under the Act of May 29, 1885, providing for the incorporation and regulation of natural gas companies. This company, becoming embarrassed, its franchises and property were sold at sheriff's sale and the purchaser, with others in 1892, reorganized the company under the name of the Fayette Gas Fuel Company. It is the only company supplying natural gas within the borough of Uniontown. The company was incorporated for the purpose of producing, dealing in, transporting, storing and supplying natural gas. Uniontown and other points in Fayette county within convenient distance of the company's lines are named as the places where gas is to be supplied to consumers. The principal business of the company is and has been the supplying of natural gas to its consumers as a fuel, and the company desired to confine its business exclusively to that purpose. To a greater or less extent, however, natural gas has been used as an illuminant by the customers of these companies since their organization and this Court, in the case of I. N. Hagan *v.* Fayette Gas Fuel Company, at No. 259, in equity, in the opinion filed July 14, 1898, by Judge J. F. SLAGLE, has declared it to be the duty of the defendant to furnish its product for all purposes for which that product has been used heretofore.

"While some of the former officers and employés of the defendant company knew of the use of their product for light by consumers, yet the present officers of the company allege that they learned for the first time of the extent of the use of natural gas for domestic lighting in the trial

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of the Hagan case, the connections in most instances between the systems of pipe for lighting and heating having been made without their knowledge, the connections so made of which they were aware being few in number and restricted to locations not served by artificial gas mains, such connections being permitted as a matter of accommodation to their customers.

"In the fall of 1896, the company began introducing the meter system, since which time the general rate to all consumers has been 25 cents per thousand cubic feet with a discount for prompt payment. In the case of manufacturers where large quantities are used a different rate is given; but for domestic consumers the uniform rate has been as above stated, without regard to the purpose for which the gas has been used, whether for light or heat, and with a minimum charge of $1 per month to each customer.

"At or about the time the meter system was adopted by the company, the Welsbach and similar burners were put on the market. Used through these burners natural gas was found to be an excellent illuminant, those of the witnesses who compared it to artificial gas testifying that it thus produced a light superior to that of the artificial product and much more economical in the quantity of gas consumed as compared with artificial gas burned through the ordinary burner.

"On September 21, 23 and 24, 1898, the defendant company caused to be inserted in the *Daily News Standard*, published in Uniontown, an advertisement, notifying domestic consumers of natural gas that after October 1, 1898, the rates for gas would be as follows: For heat, 25 cents per 1000 cubic feet; for light $1.50 per 1000 cubic feet; and requiring all consumers desiring to use gas for light to notify the company immediately that the light meters might be set. At or about the same time similar notices were mailed to the company's customers. The plaintiff, a resident of Uniontown, saw the notice as published and also received one by mail. On or about October 3, 1898, an employé of the defendant company notified the plaintiff orally that if he did not call immediately at the defendant's office and make arrangements for using the gas for illumination the gas would be shut off, whereupon the plaintiff filed the bill in this case, alleging that the proposed difference in charge for gas used for illuminating and heating purposes is an unjust and unlawful discrimination, and an unreasonable regulation, not made in good faith, but for the benefit of other corporations; that the proposed action of the defendant would be a violation of the plaintiff's rights and the defendant's duties and would work a continuous and irreparable injury to the plaintiff, and praying that the defendant be restrained from shutting off plaintiff's supply of natural gas and from any interference with the connection between its mains or supply pipe and plaintiff's premises, which would prevent him from using natural gas for either heating or illuminating purposes, so long as the plaintiff continues to pay the usual rates charged generally for gas, without discriminating as to the use thereof for illuminating purposes, etc.

"Natural gas is delivered by the company to the domestic consumer at the curb, gas for all purposes being delivered at the curb through one and the same system of mains and service pipes and heretofore measured by a single meter. The application of the gas to different purposes is made by the consumer by a system of pipes constructed by him through which the gas passes after delivery at the curb by the company. The plaintiff contends that under these circumstances the company has no right to make the discrimination proposed in its prices, based upon the application made of its product by the consumer; that after passing from the mains of the company into the pipes of the consumer, it is the property of the consumer, to be used by him in such way and for such purposes as may best suit his needs, at a single rate for the entire amount used. While the 'commodity' and 'property' argument is ingenious and plausible it may be noticed in passing that it would be equally applicable in support of the position that it is the duty of the defendant to supply gas to the consumer without regard to the use made of it by the consumer, whether for heat or for light; yet the decision above referred to in the Hagan case, which declared it to be the duty of the defendant company to furnish gas for light, was not based even in part, upon that ground. If the argument is correct the application of natural gas to different purposes and uses is a matter entirely within the control of the consumer, with which a company chartered to produce and supply the product has, and can have, nothing to do, and any dictation or control of the use of the product by the company directly or indirectly, after purchase and delivery, by virtue of any Act of Assembly or otherwise, would be a flagrant and unconstitutional interference with the right of private property. In such a view of the case it would not only be unnecessary, but unlawful, for a natural gas company to set forth in its application for a charter the purposes for which it proposed to supply its product to consumers, for the consumer would have the sole right to determine the use to be made by him of the gas purchased. It is true, as stated by plaintiff's counsel, that a natural gas company is not a supplier of nor dealer in heat or light, but it may be incorporated for

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the purpose of supplying gas for either, or both, or other purposes, or the corporation may determine the purpose for which it will furnish natural gas to consumers, and who doubts that it is not only the right, but also the duty, of a company incorporated for the purpose of supplying gas for light alone, or electing to furnish it for light alone, for instance, to restrict the use of its product by the consumer after delivery to and possession by the consumer? Otherwise the company would be under pain of forfeiture of its chartered privilege. We hardly think the property in, or the right to control natural gas, acquired by the consumer, after purchase and delivery to him by the company at the curb, even in the absence of any considerations relating to costs, expense of supplying, trouble of inspection and other kindred causes affecting the company's interest, is similar in all other respects to that acquired in and over, a pound of coffee or sugar after purchase from and delivery by the grocer, as argued by the plaintiff's counsel.

"So far as concerns this case the defendant company may be regarded as incorporated for the purpose of supplying natural gas to consumers for heat and light.

"As a fuel its product comes into competition with coal, and in order to find a market for gas as a fuel the company must make such a rate that consumers, after considering the relative value and advantages and prices of the two fuels, may be induced to purchase gas to the extent of the business desired by the company. In fixing such a competitive rate the cost of supply to the company is not considered except in relation to the minimum rate at which gas can be profitably marketed. When profitable business can be obtained by a company furnishing gas as a fuel in competition with coal or other fuel the cost of the supply of gas to the company is not a factor in fixing the rate charged the consumer. The rate under such conditions is affected chiefly by the desire to obtain and retain business, the value, advantages or disadvantages, and prices of the competitive fuels, and it is made with a view of obtaining the greatest amount of profit which the conditions of the business legitimately will yield, and the same rule is followed in every other business and enterprise. The reasonableness of the rate does not depend upon the profits which the company may make, but upon what is reasonable to be charged the person making the payment in consideration of the benefits conferred. If in competition with coal at 7½ cents per bushel, the present rate here, a sufficient number of customers could be obtained who, on account of the superior value and advantages of natural gas as a fuel, preferred gas at 50 cents per thousand cubic feet, that would be the rate for gas for fuel instead of 25 cents per 1000 cubic feet, the present price, without regard to the profits which the company might make. Nor would such a rate, under such circumstances, be an unreasonable regulation. It would be simply the application of a principle known and adhered to by every individual, firm or corporation that buys or produces and sells.

"Natural gas used for light takes the place of and is used in competition with refined petroleum, electricity and artificial gas. Burned through a Welsbach or similar burner the testimony is that it produces a light superior to artificial gas—about the best light he ever had, the plaintiff says. There is a wide difference between the value of the coal displaced by a thousand cubic feet of natural gas used as a fuel, and the value of the carbon oil, electricity or artificial gas displaced by a thousand cubic feet of natural gas used as an illuminant. Approximiately the coal is worth 25 cents, and the carbon oil, electricity and artificial gas are worth respectively $1.50. The natural gas in both cases has been furnished heretofore for 25 cents, and the consumer for light has had the advantage of the difference of $1.25. Assuming that the prices charged for oil, electricity and artificial gas are reasonable, is he entitled to it? Or has the company a right to make and enforce a regulation that will enable it to ascertain the amount of natural gas used as an illuminant, and to charge a rate for the gas so used determined by its value as an illuminant in comparison with and in competition with oil, electricity and artificial gas, or any other illuminant, and not by its value as a fuel in comparison with and in competition with coal? The difficulty is occasioned by the fact that a single product, used for two different purposes and of sufficient quantity to supply both, comes into competition with other products, used for these two purposes respectively, but of widely different values. The plaintiff contends that the defendant company should fix one uniform rate for its product, taking into consideration all the uses which render it desirable and valuable, and to which it may be applied, and that even if it should be permitted to make different rates for fuel and light, the present rates fixed by the company are so widely divergent as to be unreasonable and unjust.

"If a natural gas company incorporated for the purpose of supplying gas for light, or choosing to supply it for that purpose, were doing business in this place, under the evidence in this case $1.50 per 1000 cubic feet could not be regarded as an unjust or unreasonable price for its product, its value being ascertained by a comparison with the prices and values of competitive illuminants. A

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similar company incorporated or choosing to supply gas for heat alone might at the same time sell its product for 25 cents per 1000 cubic feet. May not a company authorized by its charter to supply gas for both purposes and which has, by its act, as this Court has declared, so determined, do what a company incorporated for either purpose might do?

"Upon the argument the inquiry was made whether the Uniontown Water Company, without giving any other reason, would be heard to say that its consumers should pay 30 cents per 100 gallons for water from its pipes to be used in washing, and $2 per 100 gallons for water from the same reservoir, through the same pipes, at the same cost of supply, for drinking purposes? Grant that it would not. But suppose drinking water, supplied by other dealers in this market was worth and sold for $2 per 100 gallons, and the water furnished by the Uniontown Water Company was the best to be had for that purpose, what then? If the demand for drinking purposes at that rate justified it, the company might refuse to supply or sell its water for any other purpose at a less rate, and who could be heard to complain that such a regulation was unreasonable and unjust? So if the illuminant furnished by the defendant company is equal if not superior to that furnished by other companies in the light business why is a demand for equal compensation unjust or unreasonable? Could the other companies be compelled to furnish their product at the rate contended for? We do not think so. Why then should the law bear more heavily on the defendant company?

"In Hoover *v.* Pa. R. R., 156 Pa., a number of cases are cited, illustrating, as stated on page 239, the "various reasons and principles upon which lawful discriminations may be made, even in charges for the carriage of the same goods over the same roads and to be used for the same purposes:" and it is further stated that where the goods at the point of delivery are to be used for totally different purposes, which do not compete or conflict with each other, the reason for a discrimination has greater force. Are the circumstances and conditions under which different rates have been made for the two purposes for which natural gas is used such as to justify the discrimination, and if so are the rates imposed reasonable?

"From the cases above referred to it is evident that the purposes for which the goods transported are used, whether they are the same or of different kinds, may be taken into consideration in fixing rates by transportation companies. So also the prices at which the same goods are sold, and a discrimination based on that element is not unreasonable. And in the classification of freight and the various rates charged therefor, the value of the freight with the worth of the transportation service to the shipper are taken into account based upon the benefits conferred upon the shipper by reason of the amount of profits afforded. And this where the goods carried are of the same general character, as bituminous and anthracite coal, or different sizes of either, or where the freight is of different kinds, and of different or approximately the same values, as iron, stone, brick, coke, etc. The service rendered by the transportation companies is practically the same in these different cases, but the rate of compensation varies with the value of the service to the shipper and the use made of it, and it is not determined by the cost of the service to the companies. The rule that the cost of the service should determine the classification and the charges for freight was urged in the case of Coxe Brothers *v.* Lehigh Valley R. R., 3 Inter-State Commission Rep., 460, particularly as to coal. The right of the shipper to demand such a basis of classification and charges was, however, very positively denied, and by way of illustration it was conclusively shown that different rates may be charged for different sizes of the same coal between the same points, and at the same cost of service, based upon a consideration of the uses to which the different sizes of coal might be applied. And for the same reasons the right to demand an average rate for the various sizes was also denied.

"It is also a well-known fact, and testified to in this case, that artificial gas companies in this State and elsewhere make one rate for their product used for light and another for fuel, and such practice has prevailed for many years, and no question, so far as we can ascertain, has been raised as to its legality. As stated in Hoover *v.* Penn. R. R., supra, such general assent may be regarded as evidence that such discrimination has not been felt to be undue or unreasonable or contrary to legal warrant. It is manifest that these different rates by artificial gas companies are not based on the quantity of gas consumed, for then it would be unnecessary to make one rate for fuel and another for light, and it might easily happen that the same consumer would use far more gas for light than for fuel, yet he would pay a greater rate for the greater quantity by reason of the use to which he applied it. It is recognized by these companies and their customers that light service is of a higher grade and more valuable to the consumer, comparatively, than fuel service and their rates vary accordingly. By far the greater volume of their business is in furnishing gas for light, and it is evident that

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their rate for fuel is based on the nature of the service rendered and the minimum rate at which gas can be furnished without loss. If it could be so furnished at 25 cents per thousand cubic feet and the fuel business thus increased by bringing it within reach of people of smaller means what objection could be raised if the service for the two purposes were reasonably worth the prices charged the consumer? And if the consumer for light has received value in the service rendered for the rate charged, other consumers for light being charged the same rate, how can he complain if the company in order to retain and obtain business makes a different rate for a less valuable and non-competitive service? Mere inequality in charges does not of itself amount to an unjust discrimination. If entitled to damages they would be measured by the injury suffered, but if the service rendered is worth the amount charged what injury has been sustained? Nor, in the present case, would an average rate based upon a consideration of the two purposes for which the gas can be used be free from injustice. The greater volume by far of the gas consumed is used for fuel and the greater number of consumers use it for that alone. Its value for fuel is far less as compared with other fuels, than its value for light as compared with other illuminants. Why then should a customer using it for fuel be required to pay an increased price by reason of its greater value for light if the company be willing to market it at fuel rates? Such an average rate would assuredly increase the price and might put it beyond the reach of many now using it for fuel, and generally would compel those using it for fuel to pay an increased price in order that those using it for light might have it at a less price.

"The case of Philada. Co. *v.* Park Bros. & Co., 138 Pa. 346, cited by counsel for plaintiff, we do not regard as decisive of the question here raised. The plaintiff in that case had a contract to supply the defendants with natural gas for fuel for their mills for one year. The defendants used gas also for illumination, and the plaintiff brought suit to recover for 454,689,000 cubic feet which they alleged was so used and not covered by the contract. The plaintiff claimed to make the charge for the gas sued for at the same rate as gas used generally for fuel. The purpose for which the gas was used was not made a part of its demand by way of increase, but appeared incidentally in ascertaining the quantity of gas consumed and not covered by the contract. It was not alleged that the gas so used by the defendants was a more valuable service from which they received greater benefits than the gas used as fuel, nor did the plaintiff make any discrimination in rates on that account. The amount sued for was based on the value of the gas consumed at fuel rates. The defendants alleged that the plaintiff had no right to discriminate as to the prices for fuel and light; the plaintiff having claimed no such right, how was the question raised? Nor is the affirmance of defendants' first point inconsistent with the views herein expressed, the discrimination not being based exclusively on the use made of the product, but in connection with the fact that the service rendered and the benefits conferred are reasonably worth the rate imposed.

"Holding then that the defendant company has the right to make one rate for its product for fuel and another rate for light, are the present rates unreasonable or unjust? No complaint is made as to the rate for fuel. As to the rate for light we think the answer is found in a comparison of the rate imposed with the rates charged for other illuminants, and which may be regarded, under the testimony, as reasonable. Tried by such a standard, as heretofore shown, the rate is not an unreasonable one.

"It is further alleged that the defendant company is not acting in good faith, for its own interest, but for the benefit of other corporations engaged in the light business, in whose behalf it is seeking to enforce an unjust and unreasonable regulation; that the rate complained of was imposed by the defendant company for the purpose of avoiding the duty of furnishing natural gas for light, thus compelling its customers to make use of other illuminants supplied by other corporations. For such a purpose the company would have no right to enforce a rate otherwise unobjectionable, much less an unjust and unreasonable one. The purpose would render it unjust and unreasonable. The testimony produced at the hearing, however, does not, in our opinion, sustain this allegation. These companies may not be active competitors and neither may be willing to cut the scale of prices which has existed here for several years past, in order to obtain business. Nor is there any evidence that that scale of prices, viz., $1.50 per 1000 cubic feet for artificial gas, and an equivalent price for the same candle power in electricity, is not fair and reasonable in towns of this size and similarly situated. Whatever testimony there is in the case on that point is to the contrary.

"It is also objected that the proposed regulation is an unjust discrimination between persons, and therefore unlawful, as where the company delivers 5000 cubic feet of gas to one customer who uses it for light for which it charges $7.50, and to an adjoining customer the same amount of gas through the same pipe, same kind of meter, same inspection system, same kind of

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gas, in every respect the circumstances and conditions, which is used for heat, but for which the company charges only $1.25. The discrimination is more apparent than real. Are the circumstances affecting the price of the product the same in both cases? Suppose both should be deprived of gas and required to procure other means of heating and lighting; the one customer instead of natural gas uses oil, artificial gas or electricity. His light will cost him approximiately $7.50. The other customer uses coal. It will cost him approximately $1.25. Wherein has injustice been done to either? Would not the discrimination be far more unjust if the same rate for gas were given to each? The regulation and rates complained of operate on all alike. There is no preference between individuals or customers, and in our opinion, the objection urged cannot be sustained.

"After a careful consideration of all the evidence in the case our conclusion is that the motion to dissolve the preliminary injunction heretofore granted must be sustained.

"The testimony taken in this case was by agreement of counsel made applicable to the case of Robinson & McKean *v.* The Fayette Gas Fuel Company, both cases being heard together. For that reason one-half of the costs incident to the hearing should be taxed to that case at No. 287, in equity.

"Let a decree be drawn accordingly."

The plaintiff took this appeal from the decree dissolving the injunction.

Howard L. Robinson, (*McKean* with him), for appellant.

The purpose for which natural gas companies are incorporated is "to produce, deal in, transport, store and supply natural gas." There is not a word in the statute limiting or restricting its supply for certain purposes. In the list of powers, it says that the gas may be supplied for either heat or light or both or other purposes. This is not a restriction, but the exact contrary. It is an express declaration of their power and right to supply it for any use, made part of the statute for the evident express purpose of leaving no doubt on that subject, such as might be conjured up by the jealousy of heat and light companies. It is an enlarging and enabling clause and not a restraining one.

In contemplation of law as well as in fact a natural gas company is not a supplier of nor a dealer in heat or light, but in one single commodity, natural gas.

Consequently all reasons or arguments offered by it for differences in the price of the commodity must be such as will apply to the business of a dealer in such single commodity, and not such as might be proper to be urged by one rendering separate and distinct services or dealing in different articles.

By-laws of corporations must be reasonable.

Endlich on Interp. of Statutes, 491.
Kneedler *v.* Norristown, 100 Pa. 368.
Com'rs *v.* Gas Co., 12 Id. 318.
Pittsburgh's Appeal, 115 Id. 4.

What is reasonable is for the Courts.

Shepard *v.* Milwaukee Gas Light Co., 70 Am. Dec. 479; 82 Am. Dec. 679.

The rule here under consideration is unreasonable, because based upon no considerations of cost, expense to the company in supplying it, no difference in the cost of inspection and no difference in the quantity supplied.

It is unreasonable because it is in a manner an attempt on the part of the defendant to dictate to its consumers what they shall do with a commodity supplied by it after it has been bought, paid for and delivered to them, a commodity which it is in duty bound to furnish them in return for the privileges and franchises which the public has granted to it. Being chartered to "supply natural gas" for heat or light or both or the other purposes, and having heretofore elected to furnish it for all purposes, and it having been judicially decided that it was its duty so to do, what concern has it with the use made thereof after it has supplied it?

It is unreasonable in that it is an unlawful and unjust discrimination between customers.

No public or quasi-public corporation can make unjust discrimination between customers, and a mandamus will issue to compel it to furnish its facilities, products or whatever it deals in, to any person paying the usual rate.

State *v.* Nebraska Tel. Co., 17 Neb. 126.
Com. Union Tel. Co. *v.* New England Tel. & Tel. Co., 17 Atl. Rep. 1071.
Williams *v.* Mutual Gas Co., 52 Mich. 499.

John G. Johnson and *S. E. Ewing*, (with them *Nathaniel Ewing*), for appellee.

I. The charter of the appellee imposed upon it no duty to furnish gas for illuminating purposes.

The Act of May 29, 1885, P. L. 29, authorizes a corporation formed in the manner therein prescribed:—

"Fourth.—To produce, mine, own, deal in, transport, store and supply natural gas, for either light, heat or both, or other purposes, and have all the rights and privileges necessary or convenient therefor."

The charter required to be filed with the secretary of the Commonwealth contains no restriction. All demanded is a specification of—

"The place or places where natural gas is intended to be mined for and produced or received,

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the place or places where it is to be supplied to consumers, the general route of its pipe line or lines and branches, the location of its general office."

By this Act it is expressly provided:—

"Sec. 10. The transportation and supply of natural gas for public consumption is hereby declared to be a public use, and it shall be the duty of corporations, organized or provided for under this Act, to furnish to consumers along their lines and within their respective districts gas for heat or light or other purposes, as the corporation may determine."

The appellee is a quasi-public corporation, being authorized to exercise the right of eminent domain and, under certain regulations, to use public highways. A duty is imposed upon it to exercise its franchise for the purpose designated. It is obliged to supply natural gas, but it is not obliged to supply it for heat *and* light *and* other purposes. The duty imposed upon it is to furnish to consumers "gas for heat *or* light *or* other purposes, as the corporation may determine."

In its articles of association, the appellee did not bind itself to furnish natural gas for all purposes. It designated its purpose to be merely to supply the same, reserving to itself the right to determine the purposes for which it would make the supply, whether for heat, or for light.

It does not follow, because the appellee found it advantageous for a time to supply gas for both purposes, that it was bound to continue to do so. The sole duty incumbent upon it was to continue to furnish gas for one, or the other, purpose, reserving the power to determine whether the purpose of the supplying should be one or more than one. As long as it continues to supply natural gas for one of the purposes specified in the Act, it performs all the duty imposed upon it by its incorporation.

II. The appellee was legally justified in raising the price of gas for illuminating purposes to $1.50 per 1000 feet.

There is no provision in the Constitution, or in the legislation of Pennsylvania, requiring corporations to supply commodities owned by them, at a price based upon the cost of production. It is only when freights are extortionate in the case of public carriers that Courts intervene. The records of this Court furnish no instance even in that class of cases, of interference, because of alleged unreasonable charges, where not discriminating.

III. Persons using gas for illuminating purposes are not entitled to demand its supply at the same rates charged to those using it for fuel.

Philadelphia Co. *v.* Park et al., 138 Pa. 346.

Circumstances under which the gas is taken by the customer who wants it as an illuminant and by the customer who wants it for fuel, are different. Different circumstances justify different rates of charge.

Hoover *v.* Penna. R. R. Co., 156 Pa. 220.
Phipps *v.* L. & N. W. Ry. Co., L. R. 1892, 2 Q. B. D. 229.

Each class of customers can only complain if the price charged it for the article it desires to use for its purpose, is unreasonable, or discriminative, in the sense we have already considered.

IV. The appellee may make any regulations as to the purpose of its supply and as to the price thereof, which would be within the power of a corporation just starting in business.

If a corporation were chartered to-day under the natural gas Act of 1885, it could elect to supply gas for heat or for light; and it could supply it for light, if it so elected, at a price usually charged for an illuminant. No past course of dealing by the appellee disqualifies it from doing what could be done by a newly-created corporation. Almost as soon as the new use as an illuminant for natural gas was found it demanded the price of which there is now complaint. It furnishes to those who demand an illuminant what is needed by them at the price usually demanded for such illuminant. The only objection to its charge lies in the fact that when its commodity was being used for fuel purposes it charged a much lower rate.

October 6, 1899. MITCHELL, J. The defendant company was chartered under the Act of May 29, 1885, P. L. 29, to produce, transport, supply, etc., natural gas for heat, light or other purposes. It has been supplying the gas for both heat and light, and proposes to continue doing so, but upon terms making a difference in price according to the use to which the gas is put by the consumer. The question now before us is the reasonableness of this regulation.

In his opinion the learned Judge below said, "So far as concerns this case the defendant company may be regarded as incorporated for the purpose of supplying natural gas to consumers for heat and light." Not only did its charter powers cover both uses but, as already said, its actual operation has included both, and it is not intended now to abandon either, even if that could be done. The corporate powers are the measure of corporate duties.

The gas is brought by the company through the same pipes for both purposes and delivered to the customers at the same point, the curb. Thence it goes into pipes put in by the consumer and after passing through a meter, is distributed by the customer through his premises according to his own convenience. The regulation in question seeks to differentiate the price according to

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the use for heating or for light. It is not claimed that there is any difference in the cost of the product of the company, the expense of supplying it at the point of delivery, or its value to the company in the increase of business or other ways. Some effort was made to show increased risk to the company from the use of gas for lighting purposes, but the evidence of danger was so remote and shadowy that it cannot be considered as more than a mere make-weight. The real argument seeks to justify the difference in price solely by the value of the gas to the consumer as measured by what he would have to pay for a substitute for one purpose or the other, if he could not get the gas. This is a wholly inadmissible basis of discrimination.

The implied condition of the grant of all corporate franchises of even quasi-public nature, is that they shall be exercised without individual discrimination in behalf of all who desire. From the inception of the rules applied in early days to innkeepers and common carriers down to the present day of enormous growth of corporations for nearly every conceivable purpose, there has been no departure from this principle. And from all the legion of cases upon this subject, the distinguished counsel for the appellee have not been able to cite a single one in which a discrimination based solely on the value of the service to the customer has been sustained.

Hoover *v.* R. R. Co., 156 Pa. 220, was much relied on by the Court below, but was decided on a very different principle. That was an action for damages for unlawful discrimination by a dealer in coal because a manufacturing company had been allowed a rebate on coal carried to it. But it was held that as the rebate was allowed in consideration of a minimum of coal to be carried per day, and also in view of return freight on the product of the manufacturing company, it was not an unreasonable discrimination. In other words that the company might look for its compensation not only to the actual money freights from present service but also to increased business to grow out of the establishment of a new industry in that place. So also Phipps *v.* London & N. W. R. W., L. R. 1892, 2 Q. B. 229, cited for appellee, where the decision was put upon the right of the railroad to make special rates for freights from distant points which otherwise it could not get at all. Both cases belong to the numerous class of discriminations sustained on the basis of special advantages to the carrier, not the customer.

Decree reversed, injunction directed to be reinstated and made permanent. Costs to be paid by appellees.

H. B.

Jan. '99, 7. Supreme Court. March 27, 1899.

In re Assigned Estate of L. H. Taylor & Co.
Howard's Appeal.

Stock transactions—Purchase and sale upon margin—Whether gambling.

Dealing in stock, even upon margin, is not in itself gambling. The test of the legitimacy of a stock transaction is whether there was or was not, under any circumstances, an intended delivery of the stock, and if not, then the transaction becomes a mere wager on the rise and fall of prices; but if there was in good faith a purchase, then the delivery might be postponed or made to depend on a future condition, and the stock carried on margin or otherwise in the meanwhile, without affecting the legality of the operation.

Delivery is not in itself a material fact; its only value is as evidence of the intent to make a bona fide sale.

Where the auditor of an account of an assignee of an insolvent finds as a fact that the transactions between the broker and a customer were, so far as the broker was concerned, actual purchase and sale of stock, this should be fairly persuasive evidence that on the part of the customer the transaction was not a gaming one.

Appeal of William H. Howard, from the judgment of the Common Pleas No. 1, of Philadelphia County, in dismissing exceptions to the auditor's report on the account of the assignees of the estate of Lewis H. Taylor & Company.

Lewis H. Taylor, Jr., Frederick T. Chandler and Benjamin Van Clem, trading as L. H. Taylor & Co., brokers, made December 21, 1895, an assignment for the benefit of creditors. The assignee's report when filed was referred to Francis Shunk Brown, Esq., as auditor. Amongst the claims presented before him was that of Wm. H. Howard, as to which the following facts appeared:

On March 13, 1893, Howard bought 100 shares of Lehigh Coal & Navigation Company for $4337.50, and the next day paid L. H. Taylor & Co., $2000. During the month of April, 1893, he ordered, bought and sold about 1200 shares of stock. On April 30, 1893, he ordered sold "short" 100 shares of Baltimore & Ohio Railroad Company and 100 shares of Philadelphia, Reading & New England Railroad Company. On July 31, 1895, he owed Taylor & Co., $50,161.61. In November, 1895, he again turned "bear," selling "short" in that single month 500 shares of Reading Railway Company, 200 shares of American Tobacco Company, 100 shares of American Sugar Refining Company, common, and 100 shares of Welsbach Light Company. In December, 1895, he also made short sales of Welsbach Light Company and American Sugar Refining Com-

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pany, common. The account had been closed in 1893, but re-opened thereafter. No stock was delivered to him after March 13, 1893, when the account was re-opened. He testified that he did not intend to gamble.

The auditor disallowed the claim, saying:

"The account, however, including his enormous short sales, has all the earmarks of a gaming transaction, and I so find it."

Exceptions were filed to the action of the auditor in disallowing the claim, which exceptions were dismissed by the Court and the report confirmed.

William H. Howard took this appeal.

John G. Johnson, (*H. C. Todd* with him), for appellant.

Though Howard deposited money and shares of stock with the brokers as collateral security for gambling transactions, yet if the gambling transactions were fully closed, leaving in the hands of the brokers the original deposit, or a part thereof, he was entitled to a recovery of so much thereof as remained.

McNaughton Co. *v.* Haldeman, 160 Pa. 144.
Peters *v.* Grim, 149 Id. 163.

So long as money staked on the result of a wager remains in the hands of the stakeholder it belongs to the person from whom it came, and may be withdrawn by him notwithstanding the loss of the bet, and without the consent of the other party to the contract.

Dauler *v.* Hartley, 178 Pa. 23.

Although purchases and sales of stock effected through a broker are gambling transactions, yet when the parties have settled the account and the broker has paid over the profits, leaving nothing in his hands but a deposit of his customer's money for further operations, he cannot set up the illegal character of the transactions when sued for the deposit.

A purchase of stock for speculation, even when done merely on margin, is not necessarily a gambling transaction.

Peters *v.* Grim, 149 Pa. 163.
Repplier *v.* Jacobs, 149 Id. 167.

Though contracts may be illegal and unenforceable as such the recovery of the consideration has been allowed where higher public considerations than the immediate equities between the parties are not involved.

Taylor on Private Corporations, sec. 314.
Brooks *v.* Martin, 2 Wall. 70.
Marsh *v.* Fulton Co., 10 Id. 676.

The transactions between Howard and the brokers were not gambling transactions.

City of Louisiana *v.* Wood, 102 U. S. 294.

Richard C. Dale, (*C. Berkley Taylor* with him), for appellee.

July 19, 1899. MITCHELL, J. It has been settled by this Court so often that it ought not to require reiteration that dealing in stocks even on margins is not gambling. Stocks are as legitimate subjects of speculative buying and selling as flour or dry goods or pig iron. A man may buy any commodity, stock included, to sell on an expected rise, or sell "short" to acquire and deliver on an expected fall, and it will not be gambling. Margin is nothing but security, and a man may buy on credit, with security or without, or on borrowed money, and the money may be borrowed from his broker as well as from a third person. The test is did he intend to buy, or only to settle on differences? If he had bought and paid for his stock, held it for a year and then sold, no one would call it gambling and yet it is just as little so, if he had it but an hour and sold before he had in fact paid for it. And so with selling. Every merchant who sells you something not yet in his stock, but which he undertakes to get for you, is selling "short," but he is not gambling, because though delivery is to be in the future, the sale is present and actual.

The true line of distinction was laid down in Peters *v.* Grim, 149 Pa. 163, and has not been departed from or varied: "A purchase of stock for speculation, even when done merely on margin is not necessarily a gambling transaction. If one buys stock from A. and borrows the money from B. to pay for it, there is no element of gambling in the operation, though he pledges the stock with B. as security for the money. So, if instead of borrowing the money from B. a third person, he borrows it from A. or, in the language of brokers, procures A. to "carry" the stock for him, with or without margin, the transaction is not necessarily different in character. But in this latter case, there being no transfer or delivery of the stock the doubt arises whether the parties intended there should ever be a purchase or delivery at all. Here is the dividing line. If there was not under any circumstances to be a delivery, as part of and completing a purchase, then the transaction was a mere wager on the rise and fall of prices, but if there was in good faith a purchase, then the delivery might be postponed, or made to depend on a future condition, and the stock carried on margin or otherwise in the meanwhile, without affecting the legality of the operation." This has been uniformly followed: Hopkins *v.* O'Kane, 169 Pa. 479; Wagner *v.* Hildebrand, 187 Pa. 136. And the rule goes so far that an agreement for an actual sale and purchase will make the transaction valid though it originated in an intention merely to wager: Anthony *v.* Unangst, 174 Pa. 10.

Turning now to the facts of the present case

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it is clear that the law was not correctly applied by the auditor and the Court below.

The brokers made an assignment on December 21, 1895, on which day they held certain stock for appellant which they had bought on his order, and he had certain other stock which they had sold on his order but which he had not yet delivered to them. He desired to close the account, complete the mutual deliveries and receive the balance which the transactions left in his favor. He was entitled to do so even if the transactions were wagering, the agreement of the parties to make the sales actual would under Anthony *v.* Unangst, 174 Pa. 10, supra, have made them valid. It is true the settlement was not actually made until January 10, but it was made as of December 20, the day before the assignment, and the auditor reports that there had been no change of values meanwhile. The time of striking a balance on the books and delivering the stock was not important. Delivery is not in itself a material fact. Its only value is as evidence of the intent to make a bona fide sale. If such is the intent, the delivery may be present or future without affecting validity.

But there was no sufficient evidence that the transactions were illegal at any time. The auditor reports that "the stocks ordered to be bought or sold by the customers of L. H. Taylor & Co. were as shown by their books actually bought and sold, and as this evidence is uncontradicted I must and do so find. . . . Thus so far as L. H. Taylor & Co. were concerned the transactions were not fictitious, but were actual purchases and sales of stock." This finding should have been a warning to caution in taking a different view of the appellant's position in the transactions. It is true the purchase or sale may be actual on part of the broker and merely a wager on part of the customer (see Champlin *v.* Smith, 164 Pa. 481, 487), but there should be at least fairly persuasive evidence of the difference. There is none here. The transactions covered by the account began with a small cash balance to appellant's credit, followed by an order to buy 200 shares of Wabash common, which were bought by the brokers, paid for by appellant, and delivered to him. The close, two years and a half later, showed as already said, a large number of shares in the hands of the brokers bought for appellant and of which he demanded delivery and other shares sold for him and which he had in his possession ready to deliver. As to the intermediate transactions appellant testified: "It was always the intention to buy the stocks out and out and pay for them, and I had money to do it with." In the face of these facts and this uncontradicted testimony, the auditor found that "the account, including his enormous short sales, has all the earmarks of a gaming transaction and I so find it." This was a mere inference unwarranted by the account itself, and wholly opposed to all the evidence in the case.

Judgment, so far as it relates to appellant's claim, reversed and claim directed to be allowed.

W. D. N.

Jan. '99, 19. Supreme Court. March 27, 1899.

In re Assigned Estate of L. H. Taylor & Co.
Austin's Appeal.

Stock transactions—Purchase ana sale upon margin—Whether gambling.

A man may speculate by buying and selling upon expectation of the rise and fall of the market and he is not thereby gambling. Whether he dealt for that purpose or for investment, and whether he held his purchase an hour or a day or a year, are not material except as evidence. The test is whether he bought and sold, and not merely settled on differences with no intention at any time of taking his purchases or delivering his sales. That and that only is gambling.

Appeal of Samuel H. Austin, Jr., from the judgment of the Common Pleas No. 1, of Philadelphia County, in dismissing exceptions to the auditor's report on the account of the assignee of the estate of L. H. Taylor & Co.

The facts of the case showing the particulars of the transaction of the appellant with the assignors were as follows:

On October 17, 1895, he paid Taylor & Co. $1000 and ordered the purchase of 200 shares of American Tobacco Company common stock for $9312.50. On October 31 he purchased 100 shares of Electric Storage Company stock, selling same on that day at an advance of over $400. On November 7 and 11 he purchased in three lots a total of 600 shares of American Tobacco Company stock, costing about $26,000. On the latter date the Electric Storage Company stock was ordered sold, and $3000 cash was paid on account. On November 14 two lots of 200 shares each of American Tobacco Company common stock were sold for a total of $18,037.50. On November 18, 19 and 20 the claimant ordered the purchase of three lots of 200 shares each of American Tobacco common stock and paid $3000 additional on account. On November 26, 100 shares of American Sugar Refining Company common stock and 200 shares of American Tobacco Company common stock, and on November 27, 100 shares of the latter stock were ordered purchased, making Mr. Austin's debit balance $65,328.67. On November 29, 200 shares of American To-

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bacco Company common stock and 100 shares American Sugar Refining Company common stock were ordered sold. On December 20, 1895, claimant's account is in debit $39,457.10, as against which L. H. Taylor & Co. held 1000 shares of American Tobacco Company common stock and 100 shares of American Tobacco Company preferred stock.

The auditor disallowed the claim, saying:

"After a most careful consideration of all the evidence in this case, having regard to the presumption of regularity, I am obliged to find, from the number and character of the transactions, that this claimant merely intended to gamble upon the rise and fall of the market, and I therefore disallow his claim."

Exceptions to the report were dismissed by the Court which was made the subject of the assignments of error.

H. J. Scott, (*A. A. Hirst* with him), for appellant.

The auditor's finding was in the face of the evidence.

Where the auditor reports facts directly proved by the witnesses, his report is entitled to great weight, but when the fact is simply a deduction from other facts, reported by him, his conclusion is the result of reasoning and is subject to revision and correction by this Court if error is discovered therein.

Hindman's Appeal, 85 Pa. 466.

An auditor's finding of fact, which is merely an inference drawn by him from other facts, has not the value to which his finding of fact is ordinarily entitled.

Reading Iron Works' Estate, 150 Pa. 369.

If in a transaction there is in good faith a purchase, the delivery may be postponed, or made to depend on a future condition, and the stock may be carried on margin in the meanwhile, without affecting the legality of the operation.

Peters *v.* Grim, 149 Pa. 163.

The transaction, in any event, was not a gambling transaction.

R. C. Dale, (*C. B. Taylor* with him), for appellee.

July 19, 1899. MITCHELL, J. This is another appeal in the matter of the assigned estate of L. H. Taylor & Co., brokers, which was considered in Howard's Appeal, ante p. 512. The law was sufficiently discussed in that case.

At the time of the assignment Taylor & Co. held certain shares of stock which had been bought on appellant's order, partly paid for by him, but not yet delivered. They were not forthcoming on demand but were credited on his account and he presented a claim for the balance that appeared to be due him.

The auditor found that "as far as Taylor & Co. were concerned the transactions were not fictitious, but were actual purchases and sales of stock." He however found "from the number and character of the transactions, that this claimant merely intended to gamble upon the rise and fall of the market." And on the argument of exceptions, the claimant having testified that he bought the stocks as an investment, the auditor said: "The claimant's testimony as to what he *intended* to do, however, is strangely at variance with the admitted facts. From October 17, 1895, to the time of the failure he bought and sold seven or eight lots of stock. His sales would often follow two or three days after his purchases. I am at liberty, under the decisions, to go beneath the surface and find the real character of the transactions, and it is a stretch of language to say that a man who buys stocks and habitually sells the same a day or so thereafter is purchasing for investment." He therefore disallowed the claim. These two extracts from his report show that the learned auditor proceeded on the popular and not on the legal view of dealing in stocks, and entirely failed to apply the settled legal distinction between "gambling" and legitimate dealing. A man may speculate by buying and selling upon expectation of the rise or fall of the market and he is not thereby gambling. Whether he dealt for that purpose or for investment, and whether he held his purchases an hour, or a day, or a year, are wholly immaterial except as evidence. The test is whether he bought and sold, and not merely settled on differences with no intention at any time of taking his purchases or delivering his sales. That and that only is gambling. As already said, the auditor found that as to Taylor & Co. the transactions were actual purchases and sales. The appellant testified that as to himself they had the same character, and this testimony was corroborated and in no way contradicted except by the auditor's inference "from the number and character of the transactions." This conclusion was not warranted by anything in the evidence.

The judgment so far as it relates to this appellant's claim is reversed and the claim directed to be allowed.

W. D. N.

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Jan. '99, 21. Supreme Court. March 27, 1899.

In re Assigned Estate of L. H. Taylor & Co.
Lex's Appeal.

Stock transactions—Purchase and sale upon margin—Whether gambliug.

Evidence must be clear that in the transaction between customer and broker no actual delivery of the stock was intended, to warrant a finding that it was a wagering transaction.

When the customer of a broker elects to treat a transaction as a purchase of stock by tendering the balance due on a running account and demanding a delivery of the stock and the return of the collateral deposited to cover his dealings with the broker, the transaction becomes legal no matter what the evidence may show other and prior transactions to have been.

Appeal of Henry J. Lex, from the judgment of the Common Pleas No. 1, of Philadelphia County, in dismissing exceptions to the auditor's report on the account of the assignees of the estate of Lewis H. Taylor & Co.

The facts of the case appearing from the record as to claim of appellant were as follows:

At the time of the failure of L. H. Taylor & Co., Harry J. Lex was indebted to the firm of L. H. Taylor & Co. in the sum slightly in excess of $3000, for which, however, the firm held as collateral security 42 shares of Catawissa R. R. first preferred stock, 80 shares of Catawissa R. R. second preferred stock, and 10 shares of stock of the Fire Association, which Mr. Lex owned outright, showing an excess in his favor of about $6300. The day after the failure Mr. Lex called upon the firm of L. H. Taylor & Co., and tendered them the amount of his indebtedness and demanded the return of his collateral, but they were unable to return the collateral to him because they had rehypothecated it. His account was balanced, and there was found to be due to the said Harry J. Lex $6242.23.

The auditor found as a fact that no delivery was intended in any of his transactions and it was therefore a gaming account and the claim was, therefore, disallowed.

To this exceptions were filed which were dismissed by the Court and the action made the subject of the assignments of error.

W. H. Lex, for appellant.

R. C. Dale, (*C. B. Taylor* with him), for appellee.

July 19, 1899. MITCHELL, J. This is another claim against the estate which was considered in Howard's Appeal, ante p. 512, a reference to which will sufficiently disclose the general facts. When the firm failed this appellant was indebted to them in about $3000 for balance due on purchases of stock they had made for him, but as collateral security for this balance they held other stocks previously bought and paid for by him, worth over $9000. He tendered the balance due by him and demanded his collateral. It could not be returned, having been hypothecated by them under a general authority, but they credited him with its value, thus making a balance due him of $6300. His claim for this balance was disallowed by the auditor on the ground that it was the result of gambling transactions. As already discussed in Howard's Appeal, ante p. 512, and Austin's Appeal, ante 514, there was no sufficient evidence that the transactions were not actual purchases and sales and no attempt to test them by the settled rule as held in Peters *v.* Grim, 149 Pa. 163.

But apart from this consideration, the evidence clearly showed an election by the appellant to treat the last transaction as a purchase, (all previous ones being closed) and to settle the account on that basis. Under Peters *v.* Grim, 149 Pa. 163; Repplier *v.* Jacobs, 149 Pa. 167; McNaughton *v.* Haldeman, 160 Pa. 144; and Anthony *v.* Unangst, 174 Pa. 10, this made it valid whatever had been its original character.

The judgment so far as relates to this appellant's claim is reversed, and the claim directed to be allowed.

W. D. N.

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WEEKLY NOTES OF CASES.

VOL. XLIV.] *FRIDAY, NOV. 17, 1899.* [No. 33.

Supreme Court.

Jan. '99, 11. Supreme Court. May 9, 1899.

Sherrard's Executors v. Johnston.

Levy on real estate—Lien of, when made on execution issued without prior issue of scire facias on judgment more than five years old.

A lien upon real estate may be acquired by a levy under an execution issued upon a judgment more than five years old, notwithstanding the fact that no revival by scire facias has taken place; such lien will prevail over that of a subsequent levy made under execution upon a judgment less than five years old, but which was not a lien on the particular real estate prior to the first levy; and can be set aside only upon the motion of the execution defendant.

Lyon v. Cleveland, 170 Pa. 611, explained.

Appeal of Gertrude O. Torrence, from the judgment of the Common Pleas for Fayette County, confirming the report of an auditor, appointed to distribute a fund raised by sheriff's sale of land of Thomas R. Torrence.

The executors of Thomas G. Sherrard having obtained a judgment against Joseph Johnston and Thomas R. Torrence, issued on February 16, 1898, a fi. fa. followed on April 19, 1898, by a vend. ex. under which certain realty was sold to Gertrude O. Torrence for $18,560, and received from the said Gertrude O. Torrence the sum of $7000, and a receipt from her for $11,560 on account of a judgment, Catherine M. Banning to use of Gertrude O. Torrence *v.* Thomas R. Torrence et al., and after deducting costs held the fund. An auditor was appointed to distribute the fund, who found the facts as follows:

1. That Catherine M. Banning died on November 23, 1897, intestate, leaving to survive her, a husband, Anthony R. Banning, and two sons, Thomas R. Torrence and George A. Torrence, and the representatives of a deceased daughter, and seised in fee of certain lands in Fayette county.

2. That on said November 23, 1897, there were three judgments shown by the records of the Court of Common Pleas of Fayette county, against Thomas R. Torrence, as follows:

Amanda Morton *v.* Thomas R. Torrence et al., No. 137 Sept. term, 1876; debt, $1679.69; interest from August 12, 1876; date of judgment, August 12, 1876.

Catherine M. Banning *v.* Thomas R. Torrence, No. 156 June term, 1885; debt, $61,688.45; interest from July 20, 1888; date of judgment, July 20, 1888.

Sherrard's Executors *v.* Joseph Johnston and Thomas R. Torrence, No. 479, March term, 1894; debt, $2614.21; interest from October 4, 1894; date of judgment, October 4, 1894.

3. That on November 24, 1897, fi. fas. were issued on said judgments as follows: On No. 156 June term, 1885, to No. 126, December term, 1897, E. D., which was delivered to the sheriff at 9 A. M.; on No. 137 September term, 1876, to No. 127, December term, E. D., which was delivered to the sheriff at 5.05 P. M.; on No. 479, March term, 1894, to No. 129, December term, 1897, E. D., which was delivered to the sheriff at 8.30 P. M.

4. That on the Banning writ, No. 126, December term, 1897, E. D., the sheriff made a levy on the real estate of Thomas R. Torrence at 7.30 P. M., November 24, 1897, which levy was made by him in his office upon a memorandum furnished him by the plaintiff's attorney of the real estate of the said Thomas R. Torrence; that later that same day, after all three of said fi. fas. were in the sheriff's hands, he sent a deputy to New Haven, about twelve miles from Uniontown, and where the real estate of the said Thomas R. Torrence is situated, and on the morning of November 25, 1897, the deputy with all three of said fi. fas. in his hands went upon the said real estate and made an actual levy upon the same. To the Morton writ, No. 127, December term, 1897, E. D., the sheriff returned as follows: "Levied on certain real estate, levy hereto attached, as of November 24, 1897, filed in these cases. And after due legal notice of time and place of holding inquisition. Inquisition held December 4, 1897, which is hereto attached on Nos. 127 and 129 December term, 1897, E. D." On the back of the description of the real estate attached to this writ is the following:

"Levied on the within real estate November 24, 1897, 5.05 P. M. Sheriff."

To the Sherrard writ No. 129, December term, 1897, E. D, the sheriff returned the following: "See return of Nos. 127 and 129, December term, 1897, E. D., for levy and return."

5. That said Sherrard's executors issued a venditioni exponas to No. 93, March term, 1898, E. D., for the sale of the said real estate so levied upon on fi. fa. No. 129, December term, 1897, E. D., and on March 5, 1898, the sheriff of Fayette county sold the interest of Thomas R. Torrence therein and made return that he had sold the real estate for the sum of $18,560 to Gertrude O. Tor-

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rence and had received payment as above stated.

6. That by an agreement of the execution creditors, being all the parties in interest, it was agreed that the Court should appoint an auditor to make distribution of proceeds of sale notwithstanding the same had not been paid into Court.

7. That the real estate so levied on and sold by the sheriff as the property of Thomas R. Torrence was his undivided one-third interest in certain real estate which he inherited from his mother, Catherine M. Banning, on November 23, 1897.

8. That the levy of the sheriff on the Banning's use, Morton and Sherrard writs were indexed in the prothonotary's office of Fayette county on the judgment index on November 24, 1897.

9. That upon the said judgment 156, June term, 1885, Catherine M. Banning for use of Gertrude O. Torrence *v.* Thomas R. Torrence a scire facias was issued to 416 September term, 1897, on which judgment by confession was entered on November 26, 1897, for $94,990.15 against the defendant.

10. That upon said judgment No. 137 September term, 1876, Amanda Morton *v.* Thomas R. Torrence et al. a scire facias was issued to No. 427, December term, 1897, on which judgment was entered on January 8, 1898, for $3122.94 against the defendant, Thomas R. Torrence.

That upon said judgment No. 479, March term, 1894, Sherrard's executors *v.* Thomas R. Torrence et al., a scire facias was issued to No. 419, December term, 1897, on which judgment was entered on January 29, 1898, for $4131.24 against Thomas R. Torrence.

Claims were made upon the fund on behalf of all the judgments.

The auditor held that as the Sherrard judgment was the only one less than five years old at the time of the levy it was the only one upon which an execution could issue without the issue of a writ of scire facias, and, therefore, that it took precedence of the Banning and Morton judgments, notwithstanding the levies under them preceded the levy on the Sherrard judgment. He therefore awarded that judgment the sum of $3150.12, payment in full, and the balance to Gertrude O. Torrence, who had become possessed of the Banning judgments.

Exceptions were filed by Amanda Morton and by Gertrude O. Torrence, who claimed the whole fund. The exceptions were dismissed by the Court, MESTREZAT, P. J.

Gertrude O. Torrence took this appeal and filed, inter alia, the following assignments of error:

"2. The Court erred in not sustaining Mrs. Torrence's second exception to the auditor's report, which second exception is as follows, viz.:

"'Second. The auditor erred in distributing any money to the Sherrard execution, No. 93, March term, 1898.'

"3. The Court erred in not sustaining Mrs. Torrence's third exception to the auditor's report, which third exception is as follows, viz.:

"'Third. The auditor erred in not awarding the entire sum of money for distribution to the execution of Catherine M. Banning for use, etc., at No. 126, December term, 1897, without any deduction for costs of audit, and in not placing all costs of the audit on Amanda Morton and Sherrard's executors.'"

Edward Campbell, for appellant.

The execution under Mrs. Torrence's judgment was at most irregular, it was not void. Of this irregularity, no one but the execution debtor can take advantage.

Thompson's Appeal, 57 Pa. 175.
McLaughlin *v.* McLaughlin, 85 Id. 323.
Speer *v.* Sample, 4 W. 376.
Wilkinson's Appeal, 65 Pa. 189.
Phila. *v.* Jenkins, 162 Id. 451.
Levan *v.* Millholland, 114 Id. 49.
Kramer *v.* Wellendorf, 129 Id. 547.
Campbell's Appeal, 118 Id. 128.
Shannon *v.* Newton, 132 Id. 375.
Smyth *v.* Levy, 6 Pa. Sup. Ct. 23.

An execution issued on a valid judgment, after five years without a revival by scire facias is not void and its validity cannot be questioned collaterally.

Vastine *v.* Fury, 2 S. & R. 430.
Righter *v.* Rittenhouse, 3 Rawle, 273.

An execution issued on a judgment which is not a lien, becomes a lien on real estate from the day of its levy.

Shearer *v.* Brinley, 76 Pa. 303.

John M. Core, for appellee.

The Act of June 16, 1836, P. L. 755, governs executions in this State, and under it real estate cannot be taken on a fi. fa. issued on a judgment more than five years old.

Miller *v.* Miller, 147 Pa. 545.

No execution can issue after five years.

Davis *v.* Ehrman, 20 Pa. 257.
Marx *v.* Goldsmith, 14 WEEKLY NOTES, 173.
Harmony B. Ass'n *v.* Berger, 14 WEEKLY NOTES, 499.
Comstock *v.* Kilchenstein, 14 WEEKLY NOTES, 388.

In order to sustain any other view of the law than the one maintained by the plaintiffs in this case, we must put a forced construction on the Act of 1836 and interpret it to mean something that it does not say. We must strain the English language. The Act clearly says that "No execution shall issue." The issuing of an execution outside of the time designated by the Act of Assembly has nothing to favor it and the direct language of the Act of Assembly against it.

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Process forbidden by law is void, and a sale under it confers no title.

Sheetz et al. v. Wynkoop, 74 Pa. 198.
Bomberger v. Raymond, 2 Dist. Rep. 280.

If a sale under a process forbidden by law is void, could a lien be obtained under a process forbidden by law?

The lien of a judgment on real estate is the right to take it in execution. This the creditor has for five years. Shall the proceeds of a sale of after-acquired real estate be awarded to a judgment which had no right to seize real estate, or to a judgment which the parties by their vigilance had kept alive and was regular in every particular?

October 6, 1899. MITCHELL, J. The levy on the Banning judgment to the use of appellant was made on November 24, while that on appellee's judgment was not until the next day. Neither judgment being a lien on the land, which was after-acquired, the first levy had the first grasp on the fund: Packer's Appeal, 6 Pa. 277. But the appellant's judgment being more than five years old the learned auditor held that it would not support an execution and he therefore distributed the fund first to the appellee. In so doing, however, he overlooked the point that the objection was not made by the debtor defendant, and was not available to any one else.

The execution on the Banning judgment was not void, but merely irregular. As between the parties a judgment unpaid remains in force notwithstanding the expiration of its lien. There is no affirmative presumption of payment until after the lapse of twenty years, though after a certain length of time, fixed by the Act of April 16, 1845, P. L. 538, at five years, the law assumes that the defendant may have a valid reason against an execution, and therefore requires that he shall have an opportunity to show it before his land is seized. This provision, however, is for the benefit of the debtor, and if he refuses or neglects to take advantage of it, no one else can. The object of the scire facias to revive et quare executionem non, etc., is to give the debtor notice that he may be exposed to an execution unless he shows cause against it. It requires a valid defence and if he has none or refuses or neglects to present it, a new judgment will be entered on which execution may at once be issued. No other creditor has any standing to interject a defence for him in the scire facias, and no reason exists for allowing such interference if the plaintiff should assume that there is no defence and issue execution without the preliminary scire facias at all.

These principles were stated by KENNEDY, J., in Righter *v.* Rittenhouse, 5 Rawle, 273, as follows: "At common law after a year and a day had elapsed from the date of the judgment in personal actions without execution being issued thereon by the plaintiff a presumption arose that the defendant might be able to show that it was paid or discharged; and after that, without affording him an opportunity to do so, the plaintiff could not take out execution upon his judgment. To enforce the payment of it, he was compelled to bring an action of debt upon it, and to prosecute the same until he obtained a new judgment, upon which he might sue out execution. To avoid the delay that attended this course of proceeding, the statute of Westminster 2d gave a scire facias upon the judgment in such actions after a year and a day, requiring the defendant to show cause, if any he had, why the plaintiff should not have execution of his judgment. An execution sued out after the year and a day was never considered void, but voidable merely."

It is firmly settled that even a judgment which is fraudulent as to the debtor, cannot be set aside by creditors unless there is collusion or fraud as to them: Thompson's Appeal, 57 Pa. 175; Zug *v.* Searight, 150 Pa. 506. And *a fortiori* must the same rule be applied where the judgment or the proceeding upon it is not fraudulent or void, but merely irregular. In Drexel's Appeal, 6 Pa. 272, judgment against the Towanda Bank was entered by confession on a warrant signed by the president only, in his own name. It was held that the other creditors of the bank had no standing to impeach the judgment, this Court saying: "It might have been reversed on a writ of error, or set aside in the Court below on motion, but only at the instance of the defendant, never at the instance of a stranger. As long as the party injured by the irregularity submits to it, no one else can complain; for a third party has a right to interfere with a judgment only when it is collusive." See also McLaughlin *v.* McLaughlin, 85 Pa. 317, where a number of analogous cases are cited in the opinion on page 323.

The cases relied upon by the learned auditor do not touch this point. In Miller *v.* Miller, 147 Pa. 545, and Bannan *v.* Rathbone, 3 Gr. 259, the Court acted on the motion of defendant. In Lyon *v.* Cleveland, 170 Pa. 611, the question arose on a motion by a terre tenant, acquiring title to the land while subject to the lien of plaintiff's judgment, to strike off a levy on a revived judgment to which the terre tenant was not party. What was decided was that until the purchaser put his title on record, took possession, or in any other way gave actual or constructive notice to the plaintiff, a revival against the original debtor would bind the land. The remarks of our

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late brother WILLIAMS, by way of argument and illustration must be read with reference to the state of facts in the case before him. It was not intended to say that the lien of a judgment and the right to issue execution were identical, or that the existence of the former depended on the latter. Under the Act of April 4, 1798, 3 Smith's Laws, 331, the lien of a judgment continued for five years, though no execution could be issued on it after a year and a day without preliminary scire facias, until the period was extended to five years by the Act of 1845.

It is argued by appellee that appellant has not sufficiently proved the assignment of the Banning judgment to her. But the recovery is in the right of the legal plaintiff. No third party has any standing to question the status of the plaintiff to use.

Judgment reversed and fund directed to be applied first to the judgment of Catherine Banning. Costs to be paid by appellee.

H. B.

Jan. '99, 121. Supreme Court. May 22, 1899.

Madara v. Shamokin & Mount Carmel Electric Ry. Co.

Common carriers— Duty to passengers—Negligence, when presumed— Burden of proof— Whether injury caused by employe, or outsider — Proof of— Practice— Act May 8, 1895— Actions by husband and wife for injury to latter —Consolidation of actions—Amendments.

A common carrier owes to a passenger the utmost degree of care, and if the passenger is injured by one of the carrier's cars, while occupying that relation, the presumption is that it was through the negligence of the carrier.

Where it is claimed in defence that the accident was caused by a mere intruder acting without authority, the burden is upon the carrier to rebut the presumption, and not upon the passenger to show the negligence of the carrier.

M. was riding on the car of a passenger railway company, which from some defect in the electricity became stalled upon an up grade. After some efforts made by the motorman and conductor to start the car, one V., who had been assisting them, told the motorman that he would go to the car barn near at hand, and bring another car to which the passengers could be transferred. The motorman acquiesced, and as V. approached with the second car he lost control of it and a collision resulted, in which M. was injured. In an action by M. against the railway company, the defendant claimed that V. acted without any authority from the railway company, but offered no evidence to establish this fact:

***Held*, that it was a question for the jury upon the evidence whether V. acted with authority or as an intruder.**

After general issue pleaded, it is too late to object to an amendment which brings the record in accordance with the pleadings.

Such objection should be raised by demurrer, before plea entered.

Appeal of the Shamokin & Mount Carmel Electric Railway Company, defendant, from the judgment of the Common Pleas of Northumberland County, in an action of trespass, brought by Nicholas Madara and Mary C. Madara, his wife, against the said defendant, to recover damages for personal injuries sustained by the plaintiff Mary C. Madara, in a collision on the line of the defendant company.

The facts of this case are set forth in the opinion of the Supreme Court.

At the trial, the record then reading, Nicholas Madara and Mary C. Madara, his wife, in right of said Mary C. Madara, counsel for plaintiff moved, that the record in the above entitled cause be amended and the rights of the said Nicholas Madara and Mary C. Madara, his wife, be consolidated under the style and title of Nicholas Madara and Mary C. Madara, his wife, *v.* Shamokin & Mount Carmel Electric Railway Company, and that the suit shall be governed thereafter by the provisions of the Act of May 8, 1895. Amendment excepted to, because too late, more than two years having elapsed since the accident. Amendment allowed. (First assignment of error.)

The defendant submitted the following points:

"1. That under all the evidence in the case, the verdict must be for the defendant.

"2. The evidence shows that the proximate cause of the collision, in which Mrs. Madara was injured, was due to the act of William Visick in bringing down the car, and there being no evidence that he was in the employ of the company, it was the act of a mere volunteer, for which the company was not responsible, and there can be no recovery in this action.

"3. The evidence that the mere declaration was made that some one would go for the car, without ratification or acceptance by the company's agent, would not charge the company with any responsibility, and the verdict must be for the defendant.

"4. There being no evidence of ratification by either the conductor or motorman of the proffer to go for the car, the company was not responsible for the act of Visick, and there can be no recovery in this action.

"5. Mary C. Madara having been empowered by the Act relating to the husband and wife, etc., approved June 8, 1893, P. L. 344, to sue with the same effect as an unmarried person, has a right to bring an action in her own name, as has also

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her husband, and the Act relating to the husband and wife, etc., approved May 8, 1895, P. L. 54, having prescribed the form of action for injuries to the wife to be one suit brought in the name of the husband and wife, with the right in either the husband or the wife to waive his or her right of action, the bringing of this suit by Nicholas Madara, in the right of his wife, Mary C. Madara, was a voluntary election on his part to waive his right of action as contemplated by the second section of the Act of Assembly, and more than two years having elapsed since the date of the accident, the record in this case cannot be amended so as to introduce a new cause of action, and Nicholas Madara is barred from recovery." Answer—"The defendant has submitted a number of points all of which are refused." (Seventh assignment of error.)

The Court, SAVIDGE, P. J., charged the jury, inter alia, as follows:

"The first question for you to determine will be, whether or not the company was guilty of want of care under the circumstances of the case which led to the accident from which this injury resulted. The contention of the defendant is, that Visick, who brought this car down, was not in the employ of the company, nor was his act authorized by the motorman or conductor. But that he was a mere interloper, who went for this car without any authority, or without the assent or approbation of anybody who had the right to give such approbation or consent; the defendant has offered no testimony bearing upon this question. However, they have a right to rely upon all the testimony in the case, and it is as much for them as it is for the plaintiff, and if the testimony, taken in connection with the facts and circumstances surrounding the transaction, satisfies you that Visick was a mere interloper, a person who went up there without authority, without the approbation or consent of the motorman, then the company would not be responsible and that would be an end of the case.

"It is contended by the plaintiffs that what he did was done for the benefit of the company, because it was done for the purpose of relieving the car that became disabled, and having the passengers carried to the destination that the company had undertaken to carry them, and he was, therefore, not an interloper or intermeddler, but he ought to be considered as acting in the capacity of an employé, or servant of the company, temporarily, and for the purpose for which he undertook to act upon that occasion. [The motorman and conductor were the parties who were in charge of this car; under the circumstances they were authorized to do what in their judgment they considered for the best interest of the company, and what they thought the situation demanded of them in the dilemma in which they were placed. It was competent for them to authorize the bringing of another car and transferring the passengers so they might be carried to their destination, and if you find that Visick undertook to go for this car, and did go for this car by the direction or assent of the conductor or motorman in charge there, then he was in law acting in the interest of the company and with authority, and his act would be the act of the company, and they would be responsible for his want of care in bringing the car down to the main track. It is contended by the plaintiffs that the evidence shows this, and from all the facts and circumstances surrounding the case, you ought to say that what he did was at the instance of, or at any rate with the acquiescence of the motorman, Sweeney. The testimony is somewhat meagre on this question. You have that of Mr. Madara, who, as far as my recollection goes, testified that Visick offered to go for the car and told Sweeney he would go for the car and that Sweeney directed him so to do, or assented to it by his silence, and remained there with his stalled car awaiting the return of Visick with the car from the car barn.

"In determining this question, you will take into consideration the other testimony, together with that of Mrs. Sarah J. Yost, who testified that she saw Visick on one or more occasions acting in the capacity of motorman on the cars of the defendant company.] To repeat: If you conclude that Visick was an intermeddler and went up there without any authority, without the assent or at the instance and direction of the motorman, the company is not responsible for his act. The defendants claim the evidence shows, although it was not introduced on their side, that the result was brought about by the act of a stranger, and the company would not be responsible, and they are relieved from the consequence of such act. [But if you conclude from all the facts and circumstances surrounding this part of the transaction, that what he did was acquiesced in, authorized by the motorman, who was competent to act for the company under the circumstances, even to the directing or bringing another car, if you find it was by his authority, consent or acquiescence, then Visick was not a stranger, was not an interloper, but was acting in the interest of the company and with the authority of the parties in charge of the car there, the motorman, and his act could not be considered that of a stranger, but would be that of a party temporarily in the service of the company, and would be an act for which the company would be responsible, and his negligence would

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be the company's negligence, and there could be a recovery in the case, and it would be your duty to find a verdict for the plaintiff.]" (Fourth and fifth assignments of error.)

Verdicts, for Mary C. Madara $1254.17, and for Nicholas Madara $795, and judgment thereon, whereupon defendant took this appeal, assigning for error, inter alia, the amendment of the record, the answers to defendant's points, and the portion of the charge given above in brackets.

C. M. Clement and *Voris Auten*, for appellant.

The original suit was in the right of the wife; and as it was not necessary to join her husband under the Act of June 8, 1893, the doing so must be treated as an election of the husband to waive the right of action given him by the Act of May 8, 1895.

Such joinder cannot be treated as surplusage, as the Act of May 8, 1895, expressly provides the form of action, in only one suit brought in the names of the husband and wife.

The entry of a plea by the defendant cannot avail the plaintiffs, as the plea entered was a mandatory not a voluntary plea.

Bratton *v.* Mitchell, 5 Watts, 70.

The amendment was a change of the form of action from a well-settled common law action to a modern statutory action; and it is too late.

Hackett *v.* Carnell, 106 Pa. 291.
Kille *v.* Ege, 82 Id. 102.
Tyrrill *v.* Lamb, 96 Id. 464.
Furst *v.* Building & Loan Ass'n, 24 WEEKLY NOTES, 505.
Grier Bros. *v.* Assurance Co., 183 Pa. 334.
Dubois Borough *v.* Baker, 21 WEEKLY NOTES, 384.

It is true that both husband and wife had rights of action, which might have been tried together, or consolidated under the Act of 1895, but having sued in right of the wife only, it is too late two years after the accident, when his right of action is gone, to amend.

Rockwell *v.* Waverly, Sayre & Athens Electric Traction Co., 43 WEEKLY NOTES, 105.
Peterson *v.* Ferry Co., 190 Pa. 364.

There was no evidence that Visick was acting under the authority of the defendant company, and it was error for the Court to charge the jury that the motorman or conductor by acquiescing in his acts could render the company liable.

Gulf, Colorado & Santa Fé R. R. Co. *v.* Reed, 48 A. & E. R. R. Cas. 423.
Towanda Coal Co. *v.* Heeman, 86 Pa. 418.
Hexamer *v.* Webb, 101 N. Y. 377.
Fredericks *v.* North. Cent. R. R. Co., 157 Pa. 117.
Ebright *v.* Mineral R. & M. Co., 2 Mon. 126.

P. A. Mahon and *J. W. Gillespie*, for appellee.

The statement of claim filed was entitled Nicholas Madara and Mary C. Madara his wife, and to this statement defendant pleaded "not guilty." The amendment was only made that the record might conform to the issue raised by the statement and plea.

If under the pleadings Nicholas Madara was not entitled to recover, the proper practice would have been for the defendant to demur to that part of the statement of claim.

Patton *v.* Railway Co., 96 Pa. 169.
Sauerman *v.* Weckerly, 17 S. & R. 115.
Railroad Co. to use of Miller *v.* Stees, 77 Pa. 332.
Act February 21, 1814, P. & L. Dig., col. 3646.
Com. *v.* Freeman, 166 Pa. 332.

Where a passenger is injured by an accident the presumption is that it was caused by the negligence of the carrier, and the burden is on the carrier to show that the accident was caused by a stranger, or some one having no authority to act for the carrier.

Quinn *v.* Railway Co., 7 Pa. Super. Ct. 19.
Duggan *v.* B. & O. R. R. Co., 33 WEEKLY NOTES, 381.
Dimmitt *v.* Hannibal & St. J. R. R. Co., 40 Mo. Ap. 654.
Phila. & Reading R. R. Co. *v.* Anderson, 94 Pa. 351.
Spear *v.* P. W. & B. R. R. Co., 21 WEEKLY NOTES, 87.
Herstine *v.* L. V. R. R. Co., 31 WEEKLY NOTES, 49.
Bernhardt *v.* West Penn. R. R. Co., 159 Pa. 360.
Shafer *v.* Lacock, 168 Id. 497.

July 19, 1899. DEAN, J. Mary C. Madara took passage for herself and five children on defendant's car at Shamokin for Green Ridge, about six miles distant, on the morning of June 30, 1895, and were carried safely to their destination. At six o'clock in the evening they took the same car line to return, Nicholas Madara, the husband, being then with his family. The car, on an up grade at Green Ridge, from some defect in machinery or power, stopped and could not be moved. One William Visick was there at the time, assisting to get the car started, and giving directions as one having authority; not succeeding, he said to the motorman that he would go to the car barn a short distance off and get another car into which the passengers could be transferred and carried to their destination. He soon returned with another car, approaching the disabled and standing one on a steep down grade. From some cause the car he was on became unmanageable, ran into the disabled one standing on the track, and seriously injured Mary C. Madara, the plaintiff. The husband and wife brought this suit in the names of both, each averring special damage sustained, as alleged, by negligence of defendant; the statement filed, as amended, is in substantial accord with the provisions of the Act of May, 1895.

When the case came to trial in the Court below, the defence set up was, that Visick, who brought the second car, was a mere intermeddler

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and acted without any authority from the railroad company. The defendant offered no evidence to establish this fact, but relied on that of plaintiff to make it out. It was conceded that Visick was an employé of the company, though not a conductor or motorman, but in just what capacity was not clear. Nicholas Madara testified positively that he heard Visick say to the motorman he would go for the car, and the motorman assented, while the latter remained in charge of the disabled car then standing on a steep down grade. The Court below, in a charge quite as favorable to defendant as it had a right to ask, submitted to the jury to find, whether, in the exigency, Visick acted by the authority or instructions of the motorman in bringing up the relieving car, instructing them, if they did so find, then he was for the time being an employé of defendant; if, on the other hand, he acted of his own motion, then he was a mere stranger, and the railway company was not answerable for his negligence. There was a verdict and judgment for plaintiffs, and we have this appeal by defendant assigning for error the instructions of the Court as already noticed. It is argued that there was no sufficient evidence of any authority in Visick to act for the company, because there was no authority vested in the motorman to direct him to procure another car, and that, even if the motorman had such authority, the evidence wholly failed to show that he exercised it.

There was evidence showing that Visick sanded the rails when they were attempting to move the disabled car, that he gave instructions to the motorman how to manipulate the machinery to start it; when all their efforts proved futile, then Visick told the motorman he would procure another car and the motorman assented. Under any view of this testimony, the Court could not properly take the case from the jury. The disabled car was on a steep grade, a point full of peril to the passengers; surely, duty required the motorman, familiar with the machinery of the car, to remain at his post for their protection; nor could they stay in that position indefinitely; humanity, as well as safety, dictated that immediate efforts for the relief of helpless women and children should be made; whether the motorman did that which was most prudent under the circumstances, was for the jury to say.

But aside from this point, which the jury has determined in favor of plaintiff, she was a passenger on defendant's car, and by their contract they owed to her the utmost degree of care; being injured by one of the carrier's cars while occupying that relation, the presumption is, that it was through the negligence of the carrier. The burden is on it to rebut the presumption, by showing that Visick was a mere intruder upon the relieving car, acting wholly without authority. The burden is not upon the passenger to prove that one apparently in authority, having access to the car barn, and the power to assume control of a car and run it on the road to the relief of the stalled car, was a servant of the company. If the accident had been apparently caused by the act of a stranger, while the plaintiff was a passenger, as in Railway Co. *v.* Gibson, 96 Pa. 83, a collision with a hay wagon, the burden would have been on her to show negligence on part of defendant. But when it arose from a collision between defendant's cars operated on its own rails, the presumption of negligence arises and the burden is on defendant to rebut it.

There is nothing of merit in appellant's objection to the form of action; as before noticed, by the amendment to the statement, it was brought within the provisions of the Act of 1895; the defendant pleaded the general issue. It is possible if this purely technical objection had been raised by demurrer, it would have received fuller notice, but as the record stands it is without merit.

All the assignments of error are overruled, and the judgment is affirmed.

S. H. T.

Oct. '98, 163. Supreme Court. November 9, 1898.

Todd v. Traction Co.

Negligence—Railroads—Electric motors—Measure of damages—Charge of court.

In an action of trespass to recover damages for injuries received, a charge which does not explicitly instruct the jury what are proper items of expense incurred by plaintiff in the illness caused by the accident from which the action arose, is inadequate; and an instruction that plaintiff is "entitled to what the jury consider a reasonable and proper allowance for the pain and suffering which he has already endured and is likely to endure in the future," is erroneous.

It is the duty of the Court below, when plaintiff's counsel has made an erroneous statement of the law on the question of the measure of damages, to give more ample instruction on the point than merely to say "the amount stated by plaintiff's counsel in his argument is not the measure of damages."

Appeal of the Second Avenue Traction Company, operating the North Side Traction Company, from the judgment of the Common Pleas No. 3, of Allegheny County, in an action of trespass wherein Alexander R. Todd was plaintiff.

On the trial of this case, before KENNEDY, P. J., the facts appeared as follows:

The plaintiff was an employé of the Pennsylvania Railroad Company. On the morning of April 8, 1897, an electric car operated by the de-

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fendant company became disabled while approaching the railroad tracks of the Pennsylvania Company. The electric car suddenly started while the conductor and motorman were endeavoring to adjust the difficulty and, despite the closed safety gates at the railroad at the crossing of Sandusky street, broke through the gates and struck the car on the train passing at the time in which the plaintiff was standing.

At the time of the accident his compensation amounted to about eighty dollars per month as a brakeman in the employ of the Ft. Wayne Railroad Company. He was 44 years old at the time of the accident, and claimed to have been so badly injured as to be prevented entirely from earning anything in his usual employment.

In his opening address to the jury, the counsel for the plaintiff stated the amount of damages sued for and claimed by the plaintiff in his declaration, namely, the sum of twenty-five thousand dollars, and stated to the jury that the plaintiff had been damaged to that amount, and would claim that amount at the hands of the jury.

The Court charged the jury, inter alia:

"And they (defendants) are also required to furnish reasonably skilled and competent men to operate the cars and the machinery and the appliances. Now that is just where the plaintiff claims the defendant failed in its duty, and it is for you to determine whether or not, the defendant company did exercise the proper care under the circumstances." (Second assignment of error.)

The Court affirmed the following point of the defendant:

"1. The fact that an accident occurred, is not in itself proof that the defendant company was guilty of any negligence; and unless the jury find from the evidence that the defendant failed to do something required by ordinary care and prudence, or that it actually did something, to cause the accident, which an ordinarily careful and prudent person would not have done, then the plaintiff cannot recover in this case, and the verdict should be in favor of the defendant."

Immediately upon the close of the charge, and immediately after the reading by the Court, and the answering of the three points already submitted, defendant's counsel orally called the attention of the Court to a statement made by the plaintiff's counsel in his argument, viz., to the effect that the plaintiff, previous to his injury, had been earning nine hundred and sixty dollars a year, and that this was equivalent to the interest upon the sum of sixteen thousand dollars, at six per cent. per annum, and that they, the jury, were at liberty to take this suggestion into consideration, in arriving at the measure of compensation due to the plaintiff for his loss of earning power. And defendant's counsel further orally requested of the Court, explicit directions to the jury that the measure of damages thus set forth in the statement of counsel for the plaintiff, was not the correct measure of damages. Which request was answered by the Court by an addition to his charge as follows: "The amount stated by the plaintiff's counsel, in his argument to the jury, is not the measure of damages. You will follow in estimating the damages, the rule I have given you, irrespective of the claim made by counsel for plaintiff." (Third assignment of error.)

Verdict for plaintiff, $18,250, and judgment thereon. The defendant took this appeal and filed assignments of error as above indicated, and also that the charge of the Court was inadequate in failing to instruct the jury that the burden of proving the negligence, under the circumstances of the case, was on the plaintiff. (First assignment of error.) And that it was inadequate in failing to give the jury any proper measure of damages. (Fourth assignment of error.)

W. P. Potter, (*W. A. Stone* with him), for appellant.

Negligence will not be presumed where an injury results from one of the ordinary incidents of travel, but the plaintiff must show it affirmatively as part of his case.

Stager *v.* Pass. Ry. Co., 119 Pa. 70.
Hayman *v.* P. R. R. Co., 118 Id. 508.

The jury had no right to capitalize the plaintiff's loss in earning power.

Tietz *v.* Phila. Traction Co., 169 Pa. 525.
Goodhart *v.* P. R. R., 177 Id. 1.

R. P. Marshall, (with him *T. M. Marshall* and *D. S. McCann*), for appellee.

If the defendant desired any special instructions as to the burden of proof of negligence, and the giving the jury a proper measure of damages, he should have asked the Court for special instructions on these points.

Burns *v.* Sutherland, 7 Pa. 103.
Bain *v.* Doran, 54 Id. 124.
Fisher *v.* Filbert, 6 Id. 61.
Seigle *v.* Louderbaugh, 5 Id. 490.

The remark of the plaintiff's counsel to the jury that he claimed $25,000 was a matter dehors the record and its propriety or impropriety cannot be passed upon on error to the Supreme Court.

McCloskey *v.* R. R. Co., 156 Pa. 254.
Thompson *v.* Stevens, 71 Id. 161.
Thompson *v.* Barkley, 27 Id. 263.
Fulmer *v.* Com'th, 97 Id. 503.
Com'th *v.* Eisenhower, 181 Id. 476.
Com'th *v.* Windish, 176 Id. 167.
Com'th *v.* Weber, 167 Id. 153.
Com'th *v.* Nicely, 130 Id. 261.

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The rule as to damages in actions upon contracts and for tortious injuries to property is incapable of being applied where the injury is to the person, for those injuries are without pecuniary measure.

Frame v. Traction Co., 180 Pa. 49.
Chicago & Eastern Ill. Ry. Co. v. Holland, 18 Ill. App. 422.
Walker v. Erie Ry. Co., 63 Barb. 260.

October 6, 1899. McCollum, J. This is a peculiar case and the occurrence on which it is based is a novel one. It is the outcome of a collision imputed to the negligence of the defendant company. Immediately preceding the collision the company's car was standing on the tracks of the street railway about twenty feet from the lines of railroad operated by the Pennsylvania Company and facing the same. The safety gates at the crossing were down and a train was passing westward on one of the lines at a moderate rate of speed. As the train was crossing the line of the street railway operated by the defendant company the latter's car started suddenly and rapidly towards the crossing, broke through the first safety gate, and collided with the rear car. The plaintiff at the time of the collision was standing in the rear car of the train and he alleges that the jar it received by the impact threw him against the radiator or stove in the car, and thus produced the injury which he claims has rendered him practically helpless. The testimony descriptive of his condition and the cause of it appears to sustain his claim respecting his injury, and the effect of it. It is not necessary to add anything further to this phase of the plaintiff's case. Of course it devolved on him to establish by competent evidence the negligence he imputed to the defendant company, and failing in this, he could not maintain his suit. The question of negligence was not made as clear as it was desirable it should be. The evidence concerning the qualifications and skill of the conductor, the motorman and the dispatcher was not comprehensive or satisfactory. If it was less vague and indefinite on this point it would command more respect and confidence. It is difficult to determine from the evidence whether the starting of the car was caused by improper management of the company's employés in charge of it, or by defects in the machinery not discoverable by them, or if discoverable not within their power to remedy or control. That the employés charged with the operation of the car did not intend to start it while the safety gates were down and a train was on the crossing admits of no doubt, and that they exercised their best skill and judgment in the discharge of their duty as they understood it is too clear for argument. The testimony of the employés having charge of the car does not show any direction from the dispatcher to the motorman to turn on the power or to start the car. It will be noticed, however, that a passenger who was once in the service of the defendant company and who had been discharged from it, testified that he heard the dispatcher say to the motorman, "that the car was all right to cut over his safety," that then he saw the motorman "reach over his head with his right hand, the same as though he was going to cut it in" and that immediately thereafter the car started. He appears to have been the only passenger who heard the remark he imputes to the dispatcher, or saw the movement of the motorman's right hand contemporaneous with the starting of the car. It seems to be conceded that neither the dispatcher nor any other person having knowledge of the machinery and the manner of operating it, would have dared to touch the controller with the power on. It follows from this that when the dispatcher turned or handled the controller the power was off.

Further reference to the collision and its consequences or to the evidence affecting the issues involved is not essential to the decision of the question raised by the assignments. The single question presented by them is whether the charge to the jury was sufficient, or inadequate and misleading. It is claimed that the Court failed to instruct the jury that the burden of proving negligence under the circumstances was upon the plaintiff, but we think this claim is sufficiently disposed of by the affirmance of the defendant's first point. It is also claimed that the Court erred in stating to the jury that it was the duty of the defendant "to furnish reasonably skilled and competent men to operate the cars and the machinery and appliances," and in saying in immediate connection therewith, "that is just where the plaintiff claims the defendant failed in its duty." In the above quotations from that part of the charge complained of in the second assignment, we discover no substantial ground for complaint or criticism, and certainly the instruction that it was for the jury to determine whether the defendant exercised proper care under the circumstances was unobjectionable.

The instruction relating to the measure of damages was exceedingly brief. It was nothing more than a perfunctory specification of the items constituting the damage claimed as the result of the negligence attributed to the defendant. The items consisted of expenses incurred as a consequence of the injury received, the inconvenience and suffering naturally resulting from it and the abridgment or loss of earning power, whether temporary or permanent, consequent upon the

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character of the injury. No reference to or explanation of the evidence or law applicable to either item was made, and the jury were left without such aid or guidance to a conclusion as they were fairly entitled to. In the recent case of Goodhart *v.* Penna. R. R. Co., 177 Pa. 1, it was held that "the expenses for which a plaintiff may recover must be such as have been actually paid, or such as in the judgment of the jury are reasonably necessary to be incurred. The plaintiff cannot recover for the nursing and attendance of the members of his own household unless they are hired servants." In the same case it was held that, "Pain and suffering are not capable of being exactly measured by an equivalent in money and they have no market price. The question in any given case is not what it would cost to hire some one to undergo the measure of pain alleged to have been suffered by the plaintiff, but what under the circumstances should be allowed the plaintiff in addition to the other items of damage to which he is entitled in consideration of suffering necessarily endured. An instruction that leaves the jury to regard pain as an independent item of damage to be compensated by a sum of money that may be regarded as a pecuniary equivalent is not only inexact but it is erroneous." Probably the most important item to be considered in a case like the one now before us relates to the loss of earning power. It is not uncommon for jurors to fall into grievous error in ascertaining compensation for such loss. For instance, they have frequently awarded to the injured party such a sum as would yield to him at six per cent. during his lifetime an annual income equivalent to his earnings when in full health and vigor. Ordinarily adequate instructions on this point would prevent the error, although they were disregarded, in Tietz *v.* Phila. Trac. Co., 169 Pa. 516. In the case at bar the plaintiff's counsel in their argument to the jury stated that their client, previous to his injury "had been earning nine hundred and sixty dollars a year, and that this was equivalent to the interest upon the sum of sixteen thousand dollars at six per cent. per annum, and that they, the jury, were at liberty to take this suggestion into consideration in arriving at the measure of compensation due to the plaintiff for his loss of earning power." The learned trial Judge did not note this statement in his general charge and at the conclusion of it the defendant's counsel requested of him "explicit directions to the jury that the measure of damages set forth in the statement of counsel for the plaintiff was not the correct measure of damages." His only answer to this request was as follows: "The amount stated by the plaintiff's counsel, in his argument to the jury, is not the measure of damages. You will follow in estimating the damages, the rule I have given to you irrespective of the claim made by counsel for plaintiff." The counsel for the defendant excepted to the answer upon the ground of its inadequacy and at his instance and request the exception was allowed and bill sealed for the defendant.

It seems to us that in view of the evidence in the case and the circumstances surrounding it, the charge to the jury was inadequate and especially so in that part of it which related to the plaintiff's loss of earning power. A decision will therefore be rendered accordingly.

Judgment reversed and venire facias de novo awarded.

W. D. N.

Oct. '98, 56. Supreme Court. November 8, 1898.

Bryant v. Pittsburgh Times.

Libel—Newspaper—Probable cause—Privileged publication.

The publication by a newspaper as an item of news, of something which imputes participation by a physician in a criminal abortion, is a libel and the publication submits the paper to liability to damages, unless proof of the truth of the assertion is shown.

The general rule is that nothing but proof of the truth of a publication is a defence to a libel. That the publication was privileged because made on a proper occasion from a proper motive and upon probable cause, is the excepted case, and he who relies upon the exception must prove all the facts to bring himself within it.

Appeal of S. H. Bryant, from the judgment of the Common Pleas No. 2, of Allegheny County, in an action of trespass for libel wherein the Pittsburgh *Times* was defendant.

On the trial of the case, before FRAZER, J., the plaintiff showed the following case:

About June 1 or 2, 1896, a woman by name of Mary Ann New, residing in the Twenty-seventh ward in the city of Pittsburgh, died, as it afterward appeared, from the results of an abortion. On or about June 3 the matter was brought to the attention of the coroner, who made an investigation into the cause of Mrs. New's death. On the afternoon of June 4, the coroner or his deputy, held an inquest on the death of Mrs. New. Dr. S. H. Bryant, also a number of other persons, were subpœnaed as witnesses, Dr. Bryant having been subpœnaed about noon of June 4. The coroner's investigation showed that Mrs. New had died from the result of an abortion, but it did not charge any person as having been responsible for, or implicated in any manner in the crime.

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On the morning of June 4, 1896, before the hearing by the coroner, the Pittsburgh *Times* published the following article:

"SUBPŒNAED THE DOCTOR.

An Inquest Will be Made Into the Death of Mrs. Mary Ann New—Her Daughter's Statement.

"Coroner Heber McDowell will make an inquest this afternoon into the death of Mrs. Mary Ann New, of the Twenty-seventh ward, who died of malpractice Monday morning. The body was buried yesterday.

"County Detective Robert Robinson was sent by District Attorney John C. Haymaker to assist the coroner yesterday. The detective and Deputy Coroner Mark Donley subpœnaed Dr. S. H. Bryant of 821 Carson street, who is alleged to have performed the operation. He is a leading homœopathic physician of the South Side, and is now under police surveillance at the order of the county detective. . . . . "

The defendant gave as evidence tending to show probable cause the testimony of one witness that he had heard plaintiff's name mentioned in discussing the death of the woman, and that of another that a child had told him that the plaintiff had attended the woman, but both swore they had not given this information to the papers or to any one.

The Court affirmed a point that the verdict must be for defendant.

Verdict and judgment accordingly. The plaintiff took this appeal.

U. S. Vogan, (*W. G. Crawford* with him), for appellant.

Did the publication charge, or tend to charge, Dr. Bryant with having committed the crime of abortion? If there was any doubt as to the meaning of the language used, that question was for the jury, and the Court had no right to give binding instructions, unless the publication was justifiable on some other ground.

Com'th *v.* Wolfinger, 7 Kulp, 537.

The defendant cannot justify by proving that such an allegation had been made by someone, or that such a rumor existed, but in order to defend on this ground, the defendant would have to prove the truth of the allegation itself.

Oles *v.* Pittsburgh Times, 2 Pa. Super. Ct. 130.
Collins *v.* Dispatch Pub. Co., 152 Pa. 187.
Dwyer *v.* Fireman's Journal Co., 11 Daly, 248.

The publication does not come under the head of privileged communications.

Conroy *v.* Pittsburgh Times, 139 Pa. 337.
Neeb *v.* Hope, 111 Id. 145.

So, where the alleged libel charges an indictable offence, the presumption of innocence ought, and must stand as prima facie evidence of falsity and want of probable cause, and therefore of malice, even in cases of the claim of privilege. To the same point, see also—

Ingram *v.* Reed et al., P. L. J. Dec. 22, 1897.
McGraw *v.* Hamilton, Id. Feb. 23, 1898.
Com'th *v.* Costello, 1 Dist. Rep. 749.

G. C. Wilson, (*W. D. Evans* with him), for appellee.

October 6, 1899. McCollum, J. The announcements contained in the publication complained of and directly affecting the plaintiff in this case are that Coroner McDowell had resolved to hold an inquest on the body of Mrs. New, who died of malpractice; that district-attorney Haymaker had sent county detective Robinson to assist the coroner; that the detective and the deputy-coroner had subpœnaed Dr. S. H. Bryant, of 821 Carson street, who is alleged to have performed the operation; that he is a leading homœopathic physician of the South Side, and is under police surveillance at the order of the county detective. The common and natural inference from the publication was that the death of Mrs. New was the result of an abortion, and that the physician then under police surveillance was connected with it.

It may be stated here that the plaintiff appeared at the inquest in obedience to the subpœna, but he was not called to testify and it was not shown that he had knowledge of Mrs. New's illness previous to the publication or that he was at any time her medical adviser or a participant in the crime which resulted in her death. The only conclusion arrived at by the coroner's investigation was that Mrs. New's death was caused by an abortion, but it did not charge any person as having been responsible for or implicated in any manner in this crime.

The plaintiff regarding the publication as libelous, and injurious to his reputation and business, instituted this suit. On the trial of it in the Court below he testified that he did not know Mrs. New, and that to the best of his knowledge he had never seen her, or prescribed for her, at his office or elsewhere. His testimony in this particular was corroborated by his son, and no attempt was made to contradict it. He also introduced evidence showing the effect of the publication upon his reputation and practice.

It was not denied by the defendant company on the trial or the appeal, that the publication complained of virtually charged an indictable offence. But the defence of probable cause was not clearly established by competent evidence and therefore it was error to withdraw the case from the jury and enter a verdict for the defendant. In Conroy *v.* The Pittsburgh *Times*, 139 Pa. 337, our brother Mitchell, speaking for this Court, said: "The general rule is that nothing but proof of the truth is a defence to a libel. That it was privileged because published on a

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proper occasion from a proper motive, and upon probable cause is the excepted case, and he who relies upon the exception must prove all the facts to bring himself within it," and "that where a publication charges an indictable offence the presumption of innocence is prima facie evidence of want of probable cause and sufficient to put the defendant to proof of the facts to support his claim of privilege." He also said in the same case "that the presumption of innocence cannot be overcome by mere rumor or idle report, or careless and insufficient examination set up as a probable cause." Applying these principles to the case at bar it seems clear that it should have been submitted to the jury.

Judgment reversed and venire facias de novo awarded.

W. D. N.

Orphans' Court.

Oct. '96, 552.

Boyer's Estate.

Trusts—Whether premium paid for investments is chargeable to principal or income.

Premium paid for investments is chargeable to the principal of the trust estate and not to the income from them; therefore a trustee may not withhold a part of the income to meet a possible diminution of principal. So much the more is this true when the trust instrument directs "the net income" to be paid to the life tenant.

Sur exceptions to the adjudication of the second account of Charles Chauncey, Esq., surviving executor of the will of Moncure Robinson, deceased.

By his will the testator devised and bequeathed, inter alia, as follows: "I direct all my estate real and personal of every kind and description to be divided into as many shares as nearly equal as possible as I shall leave children surviving me; and I direct my executors to hold for each of my daughters who may be then living, one of said shares, in trust to pay over the net income of such share to each of my daughters during her life. The proceeds of any sales of real and personal estate sold by my executors the survivor or the survivors, I direct to be invested by them or him and held for the purposes of my will in such stocks, loans or securities as he or they may deem most advantageous."

Upon the audit of the account, before FERGUSON, J., it appeared that the accountant had from time to time purchased for the estate various securities at a premium, which premiums, at the maturity of these securities when they were paid off at par, would be lost, the accountant, therefore, had charged the amount of said premium against the income.

The auditing Judge decided that the sums "paid for commissions and premiums on investments made for the estate ought properly to be charged to the principal and not to the income account."

Charles Chauncey, for exceptions.

In the absence of indications of a contrary intent on part of the settlor of the trust, the preservation of the principal of the trust estate unimpaired is the first duty of the trustee.

Hill on Trustees, 598.
Lewin on Trustees, 294.
Meyer *v.* Simonsen, 5 DeG. & Sm. 723.
Hume *v.* Richardson, 4 DeG., F. & J. 29.
Brown *v.* Gellatly, 83 Pa. 264.
Cridland's Estate, 132 Id. 479.
Earp's Appeal, 28 Id. 368.
Farwell *v.* Tweddle, 10 Abb. N. C. 94.
N. E. Trust Co. *v.* Eaton, 140 Mass. 540.
See S. C., 1 New Eng. Rep. 372.

It is the general rule where property given in trust to several persons in succession is of a wasting nature that the Court will imply an intention that it should assume a permanent character and direct conversion.

Where property though not wasting produces a high rate of interest in proportion to its value and is liable consequently to additional risk, the persons entitled in expectancy have a right to call for its conversion into 3 per cents.

Lewin on Trusts, Am. Ed., 298-301.

If the whole income were paid to the tenant for life nothing would be left to the remainderman.

Hill on Trustees, 592, 593, note 3, 597, note 1.

Bank stock should be converted into 3 per cent. consols.

Hill on Trustees, 594.
In re Housman, 4 Dem. 404.

The English principle as to leasehold estates is that the tenant for life must turn over property as he received it and must have deducted from his income the just proportion of expense of maintaining security by renewal of the lease.

Hill on Trustees, 4th Am. Ed. 683.
N. E. Trust Co. *v.* Eaton, supra.
Underhill on Trusts and Trustees, 245.

Increase in the value of the fund invested in trust belongs to the remainderman.

Cockburn *v.* Peel, 3 DeG., F. & J. 170.
Hubley's Estate, 41 L. Int. 66.
N. E. Trust Co. *v.* Eaton, 140 Mass. 534.
Boyer's Estate, 174 Pa. 16.
De Silver's Estate, 21 WEEKLY NOTES, 544.

Also gains by appreciation of investment and profits on sales of land, where they have been earned and are actually existing in the life of the testator.

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Oliver's Estate, 24 WEEKLY NOTES, 139.
Earp's Appeal, 28 Pa. 368.

So also, "Any extraordinary bonus or addition to the usual income of stock or other property where there is a trust for life remainder over must be created as capital and added to the principal fund."

Hill on Trustees, 592.

Losses are borne by the principal of the trust estate.

Hubley's Estate, 41 Leg. Int. 66.
Cockburn *v.* Peel, 3 DeG., F. & J. 170.
N. E. Trust Co. *v.* Eaton, 140 Mass. 532.
Cridland's Estate, 132 Pa. 479.

In England it has even been held in some cases that the life tenant must bear a share of the loss, as when stock in which funds were invested was reduced by Act of Parliament.

Hill on Trustees, 695.
Citing Att'y-Gen. *v.* Poulden, 8 Jur. 611, (3 Hare, 555).

In this State it would seem that "a loss arising must be borne by the estate."

Cridland's Estate, supra.

And in New York see:

Farwell *v.* Tweddle, 10 Abb. N. C. 94.

English cases decide that tenant for life is entitled "Life Tenant and Remainderman," in 34th thorized permanent investment."

Hemenway *v.* Hemenway, 134 Mass. 450.

But the real income of a bond purchased above par, say at 120, an investment which may be safe and prudent, is not the amount received annually, but the amount after deducting the same necessary to restore, at the end of ten years when the bond is due, the $20 premium. The premium is only an advance from capital which the remainderman is entitled to have repaid; if it is not the property is diminished solely for the benefit of the tenant for life.

N. E. Trust Co. *v.* Eaton, 140 Mass. 535.
Perry on Trusts, sec. 547.
Hemenway *v.* Hemenway, 134 Mass. 451.

Rich & Boyer, contra.

Premium on investments should be charged to principal.

Furness's Estate, 12 Phila. 130.
Hite *v.* Hite, 20 S. W. 778.
Shaw *v.* Cordis, 143 Mass. 443.

The decision in Trust Co. *v.* Eaton, 140 Mass. 535, is severely criticised in an able article entitled "Life Tenant and Remainderman," in 34th Alb. Law Journal, 144, the conclusions of the writer being:—

1. That so far as premiums are occasioned by an excess of interest above the market rate, the life tenant should not be called upon to make good the loss, because the premium which results from this cause will be commensurate with the excess of interest, and the investment will, therefore, net the life tenant no greater income than the same security at par, and he will, therefore, derive no benefit from it.

2. That to the extent that the premium results from the permanency of the investment, the life tenant ought not to be required to make up the deficiency in the principal caused thereby, for the reason that his interest in the permanency of the investment is but slight, as it is not difficult to secure new investments, and for the further reason that his interest in the investment may terminate at any moment; and the interest of the remainderman is to have the security run for a long time that he may have the benefit of a permanent interest after the life tenant's death.

3. That the life tenant fully and fairly bears his share of the burden by losing annually interest on the amount of premium caused by the element of safety of the investment, without being called upon to restore to the principal the whole or any portion of the deficiency which results from the payment of such premium. The only interest that the life tenant has in the safety of the investment is that he may receive the interest on it during his life. The interest of the remainderman is to receive the principal itself. That the life tenant may surely receive his interest, a certain sum is paid, and it is a just and equitable apportionment of the loss that the life tenant should pay interest for the preservation of interest, and the remainderman principal for the preservation of principal.

October 28, 1899. PENROSE, J. The questions raised by these exceptions were passed upon and decided in Furness's Estate, 12 Phila. 130, where it was said: "If the premium paid for investments is to be charged to income and not to principal, it must often happen that the persons entitled to the former will be left without means of support. Take the case of a purchase of city loan—now selling at $113, under a trust to pay income to a widow for life with remainder to her children. If she should die within two years after the investment she would receive no income at all, and the securities would, perhaps, sell for as much as they cost. The party who is to receive income is not often consulted with regard to the mode of investment; and the amount paid in the way of premium is usually dependent upon other considerations than mere productiveness of income, e. g., the facility of transfer, ease of conversion into cash, etc., etc., of more importance to the ultimate owner of the principal than to the recipient of the income."

The point did not arise in Cridland's Estate, 17 Crum. 479, in the Supreme Court or in the Court below, and was not discussed or even al-

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luded to. We see no reason whatever for changing the views expressed in Furness's Estate. If the premium on bonds which a trustee is permitted to invest in, under the law generally or under the terms of the instrument creating the trust, were always measured by, and dependent upon, the amount by which the income yielded exceeds the ordinary, current rates of interest, taking into consideration the time that will elapse before their maturity, there would, at least, be an appearance of equity in charging the tenant for life with some part of the loss of principal caused by the retention of the investment until it is paid off at par; but even in such case something is due him by way of compensation for interest on principal, tied up by having been applied in payment of premium, which might have been otherwise invested. But the rate of income yielded has little to do with the question of premium—nothing, indeed, in the case of municipal, State or national securities, which sell at very high prices and pay but small interest even on the par value, as in the case, for example, of United States 4's, now quoted at $125 to $130. The premium is largely for the supposed greater security, and still more, perhaps,—as they are but little, if at all, influenced by speculative causes, because they can always be readily converted into cash, and practically without loss, whenever it becomes necessary to realize the principal for final distribution: and there is the further reason that the holder is under no necessity of being on the watch for sheriff's sales, payment of taxes, etc., etc., as in the case of mortgage securities, and he is, moreover, relieved of any trouble by reason of being compelled to enforce collection by suit.

It is clear that the interests of the tenant for life have no concern with either of these reasons, and so far as regards security, he asks for nothing better than a mortgage on property with sufficient margin of value, which, even at a low rate of interest, as the whole principal is invested at par, will pay him as much, if not more, than a security, nominally yielding higher rates of interest, but, by reason of the premium, requiring a larger investment of principal to procure it.

If, on the other hand, security is the only consideration, the remainderman certainly is no less interested in this than the tenant for life, and the cost of obtaining it should be borne by both, proportionately. Take, for example, a bond for $1000, at four per cent., payable in ten years and costing $1100. If the tenant for life is fortunate enough to live until the bond matures, he will have received in the way of interest $400, or $40 per annum, while principal has $1000; and the loss of $100, premium, or original cost, ought to be divided in that proportion. Upon this point the cases of Cox *v.* Cox, Law Rep., 8 Eq. Cas. 343; In re Moore, 54 L. J. N. S. Ch. 432; Ketchum *v.* Duncan, 96 U. S. 659, will be found instructive. But suppose the tenant for life should, before the bond matures—say within a year after the purchase—die and the security be sold at, or near, the original cost?

Upon what theory, therefore, can a trustee be justified in withholding part of the income to meet a diminution of principal which may not even take place at all? It would seem, indeed, whatever may be the law elsewhere, that our statute forbidding accumulation except during an existing minority and for the benefit of the minor, effectually prevents this; for the withholding of any part of the income to create a fund to be applied to the restoration of principal comes directly within the ruling in Washington's Estate, 25 Smith, 102, and the numerous cases which have followed it.

A Massachusetts case, New England Trust Co. *v.* Eaton, 140 Mass. 532, is cited by the exceptant and relied upon as settling the question. The case was decided by a bare majority of the Court —a dissenting opinion by Judge HOLMES being concurred in by the Chief Justice and by Judge CHARLES ALLEN; and its unsoundness, on principle, is demonstrated in a very able article published in 34 Albany Law Journal, 144. But Massachusetts decisions, even when unanimous, and English decisions, in cases involving questions between income and principal—as, for example, Minot *v.* Paine, 99 Mass. 101; Daland *v.* Williams, 101 Mass. 571; In re Barton's Trust, L. R., 5 Eq. Cas. 238, and Hooper *v.* Rossiter, 1 McClel. 527, as against Earp's Appeal, 4 Casey, 368, etc., etc.—are unsafe guides for Pennsylvania lawyers; and until the Supreme Court of this State shall lay down a different rule, we will adhere to what we have already decided—especially as it is fully sustained by decisions elsewhere: Bergen *v.* Valentine, 63 How. Pr. 221; Townsend *v.* U. S. Trust Co., 3 Redf. 221; Matter of Pollock, 3 Redf. 100; Whittemore *v.* Beekman, 2 Dem. 275; Hite *v.* Hite, 20 S. W. Repr. 778.

Irrespective of the question of accumulation or of any other consideration, it is quite clear that under the will which creates this trust, there can be no withholding of income to meet apprehended loss of principal. The testator has directed that "the net income," that is the whole net income, shall be paid to his daughters for life. and he has relieved the trustees from liability for loss from investment in other than legal securities. If, in spite of all this, part of the income may be withheld, the daughters, the chief objects of his bounty, would be made to suffer in order

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to save the persons entitled at their deaths, whom he never knew, and for whom he could have no special solicitude. Even in Massachusetts, under these circumstances, it would seem that the case would be decided in favor of the cestui que trust. See Shaw *v.* Cordis, 143 Mass. 443.

Exceptions dismissed and adjudication confirmed absolutely.

O. C. Philadelphia Co.

Estate of Margaret Kelly.

Escheat—Deputy escheator—Appointment of—Revocation—Power to revoke.

The auditor-general, having appointed an escheator, has no right thereafter to revoke his commission and to appoint another escheator in his place.

Sur rule to show cause why rule to take depositions should not be revoked.

On the hearing, it appeared that on June 3, 1898, the auditor-general duly commissioned William Graham as escheator in the estate of Margaret Kelly.

On June 8, 1898, said William Graham, as such escheator, was granted letters of administration in said estate.

On July 29, 1898, the auditor-general notified Graham that he had revoked his commission and had appointed Walter Willard, Esq., as the escheator.

Willard applied to register of wills to have the letters of administration to Graham revoked and new letters granted to him. This application was refused.

Willard thereafter assuming to act as escheator under the commission obtained a rule to take depositions, and thereupon this present rule was taken.

W. G. Littleton, for the rule.

No power is vested in the auditor-general to remove an escheator after he has been duly commissioned and qualified. Sec. 4, Art. VI. of the Constitution, which reads: "Appointed officers other than Judges of the Courts of record and the superintendent of public instruction, may be removed at the pleasure of the power by which they shall have been appointed," does not give the power to the auditor general.

First, because the escheator is not an "officer" within the meaning of the constitutional provision which refers to a general employment in a public trust and not to one employed for a special and single object.

In re Oaths, etc., 20 Johnson (N. Y.), 492.
Bunn *v.* People, 45 Ill. 397.
In re Hathaway, 71 N. Y. 238.
Com'th *v.* Sutherland, 3 S. & R. 145.
Mechem on Public Offices and Officers.
Shepherd *v.* Com'th, 1 S. & R. 2.
Com'th *v.* Binns, 17 S. & R. 219.
Walker *v.* City of Cincinnati, 21 Ohio, 14.
Sheboygan *v.* Parker, 3 Wallace, 93.
Auffmordt *v.* Hedden, 30 Fed. Rep. 363.

The Pennsylvania Acts relating to escheats nowhere speak of the escheator as an "officer."

Second, no such power is given to the auditor-general either expressly or by implication in the Act of May 2, 1899. This power to appoint "a suitable person" is similar to that of a register of wills in the grant of letters of administration, which grant he cannot revoke without cause.

Brubaker's Appeal, 98 Pa. 21.

Third, complete jurisdiction over the escheated estate is vested in the Orphans' Court, and the dismissal of an escheator who had entered upon the performance of his duty is subject to the review of said Court.

See:—

Act of May 2, 1889, P. L. 66, secs. 5, 7, 8, 9, 10 and 29.

In the absence of express power in the auditor-general to arbitrarily remove an escheator, the Orphans' Court cannot permit an exercise of such power upon a person subject to its decrees.

James F. Campbell, contra, cited and relied upon:—

Art. VI., sec. 4, Constitution of Pennsylvania.

October 28, 1899. PENROSE, J. The Act of May 2, 1889, P. L. 66, worked a radical change in the method and practice of proceedings in escheat, which, instead of being carried on before a sheriff's jury, with right to traverse, etc., are now instituted in the Orphans' Court or Common Pleas, as the case may be (though generally in the former), and conducted to final decree or judgment, with right of appeal to the Supreme Court. The Act (sec. 4) directs the auditor-general to appoint by commission, some suitable person, resident in the county, etc., etc., to act as escheator of the property of a decedent supposed to have died without heirs or known kindred, whose duty it is to institute the proceedings by petition, and see that they are carried on to final decree,—such escheator to apply for letters of administration, and, if no application shall have been made by next of kin or creditors, to be appointed administrator by the register. The functions of the escheator are like those of an executor or administrator, limited to the single estate in which his commission authorizes him to act; he is simply part of the machinery by which the inquiry with reference to whether the decedent in that particular case did or did not die without known or ascertainable heirs or kindred, is made, in accordance with the provisions of the Act; and

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while it is said that the auditor-general "shall" appoint, by commission, the "suitable person," etc., etc., it nowhere says that he shall have any power of removal.

Though, so far as we have been informed, never hitherto attempted to be exercised, it is said that the right of the auditor-general to appoint, implies the right to remove an escheator; and in accordance with this assertion the escheator originally appointed, who, in pursuance of his appointment and of the provisions of the Act, applied for and obtained letters of administration, has been notified that his commission has been revoked and another person appointed to the position which is supposed to have been made vacant. It is obvious, if this can be done in the case of the escheator originally appointed, that it may be repeated from time to time as often as the auditor-general now in office, or his successor or successors, during the pendency of the proceedings in escheat, may think proper. This would lead to lamentable mischief and confusion,—especially where the escheator sought to be removed had, *virtute officii*, been appointed administrator, as in the present case; and unless the authority to remove can be clearly pointed out, it must be held not to exist.

It is said that in the absence of stautory or constitutional provisions, the power to remove is incident to the power to appoint, and that under Art. VI., sec. 4, of the Constitution of the State, "all officers shall hold their offices on the condition that they behave themselves while in office, and . . . . appointed officers other than Judges of the Courts of record and the superintendent of public instruction, may be removed at the pleasure of the power by which they shall have been appointed."

The power of removal referred to in the Constitution relates only to officers whose duties are of a public character, and not to persons employed for a special and single object. This is clearly shown by the numerous authorities referred to in the very able argument of counsel for the escheator (Bunn *v.* The People, 45 Ill. 397; In re Hathaway, 71 N. Y. 238; Com'th *v.* Sutherland, 3 S. & R. 145, etc., etc.); a deputy escheator or escheator is not, in any sense, a public officer, or an officer at all except as an executor or administrator is an officer; and the register of wills might just as well invoke the section of the Constitution now relied on as authority to remove an executor or administrator. So far as the power to remove is claimed as the general incident of the power to appoint, apart from the constitutional question, we think that its exercise would be inconsistent with the provisions of the statute defining the duties of the escheator, and therefore, in the absence of an express grant, the power does not exist.

It follows that the attempted removal was invalid, and that the person named in the second commission has no right to interfere in the proceedings in escheat now pending before us. The rule to take depositions obtained at his instance is, therefore, vacated and revoked.

W. M. S., Jr.

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WEEKLY NOTES OF CASES.

VOL. XLIV.] *FRIDAY, NOV. 24, 1899.* [NO. 34.

Supreme Court.

Jan. '98, 381. Supreme Court. May 15, 1899.

Fairfield Packing Co. v. Southern Mutual Fire Insurance Co.

Evidence—Cross examination—Notice—Mailing letter—Fire insurance—Additional insurance—Forfeiture.

Where a witness for plaintiff in an insurance case has given to the goods destroyed a value which differs from that stated by himself in the proofs of loss he may be cross-examined to show that he had made an intentional misstatement as to double insurance in another proof of loss to the same company on goods lost in the same fire; for the purpose of testing the truthfulness of his testimony the two matters are sufficiently parts of the same transaction.

Where an explanation of a contradiction is given, it is error for the Judge to assume that it is true; that is for the jury.

Notice is knowledge or information legally equivalent thereto brought home to the party notified in immediate connection with the subject to which the notice relates.

The receipt, not the mailing, of a letter constitutes notice, and there is no presumption of law that a letter mailed is received, except in the case of notice of the dishonor of commercial paper.

The presumption of receipt where a letter is properly mailed is one of fact for the jury and may be rebutted by proof of non-receipt.

Where a fire policy required that additional insurance shall be endorsed on it, or the policy shall be void, notice of additional insurance sent before a fire, but not received until after the fire, is not sufficient to save the forfeiture of the policy.

Appeal of the Southern Mutual Fire Insurance Company, defendant, from the judgment of the Common Pleas for Lancaster County, in an action of assumpsit in which Marian McSparran, Isabella McSparran and W. F. McSparran, trading as the Fairfield Packing Company were plaintiffs.

This was an action on a policy of insurance issued to the plaintiffs, in the sum of $3000, upon the contents of a canning house.

On the trial the plaintiffs gave in evidence the policy dated November 2, 1892, issued by the defendant, which was a mutual company.

The policy contained the following clause:

"IV. OTHER INSURANCE.—Notice of all other insurance upon the property herein described, whether made prior or subsequent to the date hereof, must be endorsed on this policy, otherwise this insurance shall be void."

The following extract from the by-laws was printed on the policy:

"10. Any person having property insured in this company, may partly insure the same property in another company, provided the whole of the insurance does not exceed three-fourths of the cash value of the property so insured, and such person will be required to give notice to the directors of this company of the amount so insured, and where insured, otherwise the insurance will be void in case of loss. This company will only pay its proportion of loss where property is partly insured in this company and partly insured in another."

W. F. McSparran testified that the building in which were goods insured was burned August 21, 1896, and that he furnished proofs of loss. The proof was dated August 27, 1896. On cross-examination defendant's counsel, having shown that McSparran was one of the owners of the burned building, asked him in order to test his credibility, whether he had furnished any other proof of loss arising out of this fire to the company. Objected to. Objection sustained. (First assignment of error). It also appeared that additional insurance had been obtained on the property covered by the policy and proof of loss from the Hartford Insurance Company and the Phœnix Company, whose policies were received about August 11 or 12, and that on August 12, McSparran sent the following notice addressed to the secretary of the company defendant at Quarryville:

"Furniss, Pa., August 12, 1896.

"H. E. RAUB, Secretary,
"Southern Mutual Insurance Co.

"DEAR SIR:—We have added to our insurance on stock, consisting of canned goods, cans, cases, labels, etc., in the following companies:

The Hartford, Hartford, Conn..... $1000
The Phœnix, London, Eng..... 1000

Yours truly,
FAIRFIELD PACKING CO."

The face of the envelope bore the following postoffice stamp: "Furniss, Pa., Aug. 12, 1896," "missent," the back, the following: "Quarryville, Aug. 27, 1896." H. E. Raub testified that he did not receive the letter until August 27. The plaintiff also gave evidence of a conversation some years previous between himself and the company's secretary with reference to sending to the company notice by mail.

It appearing that the value of the goods destroyed stated in the proof of loss differed from that given to the same goods in the annual inventory, the plaintiff, McSparran, explained the difference by saying they were calculated upon

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different bases. "One was what the goods were worth to me, and the other was what they could be sold for, when there was no demand for them."

On cross-examination of McSparran the defendant made the following several offers, to show misstatement as to double insurance on articles in the proof of loss sent by him, all of which were overruled.

"To ask the witness on cross-examination, and to prove by his answers, that, in the proof of loss prepared and furnished by him to this company for damage occurring out of this same fire, he represented there was no other insurance on certain machinery; whereas, there was other insurance on that machinery in another company, or two companies, and that he collected insurance from both companies on the machinery. This to affect his credibility." (Seventh assignment of error.)

"To prove by W. F. McSparran, called as if under cross-examination, that, at the same time he had the property insured in this building as the property of McSparran & Company, upon which identical property he had taken out other and extra insurance in other companies, without notice to the Southern Mutual Insurance Company. To be followed by proof that, for such property, he presented proofs of loss to the Southern Mutual Insurance Company, in which he swore that he had no other insurance on the property covered by extra insurance in other companies at the same time. This for the purpose of testing the credibility of the witness." (Eighth assignment of error.)

"To prove by the witness, W. F. McSparran, one of the plaintiffs, as if upon cross-examination, and by submitting to him the proof of loss on the building and machinery of McSparran & Company, destroyed in this same fire, that he presented to the Southern Mutual Insurance Company a claim or proof of loss embracing the engine, which he has already testified was not the property of McSparran & Co. To be followed by proof, that at the same time he had insured this engine and other machinery in two other insurance companies, without notice to, or knowledge of, or consent from the Southern Mutual Insurance Company." (Ninth assignment of error.)

The defendant presented, inter alia, the following points:

"1. The testimony of Dr. H. E. Raub, secretary of the company, that he did not receive the letter marked 'H. C. B. 3,' and dated, 'Furniss, August 12, 1896,' until August 27, 1896, six days after the fire, is uncontradicted. If the jury believe this evidence, their verdict must be for the defendant.

"2. The contract of insurance in this case provides that, 'Notice of all other insurance upon the property herein described, whether made prior or subsequent to the date hereof, must be endorsed on this policy; otherwise this insurance shall be void.' The undisputed testimony is, that no notice of any other insurance upon the property described in said policy was ever endorsed on the policy, wherefore the insurance was void, and the verdict of the jury must be for the defendant." These points were refused. (Fifteenth and sixteenth assignments of error.)

In the general charge the Court said:

"The plaintiffs in this case having mailed the notice of the taking of additional insurance on the day, or the day after, it was taken, there was no breach of duty on their part. As was said in the above case, the giving of the notice was the duty of the insured, and the endorsement of it on the policy was merely optional with the company. Unlike the cases cited, no consent or approval was required; the provision required only notice to be given. We hold, upon the well settled principle, that, where a loss occurs, and one of two innocent parties must bear it, the party who occasioned it must bear it; that the company, in this case, having given permission to take out additional insurance by and under the provision of the by-law, it required but notice to be given to the directors of the company of the amount so insured and where it was insured; that the defendant cannot be relieved from the payment of this insurance. Unlike the provisions in the policies in Bard *v.* Ins. Co., 153 Pa. 257, and Hook *v.* Insurance Co., 160 Pa. 230, the insurance company, in this case, took the risk, under its permissive clause or provision for additional insurance, during the giving of the notice and its receipt and its action upon it. It is true the company did not receive the notice in time to endorse it on the policy before the fire. It would be absurd to say it was necessary to have it endorsed on the policy after the fire when the loss had already occurred, in order to permit the plaintiff to recover. Indeed, we cannot see how we can distinguish this case from the opinion of the Court in the case of Strunk *v.* Insurance Company, and we are, therefore, obliged to direct a verdict in favor of the plaintiff for the amount of the insurance, with interest from the time it became due." (Fourteenth assignment of error.)

Verdict for plaintiff, $3345 and judgment thereon. The defendant took this appeal and filed assignments of error, inter alia, as above indicated.

W. U. Hensel, (*J. Hay Brown* with him), for appellant.

A party who has been examined in chief as a

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witness in his own behalf may be cross-examined as to any matters which go to affect his credibility.

Huoncker *v.* Merkey, 102 Pa. 466.

The mere mailing of the notice of the additional insurance did not comply with the requirement that it be endorsed on the policy or that notice should be given.

Notice or knowledge is not a waiver of endorsement, at least where the notice is not given or knowledge received in a manner requiring the company to act by consenting or refusing to allow other insurance.

Goldin *v.* Northern Assur. Co., 46 Minn. 471.

Even oral notice is not a compliance with a section of the policy requiring endorsement on policy.

Carpenter *v.* Providence Co., 16 Peters (U. S.), 495.
Corcoran *v.* Ins. Co., 183 Pa. 449.
Beatty *v.* Ins. Co., 66 Id. 9.
Bard *v.* Penn Co., 153 Id. 257.
Hook *v.* Ins. Co., 160 Id. 230.
Gould *v.* Ins. Co., 134 Id. 570.
Ayres *v.* Ins. Co., 17 Iowa, 176.
Zimmerman *v.* Home Co., 77 Id. 685.

While the mailing of a letter, under certain conditions is prima facie evidence of notice, positive proof of the non-receipt of letter shifts the presumption.

B. F. Davis, (*George Nauman* with him), contra.

The evidence rejected was under guise of assailing the credibility of the witness, an attempt to interject the defence on cross-examination. This is not admissible.

Cross-examination must be confined to the matter of the examination-in-chief; and this rule applies where a party to the suit is the witness.

Boyd *v.* Conshohocken Worsted Mills, 149 Pa. 363.

The notice required in this case could only be given after the insurance was effected. The by-law in question gave no right to declare the policy void on receiving notice of additional insurance.

Westlake *v.* St. Lawrence Co. Mutual Ins. Co., 14 Barb. 206.

Notice was promptly sent and if received even after the fire that was sufficient.

Insurance Co. *v.* Stauffer, 33 Pa. 405.
Strunk *v.* Ins. Co., 160 Id. 349.

October 6, 1899. MITCHELL, J. The evidence going to the credibility of McSparran should have been admitted. He was the main witness for the plaintiff, and it was conceded that his testimony as to the value of the goods burned differed materially from the value as stated by himself in the proofs of loss. He had offered an explanation the truth and satisfactoriness of which was for the jury to pass upon. Defendant offered to show that he had made an intentional misstatement as to double insurance, in another proof of loss to the same company on goods claimed to have been lost in the same fire. For the purpose of testing the truthfulness of his present testimony the other was sufficiently a part of the same transaction. It was error to exclude it. The Judge accompanied the exclusion with the remark, "the witness is entitled to see the proofs of loss," but it nowhere appears that the witness had asked to see them or in any way denied their execution. Nor is the argument of appellees that it was an effort to interject the defence into the cross-examination tenable. The offer was not part of a new defence, nor offered as such, but expressly as going to the credibility of the witness and therefore to the plaintiffs' proof of their own case: Huoncker *v.* Markey, 102 Pa. 462.

It was also an error for the Judge to assume that the explanation was true. That was for the jury, and it was a vital point in the case, for if the value as stated in the proofs of loss was the correct one, then the goods were confessedly over-insured and plaintiffs could not recover at all.

The policy in suit contained a provision that "Notice of all other insurance upon the property herein described, whether made prior or subsequent to the date hereof, must be endorsed on this policy, otherwise this insurance shall be void." And one of the by-laws, also printed on the policy provided that "Any person having property insured in this company, may partly insure the same property in another company, provided the whole of the insurance does not exceed three-fourths of the cash value of the property so insured, and such person will be required to give notice to the directors of this company of the amount so insured, and where insured, otherwise the insurance will be void in case of loss." The plaintiffs received policies for additional insurance on August 12, and gave evidence that notice was mailed to the secretary of the company the same evening or the next day. The Judge charged the jury as matter of law that this was sufficient compliance with the policy and the by-law. In so doing he went far beyond the rule to be found in any of our cases.

Notice is knowledge or information legally equivalent to knowledge, brought home to the party notified in immediate connection with the subject to which the notice relates. It is not therefore the sending, but the receipt of a letter that will constitute notice, and there is no presumption of law that a letter mailed has been received. Our earlier cases were inclined to exceptional strictness on this point. In Tanner *v.*

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Hughes, 53 Pa. 289, it was held that the only cases in which there is a legal presumption of receipt, are those concerned with notice of dishonor of bills or non-payment of notes and that this laxity grew up by commercial usage and even by that is confined to cases where the parties do not live in the same place. This was repeated in Bank *v.* McManigle, 69 Pa. 156, and Kenney *v.* Altvater, 77 Pa. 34, in which it was said, "letters properly directed and duly mailed are sufficient evidence of notice of the dishonor of bills, or non-payment of negotiable notes. This rule is restricted to commercial paper. It establishes no such legal conclusion in other business relations." In Susquehanna Ins. Co. *v.* Toy Co., 97 Pa. 424, a distinction was laid down more specifically that while there is no legal presumption of receipt, yet where by the contract (in that case a policy of insurance) notice was to be given by one party to another in a distant place, the custom and usage of business justify the use of the mails and proof of a letter properly addressed and mailed is prima facie evidence for the jury of its receipt by the person addressed. This was followed in Whitmore *v.* Ins. Co., 148 Pa. 405, 417, where the rule was thus stated by the present Chief Justice: "The fact of depositing in the postoffice a properly addressed, prepaid letter, raises a natural presumption, founded in common experience that it reached its destination by due course of mail. In other words it is prima facie evidence that it was received by the person to whom it was addressed; but that prima facie proof may be rebutted by evidence showing that it was not received. The question is necessarily one of fact, solely for the determination of the jury under all the evidence." This was followed in Jensen *v.* McCorkell, 154 Pa. 323, and London Co. *v.* Russell, 1 Super. Ct. 320, and is now the settled rule in this State as it is generally in others: 16 Am. & Eng. Encyc. of Law, 825, title, Notice.

In the present case the prima facie evidence of receipt of the letter by due course of mail was fully rebutted by the uncontradicted testimony of the person addressed that it did not reach him until August 27, confirmed by the stamp of the receiving postoffice on the same date. In the meantime the fire had occurred on August 21.

The policy requires that the additional insurance shall be endorsed on it, or the insurance shall be void. It is not necessary to go the full length of appellant's argument that the endorsement is indispensable to the plaintiff's recovery. It may be waived by delay of the company to act on the notice, as in Kalmutz *v.* Ins. Co., 186 Pa. 571, or in other ways. But the object of the clause is to give the company an opportunity to examine into a new factor which may alter its position in the contract, and to regulate its action accordingly. This opportunity it cannot have until the notice is received. In the present case the additional insurance brought the total amount up to within a few dollars of the three-fourths value which would constitute over-insurance, by plaintiff's own testimony, and if the value was as stated in the proofs of loss, then the limit was passed and the insurance void for that reason. The case in that respect is a notable illustration of the purpose and necessity of such a clause. The company was entitled to notice of such a material change in the relation of the amount insured to the value of the property, and an opportunity to accept and approve the contract in its new condition, or to terminate and cancel the insurance in the method provided in the policy. This opportunity was not given it until after the fire had taken place. It was then too late. By the explicit terms of the policy the insurance was void until the additions were endorsed on the policy, and the company was in no default and did no act which could be treated as a waiver. The risk of the delay therefore was by the terms of the contract on the insured.

The evidence of conversations between one of plaintiffs and the secretary of the company in regard to sending notice by mail, do not affect the result. Even if the secretary had power to alter a condition of the policy, which nowhere appears, the evidence does not show that he did so. The conversations testified to were very vague as to time and circumstances and the latest of them was admittedly several years before the contract in question. The by-law endorsed on the policy requires notice to be given to the directors, and the utmost that the secretary's conversation can in any view amount to, is that notice might be given to him instead of the directors and by mail instead of in person by plaintiffs as the witness expressed it "running to Quarryville to see him, which was nine miles from my home." By no stretch of construction can this be treated as an agreement that a letter posted should be accepted as notice before it was received. This default of timely notice being fatal to plaintiff's recovery, defendant's seventh point should have been affirmed and the verdict directed in its favor.

Judgment reversed.

H. B.

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Jan. '97, 397, 398. Supreme Court. March 22, 1898.

Lesley et al v. Kite et al.

Municipal corporation— Ultra vires.

A municipality cannot by ordinance provide a new remedy in the nature of an attachment, lien or trust of any kind, whereby sub-contractors may enforce payment of their claim out of money due the principal contractor.

It is beyond the authority of councils of a municipality to empower the director of public works to retain money due a city contractor or to withhold the warrant therefor, in order that his creditors who are not parties to the contract may proceed by bill in equity or otherwise against him, and thus have the money due by the city applied to their claims.

Appeal of Robert W. Lesley and John W. Trinkle, co-partners, trading as Lesley & Trinkle; McAvoy & McMichael, Limited; Joseph L. Siner; and Josiah Thompson, trading as J. Thompson & Co., plaintiffs, from a decree of the Common Pleas No. 1, for the County of Philadelphia, in a proceeding in equity in which J. Sellers Kite and Robert Moore, co-partners, trading as J. Sellers Kite & Co., and the City of Philadelphia, Thomas M. Thompson and George S. Webster, were defendants.

Appeal of the same plaintiffs (except Joseph L. Siner), from a decree of the same Court against the same defendants.

Two bills were filed by practically the same plaintiffs against the same defendants. They rested upon two different contracts entered into by J. Sellers Kite & Co. with the city of Philadelphia, both bearing date August 27, 1895, the first being for the construction of a sewer on Allegheny avenue, and the other for the construction of a main sewer extension of George's Run sewer. Both were authorized by an ordinance approved June 27, 1895.

The plaintiffs, in each case, had furnished materials and work to the contractors, Kite & Co., in aid of the latter in performance of their contracts with the city. Each averred that the ordinance of June 27, 1895, contained the following provision (ordinances 1895, page 173):—

"Section 3. The director of the department of public works shall give one month's notice of the date of final payment, and satisfactory evidence shall be furnished that full compensation has been made for all labor done and materials furnished previous to drawing warrant for final payment."

Each bill averred that by the respective contracts, which were identical in form and differed only as to the sewer to be constructed and the amount to be paid therefor, the final payment was to be made to the contractors, subject to the provisions of this ordinance; that there was an unpaid balance under each contract due to Kite & Co.; that the city had duly advertised the fact of its intention to pay; that the contractors were insolvent; that the city had refused to pay because of claims presented by sub-contractors, sufficient, in each case, to exhaust the balance due by it; and that the contractors had refused to collect the money.

Each bill prayed for the appointment of a receiver to collect the money due, under final estimate in each case, to the contractors; and for a decree obliging the contractors to join with said receiver in a receipt to the city of Philadelphia, and ordering payment in each case out of the fund in the hands of the city, to the sub-contractors.

A demurrer was filed in each case. The Court sustained the demurrer and dismissed the bill in each case.

The plaintiffs took these appeals.

John G. Johnson, (with him *John Scott, Jr.*, *Henry P. Brown*, *John A. Siner* and *Joseph J. Broadhurst*), for appellants.

It was argued in the Court below that the third section of the ordinance of June 27, 1895, if not repealed by the ordinance of October 25, 1895, was ultra vires and void, in so much as it attempted to provide "a new remedy for the collection of debts."

In entering into contracts, the city of Philadelphia occupies the position of any other party bargaining for the performance of work or the supply of materials. It has a right to do what may be done by any private person in the way of arranging payments, and of stipulations as to the time when they shall become due. It required that before a warrant for final payment should be drawn the director of the department of public works should be furnished with satisfactory evidence "that full compensation has been made for all labor done and materials furnished previous." Could not an individual owner have made such stipulation? In almost every case of construction of a building for many years there has been an inserted stipulation to the effect that the final payment shall not be made to the contractor until evidence is furnished of the payment of mechanics and material-men. It is true that no lien can be filed against public works. This immunity, however, is not in the interest of the contractor, but in that of the city of Philadelphia. It is difficult, therefore, to see why, for the protection of those who act as sub-contractors, and who are without a lien, it may not provide that the contractor himself shall not be paid until he has shown that those equitably, if not legally, entitled to participate in the fund have been compensated. To speak of this ordinance, by which the city com-

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pelled its contractors to meet the equitable claims of those who had assisted in the construction of its sewers, by stipulating that they shall pay the latter before a final warrant could be drawn, as being ultra vires, is hardly within the bounds of what requires to be met by counter argument.

This is not an attempted substitute for an attachment against the city. The city may enter into a contract for work on condition that the consideration shall be paid partly to the contractor directly and partly to those who aid him in the performance. We seek to enforce no right adverse to the city, but one founded on its own ordinance. This is permissible.

Sample *v.* Hale, 34 Neb. 220.

Where a person receives a fund for the purpose of liquidating the indebtedness of one with whom he contracts, such third person may sue directly.

Brown *v.* T. & T. Co., 174 Pa. 456.
Benner *v.* Weeks, 159 Id. 504.

The right of a city to require payment of subcontractors and that the contractor shall furnish proof thereof, and to retain money until the requirement is complied with is sustained in—

Lyman *v.* City of Lincoln, 38 Neb. 794.
Merchants' & Traders' Nat. Bank *v.* Mayor, 97 N. Y. 355.
Bank *v.* Winant, 123 Id. 265.

William Findlay Brown, for appellees.

Section 3 of the ordinance of June 27, 1895, if not repealed by the ordinance of October 25, 1895, is ultra vires of councils and void in attempting (1) to provide a new remedy for the collection of debts, and (2) to constitute the city of Philadelphia a trustee to execute a purely private trust.

It is contended by the appellants that "in entering into contracts the city of Philadelphia occupies the position of any other party bargaining for the performance of work or the supply of material; it has a right to do what may be done by any private person in the way of arranging payments and of stipulations as to the time when they shall become due."

This is doubtless correct in so far as the city of Philadelphia confines itself strictly to its relations with its own contractors, but has no application whatsoever when it wanders away from its legitimate function and seeks to establish itself or its officers as arbitrators between its contractors and strangers to the contract.

The argument of the appellants proceeds upon the theory that municipal corporations, or the officers thereof, may do anything not actually prohibited by law which the caprice of councils or executive officers may, from whatsoever motive, consider for the interests of the municipality.

The rule of law is the reverse.

Whelen's Appeal, 108 Pa. 197.
Williamsport *v.* Com'th, 84 Id. 487.

A municipality cannot by ordinance create a legal duty or prescribe a remedy which is enforceable in the Courts.

Railroad Co. *v.* Ervin, 89 Pa. 75.

Besides this section 3 of this ordinance is in conflict with Art. III., sec. 7 of the Constitution which provides as follows: The general assembly shall not pass any local or special laws.

(1) Authorizing the creation, extension, or impairing of liens. . . . .

(2) Providing or changing methods for the collection of debts. . . . .

(3) Granting to any corporation, association, or individual any special or exclusive privilege or immunity. . . . .

This section applies to ordinances of councils where clearly in conflict.

Norristown *v.* Norristown Ry. Co., 148 Pa. 87.

If it is claimed that the position of the city is that of a party holding a trust fund, such position is ultra vires.

Franklin's Estate, 150 Pa. 437.

The remedy sought by this bill is against public policy, being merely a substitute for an attachment sur judgment against the city of Philadelphia (before, however, obtaining judgment), or for a lien against public works.

The relief sought in this case can fairly be considered an attempt to accomplish by a bill in equity the same end which would be reached by an attachment sur judgment, or by a mechanic's lien—the seizure of money in the city's hands belonging to the defendants by a bill in equity for a debt not in judgment. The plaintiffs do not even aver that they have obtained judgment.

It has been long established as contrary to the policy of the law that the city should be liable to attachment execution, or any other indirect process of law which would tend to hamper public officers. This is clearly established as the law of Pennsylvania.

Erie *v.* Knapp, 29 Pa. 173.
Phila. Granite & Blue Stone Co. *v.* Douglass, 14 Pa. C. C. 234.
Peerless Brick Co. *v.* Philadelphia, 1 Dist. Rep. 91.

The appellants urge that while the city is not subject to attachment or lien, it can, by its own act, establish a method of accomplishing the same result, which is tantamount to both of these remedies. In other words, the policy of the law is that the city may not be attached or liened, and yet the appellants argue that while neither of these remedies can be employed under the law, the councils of Philadelphia may create a remedy, which, in all its essential attributes, is the

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same because it accomplishes the same result under similar conditions.

The complainants in this bill are neither parties nor privies to the contract in question, and therefore have no standing in this Court to determine any rights thereunder.

Torrens v. Campbell, 74 Pa. 470.
Vandakin v. Soper, 2 Am. L. C. 163.

July 19, 1899. STERRETT, C. J. This bill, against J. Sellers Kite & Co. and others, was filed by the plaintiffs on behalf of themselves; and of all other creditors who, on account of the subject matter thereof, might join therein and contribute to the expenses thereof.

After making certain averments of fact, as the basis of their claim for equitable relief, the plaintiffs pray that a suitable person be appointed to act as receiver of the fund now in the hands of the city and for other purposes thereinafter set forth, and that the Court will order and direct:

"1. That said J. Sellers Kite & Co. shall, in conjunction with said receiver, so to be appointed, collect said final estimate under said contract for the benefit of the claimants thereon, who have filed their claims as aforesaid and shall make and deliver to the city of Philadelphia due and proper receipts and releases therefor."

"2. That said J. Sellers Kite & Co. shall make and deliver to the city of Philadelphia due and proper receipts for the warrant so to be received from said city for said final estimate, and shall endorse and deliver the same to said receiver, so that the same may be collected and proceeds thereof be received by him."

"3. That said receiver shall, out of the fund so received, after deducting the costs—including fees of the receiver—pay the claims of the plaintiffs and other material-men, as filed with interest so far as said fund may be sufficient, upon receipt of full releases and discharges to the city of Philadelphia, and to the defendants, to the extent to which said claims may be paid, and shall pay over any balance thereof unto the said J. Sellers Kite & Co., or their order;" and, "4th, general relief."

The averments of fact referred to as constituting the grounds of equitable relief, on which the plaintiffs rely, are fully set forth in the bill, paragraphs one to eleven inclusive, and need not be recited here. The sole foundation of their claim, however, is stated in paragraph four, thus:

"The city of Philadelphia, by its ordinance approved June 27, 1895, did authorize and direct the director of public works of said city to enter into certain contracts for the construction of certain main sewers, inter alia, on Allegheny avenue from the end of the present sewer west of Edgemont street to the Aramingo canal. A copy of said ordinance is attached hereto, marked Exhibit A. By sec. 3 of said ordinance, it is provided:

"The director of public works shall give one months' notice of the date of final payment, and satisfactory evidence shall be furnished that full compensation has been made for all labor done and materials furnished previous to drawing warrant for final payment."

It is upon this section that the plaintiffs rely, in connection with the fact that they furnished labor and materials to J. Sellers Kite & Co., the contractors with the city for the construction of said main sewer; which labor and materials went into said construction and have never been fully paid for by said contractors.

The ordinance referred to is a general ordinance, containing four sections; the first authorizes the construction of several main sewers, including the one above mentioned, which the defendants, J. Sellers Kite & Co. afterwards contracted to build. The second section authorized the director of public works to advertise for proposals and award contracts. The third is quoted in full above; and the fourth authorized the mayor to enter security for damages resulting to private property from the construction of said sewers. The contract awarded to J. Sellers Kite & Co. for the sewer above mentioned, although dated August 27, 1895, was not fully executed until it was sanctioned by councils and security approved by ordinance dated October 25, 1895. In the contract, thus fully executed and approved, the time and terms of payment are essentially different from provisions of the ordinance on which appellants rely. It provides, inter alia, that, "final and full payment of the balance due to the contractor for main sewers, after all legal and equitable deductions, will be made upon the acceptance and approval of the director of the department of public works, one month after the date of completion, and to the contractor for branch sewers, immediately after the date of the satisfactory completion, provided the whole work and each of its parts, including the streets be in perfect order." No special reference is made therein to the third section of the ordinance of June 27, 1895, or to its provisions. Nor is any reference made to the ordinance itself except in the use of the words, "as authorized by ordinance approved June 27, 1895;" and these words evidently refer only to the location and extent of the sewers to be constructed.

The defendants demurred on the ground that "upon the face of the bill complainants are not entitled to the relief claimed, and have a full, complete and adequate remedy at law for all

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things and matters complained of in said bill of complaint."

After hearing, and consideration of the demurrer, the learned Court below, without filing any opinion, entered a decree sustaining the same and dismissing the bill. From that decree this appeal was taken.

The specifications of error are necessarily restricted to the two questions suggested by the decree. If the Court was right in sustaining the demurrer, it must be conceded that dismissal of the bill followed as a matter of course.

We have fully considered the positions taken and so ably discussed by the learned counsel for appellants, but we are not convinced that there is any error in the decree that requires a reversal or modification thereof. On the contrary we are of opinion that the conclusion reached by the learned Court below is correct.

It is not our purpose, nor is it necessary to discuss at length the questions presented by the record.

There is much force in the contention of appellee's counsel that the 3rd sec. of the ordinance of June 27, 1895, was impliedly repealed by the ordinance of October 25, 1895, approving the contractor's sureties and giving the necessary consent of the city to the contract, then and there finally executed, and as it now appears. While the contract thus finally executed by all the parties thereto distinctly specifies time and terms of payment different from the provisions of said 3rd section, we are not prepared to say that there is such irreconcilable conflict as to warrant the conclusion that said section was impliedly repealed by the ordinance of October 25, 1895.

Properly construed, the 3rd section of the ordinance, relied on by appellants, never created, nor was it intended to create, any contractual or other relation, between the city and its contractors, for municipal improvements, or sub-contractors under the latter, or between any of them, that would authorize the maintenance of any such proceeding as that now under consideration. If it did, it would be clearly ultra vires the city councils and also void, as being manifestly in conflict with sound principles of public policy long recognized and firmly established in this Commonwealth.

As it appears to us, the only clause in said 3rd section that suggests even a colorable right to maintain such a proceeding as that now under consideration, is the following: "And satisfactory evidence shall be furnished that full compensation has been made for all labor done and materials furnished." We think the attempt to impose this injunction on the director of public works was ultra vires and void.

Appellants' contention proceeds upon the erroneous theory that municipal corporations, or the officers thereof, may do anything—not actually forbidden by law—which the caprice of councils, or of executive officers, may consider to be for the interests of the municipality. This is a mistake. Nothing is better settled than that a municipal corporation does not possess and cannot exercise any other than the following powers: (1) Those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation—not simply convenient but indispensable. Any fair, reasonable doubt as to the existence of power is resolved by the Courts against its existence in the corporation, and therefore denied: Dillon on Municipal Corporations, sec. 89. It is equally well settled that the agents, officers, or city councils of a municipality cannot bind the corporation by any contract not within the scope of its powers: Id., sec. 457.

It is unnecessary to multiply authorities for the purpose of showing that city councils have no authority whatever, express or implied, to provide a new remedy in the nature of an attachment, lien, or trust of any kind, whereby subcontractors may enforce payment of their claim out of money due the principal contractor. On grounds of public policy, the Legislature has hitherto withheld from contractors and sub-contractors not only the right of lien on public buildings, but also the right of attaching money in the hands of the city. On the same principle, it cannot be successfully contended that councils may by ordinance empower the director of public works to retain money due one of the city's contractors in order that his creditors, who are not parties to the contract, may proceed by bill in equity, or otherwise, against him and thus have the money applied to their claims. In other words, city councils are powerless to provide any remedy to be used as a substitute for attachment or any other remedy which the Legislature has heretofore withheld on grounds of public policy, or otherwise.

For these and other reasons that might be added, we are clearly of opinion that there was no error in sustaining the demurrer and dismissing the bill.

Decree affirmed and appeal dismissed at appellants' costs.

H. B.

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Oct. '98, 159. Supreme Court. October 25, 1898.

McKee to Use v. Kerr.

Sheriff's sale—Rule to set aside—Advertising—Acts of March 27, 1824 and June 16, 1836.

There is no material difference in the direction as to advertising sheriffs' sales of real estate, between the Act of March 27, 1824, and the Act of June 16, 1836, the former directing the sheriff to advertise "once a week for three successive weeks," and the other to advertise "once a week during three successive weeks;" in either case it is sufficient if the advertisement be inserted in three successive periods of a week each, although they may not be inserted on the same day of the week and they may not cover twenty-one full days between the first advertisement and the sheriff's sale.

Appeal of William S. Kerr, defendant, from the decree of the Common Pleas of Westmoreland County, discharging a rule to set aside sheriff's sale of defendant's real estate.

The facts are set forth in the opinion of the Supreme Court.

George S. Rumbaugh, for appellant.

The Acts of June 16, 1836, March 27, 1824, and 1705, requiring sheriff sales to be advertised once a week during three successive weeks previous to the sale, means three full weeks or twenty-one days.

Barclay v. Robb, 5 Pa. C. C. 646.
Good v. Maule, 8 Id. 624.
McGonigle v. Johnson, 8 Id. 653.
Erie Saving Fund v. Thompson, 13 Phila. 511.
Wallace's Estate, 7 P. L. J. 401.
Francis v. Norris, 2 Miles, 151.
Smith v. Tinicum Fishing Co., 1 Del. Co. 127.
Gibbons v. Williams, 10 C. R. R. 299.
Athens Nat. Bank v. Frost, 3 Dist. Rep. 601.
North Whitehall Twp., 47 Pa. 156.

The property was sold at a price much below its value. All the testimony taken before the commissioner showed that the property is worth $10,000, while it was sold for only $3000.

George H. Hugus and *John F. Wentling*, (with them *Joseph R. McQuaid* and *D. A. Miller*), for appellee.

July 19, 1899. McCollum, J. This is an appeal from the refusal of the Court of Common Pleas of Westmoreland County to set aside a sheriff's sale of real estate. It is alleged in support of the appeal that the sale was not lawfully advertised; that the real estate sold for $3000 was worth $10,000, and that the sheriff's conduct in posting the handbills and in the management of the sale was prejudicial to the interest of the defendant, and "malicious, improper and illegal." There is no evidence in the case sustaining the accusation against the sheriff, or the statement that the real estate is worth $10,000. The only support they have is in the defendant's petition to set aside the sale and in his reply to the sheriff's answer thereto. It is not necessary, therefore, to devote any time to the discussion of these matters. The accusations are sufficiently met and discredited by the sheriff's answer to the petition, and the statement respecting the value of the property can have no consideration on appeal without clear proof of a flagrant abuse of the discretion the Court below has in case of alleged inadequacy of price. The real estate in question was advertised to be and was sold by the sheriff on May 14, 1898. It was advertised in the *Tribune-Herald* on April 27 and on May 4 and 11, and in the Greensburg *Press* on April 26 and May 4 and 10 preceding the sale. It was also advertised, on defendant's request, in the Westmoreland *Democrat* on May 4 and 10. These were weekly newspapers published in Westmoreland county. The property was also advertised by the sheriff in the Greensburg *Daily Tribune* on April 20 and 27, and May 4 and 11, and in the Greensburg *Daily Press* on April 20 and 27 and May 4 and 11. These were daily newspapers published in said county, and having a larger circulation therein than either of the weekly papers mentioned above. It will be seen from the foregoing statement that there were twenty-three days between the first advertisement in the daily papers, and the day of sale, and that in two of the weekly papers first referred to the property was advertised once a week for or during three successive weeks.

There is no material difference in the direction as to advertising between the Act of March 27, 1824, and the Act of June 16, 1836. The former directs the sheriff to advertise "once a week *for* three successive weeks," and the latter directs him to advertise "once a week *during* three successive weeks." On this subject we refer to and quote from the opinion of our brother Mitchell, in Hollister to use *v.* Vanderlin, 165 Pa. 248, as follows: "The language of the Act of June 16, sec. 63, P. L. 772, is that the officer making the sale shall give notice by advertisement 'once a week during three successive weeks.' Does this require that the first notice shall be three full weeks, or twenty-one days, before the day of sale? It does not appear that this point has ever been expressly decided by this Court, and the decisions of the Courts of Common Pleas are not uniform upon it. The general practice, however, has been against such requirement, and as referring to calendar weeks or specified periods of time, and an advertisement in three successive periods of the kind, although the advertisements may not have been all on the same day of the week, and there may not have been twenty-one full days between the first and the date of the sale. This is the rule laid down in the books of practice: 1 Troubat &

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Haly, sec. 1250; and has been recognized by this Court inferentially, at least, in In re North Whitehall Township, 47 Pa. 156, where a notice directed to be given 'three weeks before the time of meeting' was held to mean twenty-one full days, and was expressly distinguished by STRONG, J., from a notice 'during three successive weeks,' or one for 'given number of insertions in successive week.'" See also as bearing upon this subject, Stoever's Appeal, 3 W. & S. 157, and Bachelor *v.* Bachelor, 1 Mass. 256.

Upon due consideration of the case our conclusion is that no error was committed by the Court below in refusing to set aside the sale. The assignments are overruled, the order discharging the rule to set aside the sale is affirmed and the appeal is dismissed at the costs of the appellant.

W. C. S.

Oct. '98, 3. Supreme Court. October 24, 1898.

Schotte, Administrator v. Meredith, Administrator.

Agreement of sale—Clear of all encumbrances —Testimony.

The plaintiff offered to prove by the scrivener of a contract that it was the understanding of the contracting parties that the purchaser was to assume all debts of an estate for which the interest of plaintiff was liable, and that the failure to set this forth in the agreement was attributable to the mistake of the scrivener; and it was further proposed to prove that his omission to specifically mention in the stipulation the agreement respecting the payment of a mortgage was a mistake. The plaintiff also offered to prove declarations and admissions of defendant clearly and positively corroborative of the agreement claimed by him. The evidence offered was rejected by the Court:

***Held,* to be error, because the witness was competent and disinterested.**

Appeal of Karl B. Schotte, administrator of the estate of Charles T. Schotte, plaintiff, from the judgment of the Common Pleas of Armstrong County, in an action against William B. Meredith, administrator of Frederick G. Schotte, deceased, on a contract for the purchase of an interest in certain real estate.

The facts are set forth in the opinion of the Supreme Court, infra.

W. D. Patton, for appellant, cited—

Caley *v.* Phila. & Chester Co. R. R. Co., 80 Pa. 363.
Wolf *v.* Wolf, 158 Id. 621.
Selden *v.* Williams, 9 Watts, 9.
Hampton *v.* Speckenagle, 9 S. & R. 211.
Cassell *v.* Cooke, 8 Id. 268.
Espy *v.* Anderson, 14 Pa. 308.
Weaver *v.* Zimmerman, 3 WEEKLY NOTES, 56.
Clark *v.* Clark, 1 Gr. 33.

Ross Reynolds, (*M. F. Leason* with him), for appellee, cited—

Hunter *v.* McHose, 100 Pa. 38.
Fox *v.* Foster, 4 Id. 119.
Frey et al., Ex'rs, *v.* Heydt, 116 Id. 601.
Dentler *v.* Brown, 11 Id. 299.
Memmert *v.* McKeen, 112 Id. 315.
Withers *v.* Baird, 7 Watts, 227.
Gans *v.* Renshaw, 2 Pa. 34.
Thompson *v.* Carpenter, 4 Id. 132.
Nicol *v.* Carr, 35 Id. 381.
Speakman *v.* Forepaugh, 44 Id. 363.

July 19, 1899. MCCOLLUM, J. This is an action of assumpsit on a contract between C. T. Schotte and F. G. Schotte by which the former on February 23, 1886, agreed, in consideration of one dollar in hand paid and two thousand dollars payable at any time within ten years from April 1, 1886, with interest at 6 per cent., to convey to the latter, his heirs and assigns, on or before the last mentioned date, in fee simple and clear of all encumbrances, his undivided one-third interest in the farm commonly known as Humboldt Farm, and in all the personal property then on said farm, including stock, grain, implements, etc. The contract contained, inter alia, a stipulation in the words following, to wit: "The said F. G. Schotte agreeing to assume all debts due by said estate for which the said C. T. Schotte may now be liable." The parties to the contract were sons and heirs of C. B. Schotte, who died March 26, 1884, seised of said farm and intestate. F. G. Schotte, purchaser of the interest of C. T. Schotte in the real and personal property above mentioned, took possession of said farm and renewed the insurance upon the buildings and other property thereon in the name of G. A. and F. G. Schotte, loss, if any, to be paid to F. G. Schotte.

F. G. Schotte died on April 25, 1886, and C. T. Schotte on February 23, 1889, brought suit against the administrator of his estate for the money called for by the contract, which suit was dismissed on the ground that it was premature: 138 Pa. 165. C. T. Schotte died on August 29, 1893, and on April 15, 1896, his administrator instituted the present suit. On the trial of it the jury found for the defendant by direction of the Court. It is stated in the appellant's history of the case, and not denied by the appellee, that the ground of the direction to find for the defendant was that the vendor was bound by his contract to convey his interest clear of all encumbrances and that he had failed to do so.

The appellant contended and offered to prove on the trial, that it was the understanding of the contracting parties that F. G. Schotte was to assume all debts of the estate of C. B. Schotte, deceased, for which the interest of C. T. Schotte therein was liable, including the Gilpin mortgage;

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that the stipulation to which we have already referred was intended by them to express that understanding and that its failure to do so was attributable to the mistake of the scrivener in not expressly stating therein that F. G. Schotte was to pay the Gilpin mortgage. The witness by whom the appellant proposed to prove that it was agreed by the parties that F. G. Schotte should assume and pay the Gilpin mortgage was the scrivener who wrote the contract between them and by whom it was also proposed to prove that his omission to specifically mention in the stipulation the agreement respecting the payment of the mortgage was a mistake. That the witness was competent and disinterested was undisputed. The appellant also offered to prove declarations and admissions of F. G. Schotte clearly and positively corroborative of the agreement claimed by the appellant. The evidence offered was rejected by the Court, and in the rejection of it we think there was error which calls for a reversal of the judgment.

The assignments of error are therefore sustained.

Judgment reversed and venire facias de novo awarded.

W. C. S.

Superior Court.

Oct. '98, 177. Superior Court. December 14, 1898.

Jagode v. Smalley.

Attachment—Unpaid stock subscription—Receiver—Insolvency.

Where the charter of incorporation of a company provides that the stock shall not be assessable by any authority of the company, but shall be assessable "only in the event of the insolvency of the company and upon the legal demand of outside creditors," the insolvency meant is an insolvency legally determined by a Court of competent jurisdiction; and where the receiver is directed to collect from stockholders the unpaid amounts due upon their shares, the amount so due is not a debt payable to the company and liable to attachment as such by a creditor, but payable to the receiver, to be administered as part of the trust fund for all creditors alike; hence where an attachment has been issued by a creditor of the company against shareholders as garnishees and a receiver is afterwards appointed and directed to collect the amount of subscription due on their shares, the said amount will be taken by the receiver and not by the attaching creditor.

The rights of creditors of a foreign corporation with reference to unpaid subscriptions upon the stock of the same, as they depend upon the charter of said corporation, are not altered by the fact that the amount of said subscription has been paid into Court in this State.

Appeal of Philip Jagode, trading as Philip Jagode & Co., from the judgment of the Common Pleas No. 1, for Philadelphia County, upon a case stated, filed in the suit of Philip Jagode, trading, etc., *v.* The Eastlake Woolen Company.

The case stated was as follows:

"William C. Houston, Jr., and William H. Kirkpatrick, garnishees, and John Smalley, receiver of the Eastlake Woolen Company, the parties to this case stated, by their attorneys, in lieu of an issue of interpleader regularly joined, agree to the following facts:

"Upon November 12, 1895, plaintiffs issued a foreign attachment against the Eastlake Woolen Company, attaching the above-named garnishees, inter alia, which attachment was so proceeded in that, upon November 16, 1896, plaintiffs obtained judgment against the defendant for want of an appearance, and damages were assessed upon the same for $1528.10.

"After the service of the attachments upon the garnishees, John Smalley, receiver of the Eastlake Woolen Company, defendant, notified the garnishees that he claimed the moneys in their hands owing to the defendant company.

"On August 14, 1897, the garnishees, William C. Houston, Jr., and William H. Kirkpatrick, obtained rules to show cause why the plaintiffs and John Smalley, receiver, should not interplead as to the subject matter of the action and why the garnishees should not have leave to pay the money into Court. These rules were made absolute, and on September 24, each of the garnishees paid into Court the sum of two hundred and fifty dollars.

"The claim of the plaintiff against the Eastlake Woolen Company is founded upon a promissory note dated July 8, 1895, at four months, given to them by the defendant company for value received.

"The Eastlake Woolen Company, defendant, is a corporation organized under the provisions of an Act of the Legislature of the State of New Jersey, entitled 'An Act concerning corporations,' and approved April 7, 1875, and the supplements thereto. In the certificate of incorporation of said company bearing date September 15, 1885, it is provided, inter alia, as follows:

" 'The common or general stock shall not be liable to assessment by the company or board of directors thereof, or other authority of the company, but shall be assessable only in the event of the insolvency of the company and upon the legal demand of outside creditors.'

"The said William C. Houston, Jr., garnishee, is a subscriber for and holder of five shares of the common stock of said corporation, and the said William H. Fitzpatrick, garnishee, is the

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holder of five shares of the common stock of the said corporation.

"On December 2, 1895, upon bill filed in the Court of Chancery of New Jersey by Martin Anderson, complainant, and the Eastlake Woolen Company, defendant, the said Eastlake Woolen Company was declared to be insolvent, and the said John Smalley was upon the same day appointed receiver, with full power to demand, sue for, collect and receive, and take into his possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes and property of any and every description belonging to the Eastlake Woolen Company. That at the date of the appointment of said receiver as aforesaid the value of fifty dollars per share of the common stock subscribed for and held by said garnishees respectively was wholly unpaid.

"On December 16, 1896, the Court of Chancery in the said proceeding made an order authorizing, empowering and directing the said receiver to demand of the said William C. Houston, Jr., and others, severally, the whole amount due from them respectively as stockholders, as aforesaid, and enforce such payment by suit, and then apply the moneys recovered to the payment of the just debts of the company under the direction of the Court.

"No receiver of said corporation has been appointed in the State of Pennsylvania.

"The following question is therefore submitted for the determination of your honorable Court: Whether the plaintiffs are entitled, under their judgment, to receive the moneys paid into Court as aforesaid, or whether the same is payable to John Smalley, receiver?

"If the Court should be of the opinion that plaintiffs are entitled to receive the money, then the Court is respectfully requested to enter judgment in favor of the plaintiff. If the Court should be of the opinion that John Smalley, receiver of the Eastlake Woolen Company, is entitled as such to receive the money so paid into Court, then the Court is respectfully requested to enter judgment in favor of John Smalley, receiver.

"Each party reserves the right of appeal."

The Court entered judgment for the defendant, Smalley, receiver, without giving any opinion.

The plaintiff took this appeal.

H. S. P. Nichols, (*Joseph de F. Junkin* with him), for appellant.

The question is, was the foreign attachment such "a legal demand by an outside creditor" as entitles the attaching creditor to hold the fund as against it?

The primary controlling factor in the consideration of the case is the contract, which constitutes the basis of the liability of the garnishees.

"The common or general stock shall not be liable to assessment by the company or board of directors thereof, or other authority of the company, but shall be assessable only in the event of the insolvency of the company and upon the legal demands of outside creditors."

Two conditions clearly appear from this:

(1) Before any stockholder could be made liable the company must be insolvent.

(2) The amount due is then collectible upon "the legal demand of outside creditors."

That the company was insolvent, in the legal acceptation of such term, when this attachment took effect, plainly appears from the case stated.

The plaintiff held a note of the company, which in the usual course of business had gone to protest on November 11, 1895, and was unpaid. That constituted the legal ascertainment of insolvency; the appointment of the receiver was simply confirmatory of the fact.

Buchanan *v.* Smith, 16 Wall. 277.

A foreign receiver can only claim here by comity, and is without standing when his claims conflict with the rights of a citizen.

Bagby *v.* Atlantic R. R. Co., 86 Pa. 291.
Sands *v.* Greeley, 88 Fed. Rep.

If the stockholder who is attached, admits his entire liability, and proffers the money, as here, to the attaching creditor, there is a clear chose in action or thing attachable, and to which the creditor is entitled.

Doubly is this the case, where here the only light upon the question of the stockholder's liability is contained in the case stated, where the contract of subscription is set forth, and it expressly provides that the subscription is "assessable only . . . . upon the legal demand of outside creditors."

According to the dictionary (Worcester's), "assess" is "to charge with any certain sum, as a due tax."

There is no restriction in this contract as to how the assesssment, or charge, is to be made, or by whom.

"Assessable" here is equivalent to "chargeable," or "payable," and this Court is just as competent to "assess," and compel the payment of such assessment, as the Court of this receiver, when it has before it the two stockholders, who have admitted that they owe the entire amount, and also before it the creditor, to whom by solemn judgment of the Court below, more than three times the amount of the assessment has been found to be due.

Also it follows, logically, under the charter contract, that the company, being insolvent at

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the time the attachment was served, "a legal demand by an outside creditor" made an assessment, which eo instante became a debt due in satisfaction of the creditors' claim against the company, and therefore attachable under the judgment against the company.

A garnishee is liable for funds belonging to the defendant in the attachment which comes into his hands, or with which he is chargeable, after the service of the writ up to the time of answer or plea pleaded.

Sheetz *v.* Hobensack, 20 Pa. 412.
Hays *v.* Lycoming Fire Ins. Co., 99 Id. 621.
Silverwood *v.* Bellas, 8 Watts, 420.
Boyle *v.* Franklin Fire Ins. Co., 7 W. & S. 76.

Charles E. Morgan, Jr., for appellee.

By the acceptance of the stock the garnishees did not become, under any circumstances, debtors to the company. Their responsibility thereunder was not only conditional upon the insolvency of the corporation and declaration of that fact by a Court having jurisdiction of the company, but was an obligation to make payment not to the company, but to the general body of its creditors who are represented by the appellee.

Lane's Appeal, 105 Pa. 49.

The fact that the appellee is a receiver of a New Jersey corporation, appointed by the Court of Chancery of New Jersey, has no bearing upon the question presented by the case stated. That a foreign receiver will be recognized in our own Courts in all cases where the rights of domestic creditors are not thereby prejudiced, is well settled.

Bagby *v.* Atlantic R. R. Co., 86 Pa. 291.
Sands *v.* Greely, 88 Fed. Rep. 131.

At the time when the plaintiff issued his writs of attachment, there existed no indebtedness by the garnishees to the corporation, and, consequently, there was nothing to attach in their hands.

There was no liability upon the garnishees until after the appointment of the receiver, and the entry of the decree of the Court of Chancery of New Jersey imposing the assessments, and directing payment of same to be enforced by him. The appellant, therefore, was vested with no right which can be prejudiced by payment by the garnishees to the appellee of the amount of the judgment in his favor entered by the Court of Common Pleas.

May 18, 1899. W. W. PORTER, J. The garnishees were stockholders of the defendant company. There remained on the subscription of each an unpaid balance of $250. By the articles of incorporation of the company it was provided that "the common or general stock shall not be liable to assessment by the company or board of directors thereof or other authority of the company, but shall be assessable only in the event of insolvency of the company and upon the legal demand of outside creditors." It is conceded by the appellee that the foreign attachments issued by the appellant, were in date prior to the appointment of the appellee as receiver for the Eastlake Woolen Company, and that if the liability of the garnishees was a debt *to the company* at the time the attachments were issued, and as such subject to attachment under the laws of the State of Pennsylvania, the judgment should have been entered for the appellant. This narrows the subject of inquiry materially.

Under the conditions imposed by the terms of subscription the unpaid portion thereof was not due and therefore not attachable unless the company was legally insolvent at the time of the service of the writs. It is claimed that the company was insolvent because its notes (upon which the plaintiff's claim was founded) had already gone to protest. This was evidence of insolvency but it was not such an ascertainment of the fact of insolvency as the terms of the charter contemplated. These required that the insolvency should be legally determined by a Court of competent jurisdiction. This was done by the Court of Chancery of New Jersey on December 2, 1895. The insolvency therefore was not ascertained until after the levy of the writs, and by the same judicial act the unpaid subscriptions became payable, not to the company, but to a receiver whose duty it was to collect and apply them with the other funds in his hands to the payment of the debts of the company generally. In this view of the case the unpaid subscriptions were never, under the contract of subscription, debts due the company which might be seized by attachment.

There was, however, a further condition precedent to liability for unpaid subscriptions by the articles of incorporation, namely, that the liability should be imposed by "assessment." This assessment could not be made "by the company, board of directors thereof or other authority of the company." It was made possible only in case of insolvency and on the "legal demand of outside creditors." Granting that the insolvency existed, it was not in the power of attaching creditors to "assess" the particular stockholders. It required the direction of the Court to the receiver based on "the legal demand of outside creditors" to make the "assessment" contemplated by the articles of incorporation. This act of assessment did not make the unpaid subscriptions debts due "the company" but to the receiver by whom they were to be administered as part of the trust funds held for all the creditors alike. The creation of the indebtedness was simultaneous with its ap-

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propriation to this use. This marks a clear distinction between this case and Hays *v.* Fire Ins. Co., 99 Pa. 621, cited by the appellant, where the debt was due when attached but not ascertained in amount. All that has been said is sustained by the elaborate opinion of Mr. Justice GREEN in Lane's Appeal, 105 Pa. 49.

The act of the garnishees in voluntarily paying the money into Court does not change the status of their obligation as respects the creditors of the company. To hold otherwise would be to put it into the power of certain stockholders to prefer by their act particular creditors of the company to the detriment of the trust fund for the creditors generally. Neither does the fact that the company is a foreign corporation and that the receiver has been appointed by a Court of another State affect the question before us. Such appointment will be recognized by our Courts upon the doctrine of comity, to which our State Courts lend their aid when not in conflict with the rights of our own citizens: Bagby *v.* Atlantic R. R. Co., 86 Pa. 291.

By the recognition of the appointment of the receiver by the Court of New Jersey no rights of attaching creditors are prejudiced in this case. There was no liability fixed upon the garnishees until the imposition of the assessment by the Court of New Jersey. By this judicial act the debt became due to the receiver and not to the company. The attaching creditor had therefore acquired no prior right which will be prejudiced by payment to the receiver.

The judgment is therefore affirmed.

H. B.

Oct. '98, 105. Superior Court. November 23, 1898.

Borough of Lansdowne v. Delaware County and Philadelphia Electric R. W. Co.

Municipality—Boroughs—Trolley poles—License fee.

Where trolley poles exist within the boundaries of a municipality, the fact that they were erected before the incorporation of the municipality does not deprive the latter of the right to impose a reasonable license fee for the maintenance of said poles.

The license fee in such case is not confined to the amount of a reasonable sum to cover the expense of supervision and inspection of the poles.

Appeal of the Delaware County & Philadelphia Electric Railway Company, defendant, from the judgment of the Court of Common Pleas for Delaware County, in an action brought against it by the Borough of Lansdowne.

This was an action to recover license fees for the maintenance by the defendant of trolley poles within the boundaries of the plaintiff borough.

On the trial, before CLAYTON, P. J., the following facts appeared: The Delaware County & Philadelphia Electric Railway Company was incorporated May 11, 1892. A part of its route was on Baltimore avenue, from Cobb's creek to the borough of Media, in said county of Delaware. It obtained the consent of all the municipalities and townships along the line of Baltimore avenue to construct and operate its road. The consent of the supervisors of the township of Upper Darby was procured April 19, 1893, and the said railway company built its road on Baltimore avenue in said township immediately after the agreement was made with the supervisors. The road was an electric overhead trolley road, and the poles were erected on the side of Baltimore avenue and wires were strung on said poles in accordance with the agreement entered into with the supervisors of said township. After the road was constructed the borough of Lansdowne was incorporated under the general borough act of April 3, 1851, and the borough included a part of Baltimore avenue in said township on which the road of said railway had been constructed. The borough was incorporated June 7, 1893, and no poles were erected by the railway company in said borough afterwards, having all been erected previous to its incorporation.

The plaintiff offered in evidence an ordinance of the borough of Lansdowne, passed January 30, 1895, as follows:

"It shall be the duty of the highway committee to cause a thorough inspection to be made at least once every year of all telegraph, telephone, electric light, and trolley poles erected within the borough limits, and if any pole shall be found defective or dangerous from any cause, they shall notify the owner of such pole, who shall forthwith replace the same with a sound pole; . . . .

"2. All telegraph and similar poles now erected or hereafter to be erected in the borough of Lansdowne shall be designated by the name or initials of the owner of such poles, and each of such poles shall be legibly marked in oil paint with a distinctive number, together with the name or initials of such owner. It shall be the duty of every such owner or owners, on or before the first Monday of March, 1895, and annually thereafter on the first Monday of January in each year, to make application to the clerk of council for a license for the ensuing year to maintain the poles theretofore erected, specifying the poles so to be maintained by their designation, as provided for in this section, and the clerk of council shall issue a license to such applicant which shall authorize the maintenance of the poles designated in the

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application only for the period of one year from the first day of January of the year for which said application is made and no longer, and the charge for issuing such license shall be the sum of one (1) dollar for each and every pole authorized to be maintained thereby, and shall be paid to the clerk of council, for the use of the said borough.

"3. No telegraph or similar pole shall be hereafter erected within the limits of this borough unless a license shall be first taken out as aforesaid, for which the applicant shall pay one dollar to the clerk of council unless the license be issued during the months from July to December inclusive, in which case the applicant shall pay the sum of fifty cents."

This was admitted under objection.

The defendant presented the following points:

"1. No license fees are due for poles erected previous to the passage of the ordinance.

"2. Under all the evidence the defendant, if liable at all, is liable only to the payment of a reasonable sum to cover the expense of supervision and inspection of poles, and the burden of proving such reasonable sum is on the plaintiff, and if the plaintiff has been to no expense for such inspection there can be no recovery.

"3. Under all the evidence the verdict must be for the defendant."

The Court answered the points as follows:

"Subject to the first and second points presented by the defendant, the answers to each are reserved, the jury are directed to find a verdict for the plaintiff for $132."

The Court subsequently overruled a motion for judgment non obstante veredicto and entered judgment on the verdict. The defendant took this appeal and filed assignments of error, first, the admission of the ordinance; second, third and fourth, the non-affirmance of its points; fifth, the entry of judgment.

J. B. Hannum, for appellant.

Can fees be collected for poles already erected at the time of the passage of the ordinance?

A license is a permission, a right given by some competent authority to do an act, which without such authority would be illegal.

Bouvier's Law Dictionary.

In this case, when the ordinance was passed, it required no authority from the borough to erect the poles or to maintain them. They had been erected, and the borough had no authority to compel them to be taken down. They were erected by virtue of the authority contained in the agreement with the supervisors of Upper Darby township.

Therefore no license fees can be collected from the defendant.

Borough of Philipsburg *v.* Central Pa. Tel. Co., 22 WEEKLY NOTES, 572.

While it has been held in a number of cases that a municipality has a right, and it is its duty, to supervise and control the erection and maintenance of telegraph poles and similar poles within its limits, yet it has never been held by any of the higher Courts that a borough is such a municipality, that has this power. All the cases have been city cases, and in McKeesport City *v.* Pass. Ry. Co., 2 Pa. Super. Ct. 242, the Court says the city gets authority from the Act of May 23, 1889, Art. V., sec. 3.

A borough ordinance must be confined to the particular subjects referred to in the twenty-six paragraphs of sec. 2, Act of 1851.

Borough of Millerstown *v.* Bell, 123 Pa. 151.

The charge is unreasonable; a license fee which exceeds the amount reasonably necessary to defray the expense of inspection and regulation is void.

Philadelphia *v.* Western Union Tel. Co., 40 Fed. Rep. 615.

L. L. Smith, for appellee.

It is an implied term in all charters that the corporations enjoying the franchises shall be subject to proper police regulations. This is settled law, as is shown in the following citations:—

Dillon on Municipal Corporations (4th ed.), sec. 141-2.
Prentice on Police Powers, 52.
Butchers' Union Co. *v.* Crescent City Co., 111 U. S. 746.
Home Ins. Co. *v.* City Council, 93 Pa. 116.
Railroad Co. *v.* New Orleans, 143 U. S. 192.

Police regulations would, in a majority of cases, be unavailing if they merely regulated future conditions. The poles which were erected prior to the ordinance are just as much the subject of inspection as the poles erected afterwards. The municipalities are just as much liable for permitting defective poles to be left in the highways whether these poles were erected prior to the ordinance or subsequent thereto. The police power of the State is the highest power of the government under the Constitution, and when delegated to a municipality may be exercised by it according to its discretion, irrespective of any attempt at exemption, and subject only to the condition that its exercise be reasonable. The case of Philipsburg *v.* Telegraph Co., 22 WEEKLY NOTES, 572, cited by appellant in this connection, has been shown to be opposed to the decisions of the Supreme Court of this State.

Of course, it will scarcely be contended that the fact of the erection of the borough after the permission to appellant from the township, seriously affects the question. The borough succeeds to the rights and liabilities of the township (un-

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der Act of June 12, 1878, P. L. 184). The important consideration, however, is that the police power is above rights and privileges contractual or permissive conferred by the township or borough.

There is no distinction between boroughs and cities in the exercise of police power.

Borough *v.* Bell, 123 Pa. 151.
Borough *v.* Phillips, 148 Id. 482.

McKeesport *v.* Ry. Co., 2 Pa. Super. Ct. 244, is another illustration. The Act of 1889, referred to in that case, contains no broader grant of powers than does the general borough Act.

A license fee of one dollar per pole is reasonable.

Allentown *v.* Telegraph Co., 148 Pa. 117.
Chester *v.* Telegraph Co., 148 Id. 120.
Chester *v.* Telegraph Co., 154 Id. 464.
Philadelphia *v.* Telegraph Co., 167 Id. 406.
McKeesport *v.* Railway Co., 2 Pa. Super. Ct. 242.
Telegraph Co. *v.* City, 22 WEEKLY NOTES, 39.
Bethlehem *v.* Telephone Co., 4 Northamp. 389.

March 23, 1899. SMITH, J. The essential features of this case are ruled by our decision in The Borough of Ridley Park *v.* Citizens' Electric Light Company, in which an opinion has been filed at the present term. The defendant's first point was rightly refused. The fact that the poles were erected in the street before the borough was created cannot strip the municipality of the powers vested by the Act of incorporation nor impair their due execution. This principle is established by cases in the United States Supreme Court and in those of our own Supreme Court.

All the specifications are overruled and the judgment is affirmed.

H. B.

Common Pleas.

C. P. No. 2. November 11, 1899.

Potts v. Steel Co.

Costs in non-suit—Rules of court—Act February 21, 1767.

Sur rule to strike off defendant's bill of costs for attendance of witnesses.

The record showed that a non-suit had been entered on January 15, 1899, when the case was called for trial, and that defendant filed his bill of costs February 1, 1899.

John F. Develin, for the rule.

Bills of costs for attendance of witnesses must be filed and a copy thereof served on the other side within four days after the continuance or trial.

Rule of Court 14, sec. 2.

Max Graft, contra.

The Court rule does not apply, as a non-suit is neither a continuance or a trial.

Develin, in reply. Then no costs can be recovered under the rule.

Graft. The defendant is allowed his costs in case of non-suit by statute.

Act February 21, 1767, sec. 3, Purd. Dig. 1605.

November 11, 1899. THE COURT. Rule discharged.

W. M. S., Jr.

NOTE.—The Act of February 21, 1767, is very indefinite in its terms and seems to apply only where a non-suit is granted on motion because plaintiff refuses after notice to bring the issue on to be tried, and in such procedure, defendant is allowed his "costs where he would, upon non-suit be allowed the same." This practice is obsolete, as defendant can order the case on the list when it is at issue and proceed under the Act of March 30, 1812. There does not appear to be any other statute regulating costs in case of non-suit. REP.

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WEEKLY NOTES OF CASES.

VOL. XLIV.] *FRIDAY, DEC. 1, 1899.* [NO. 35

Supreme Court.

Jan. '98, 211. Supreme Court. April 17, 1899.

Cummins v. German American Ins. Co.

Fire insurance—Statement of property destroyed—Liability of insurers—Proof of value of property—Plans and specifications—Proofs of loss—Evidence for court and jury.

Where, under the terms of the contract, the insurers are only liable for the "actual cash value of the property" at the date of the fire, it is necessary to ascertain this from the evidence, and whilst the price of timber at the date of the fire is by no means conclusive as to the cash value of the barn, it is evidence on the question, and the weight to which it is entitled will depend upon the dimensions, quality and kind of timber in the barn as compared with the price of such timber at the time of its destruction, and the weight of such testimony could only be properly determined after cross-examination.

To prove the cost of rebuilding a destroyed barn in the condition in which it was at the date of a fire, it is not necessary that the witness should be a carpenter, as the value of his testimony depends on his knowledge of the subject.

In an action on an insurance policy where the assured alleges that he had made proofs in accordance with the demands of the insurer contained in a letter received by the assured, it is error to exclude the letter when offered in evidence by the insurer to show that assured's attention was specially called to certain requirements with which he had not complied.

At the trial of the cause, the defendant asked the Court to instruct the jury as follows: "A clause in a policy of insurance providing that the assured shall, if required, furnish verified plans and specifications of any building destroyed, is reasonable, and it is the duty of the assurer to comply, and the burden of proof is on him to show that he is unable to furnish the same, and that he made a reasonable effort to do so and was unsuccessful; and if his own evidence shows that he made no effort to comply with the demand of the company or that he could have obtained with reasonable diligence the information required, he cannot recover on this policy." The Court in the general charge practically affirmed this point, but formally negatived it at the close:

Held, that the verbal inconsistency was well calculated to mislead the jury, and the defendant would have had the right to complain thereof if the question had been one for the jury, but as it was a question for the Court it should have been decided without submission to the jury.

Proofs of loss made out by the insured cannot be received in evidence for the jury or be read by them; they are only evidence for the Court that it may determine whether a condition precedent to recover has been sufficiently complied with to warrant the institution of suit. As the stipulation in the policy requiring them is in writing and the proofs are in writing, the interpretation of the contract and the alleged writing claiming to be a compliance with it, are for the Court.

Kittanning Ins. Co. *v.* O'Neill, 110 Pa. 548, followed.

Appeal of German-American Insurance Company, defendant, from the judgment of the Common Pleas of Huntingdon County, in an action by S. W. Cummins to recover for loss of property insured by the defendant company.

The facts as they appeared at the trial, before BAILEY, P. J., and the assignments of error, are set forth in the opinion of the Supreme Court.

At the trial the defendant submitted the following points:

"1. That the measure of damage is not the valuation of the policy, but the jury must find what the actual cash value of the building was, and that must not be what it would cost to rebuild, but what is shown to be its money value, under all the circumstances of its situation and surroundings at the time of fire; and further that the relative value to the assured is no criterion; but its real value at the time of the fire." Answer—"Affirmed."

"2. That the measure of damages is not the valuation of the policy, but the jury must find what the actual cash value of the building was and that must not be what it would cost to rebuild, but what is shown to be its money value, under all the circumstances of its situation and surroundings at the time of fire." Answer—"Affirmed."

"3. That a clause in a policy of fire insurance providing that the assured shall, if required, furnish verified plans and specifications of any building destroyed, is reasonable and it is the duty of the insured to comply." Answer—"Affirmed."

"4. That a clause, in a policy of fire insurance, providing that the assured shall, if required, furnish verified plans and specifications of any building destroyed, is reasonable and it is the duty of the assured to comply and the burden of proof is on him to show that he is unable to furnish the same and that he made a reasonable effort to do so and was unsuccessful; and if his own evidence shows that he made no effort to comply with the demand of the company or that he had or could have obtained with reasonable diligence the information required, he cannot recover on his policy." Answer—"In view of the facts proven in this case we cannot affirm this point as stated. We have submitted the question of fact to the jury in our general charge."

"5. That George J. McCaffrey, the adjuster of the company, having made demand upon the

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plaintiff by letter dated November 1, 1897, and which the plaintiff admitted receiving on November 6, 1897, to furnish verified plans and specifications and stated therein, that the specifications must include a detailed amount of lumber, etc., used in the construction of said barn and the prices paid therefor, it was the duty of the plaintiff to comply with this demand, and he must show that he made a reasonable effort to do so and was unsuccessful, that if his own evidence show that he made no effort to comply with the demand or that he had or could have obtained with reasonable diligence the information required, he cannot recover on his policy." Answer.—"This point is refused in view of the facts. We have submitted the questions of fact raised in it to the jury.

"6. That the supplemental proof of loss furnished by the plaintiff having been received by the defendant company on November 16, 1897, over sixty days after the fire, their silence is no evidence of waiver of any objections thereto." Answer.—"Refused."

"7. That George J. McCaffrey, the adjuster of the defendant company, having by letter dated November 1, 1897, required that plaintiff furnish verified plans and specifications of the barn destroyed, which letter the plaintiff received on November 6, 1897, and did not furnish such plans and specifications until November 16, 1897, that they were too late and that the plaintiff cannot recover." Answer—"Refused."

"8. That under all the evidence in the case, the verdict must be for the defendant." Answer—"Refused."

W. H. Woods, for appellant.

A. O. Furst, (*J. D. Dorris* with him), for appellee.

July 19, 1899. DEAN, J. On January 6, 1896, defendant issued to plaintiff a policy of insurance against fire, covering his house and barn building on his farm in Jackson township, Huntingdon county. Six hundred dollars was placed on the house and $1100 on the barn. The term of insurance was three years. On September 16, 1897, the barn was destroyed by fire. Notice of the loss was immediately given the company, an adjuster visited the property soon after, but as the assured was absent, nothing was done. A special agent of the company then met Cummins, the latter demanded the face of his policy, $1400, as his loss, to which the agent would not agree. The company then demanded, under a stipulation of the policy, a detailed statement of the property destroyed and its value. The assured furnished what purported to be such a statement about October 16, 1897, some thirty days after the fire; this statement was very meagre in details; the company was not satisfied with it, and demanded in writing a fuller one, giving the quantity, sizes, and value of the material with verified plans; in response, the assured furnished another statement, in which he undertook, as nearly as he could, to comply with the demand. The company denied that this was a compliance with the terms of the policy, and refused payment; thereupon Cummins brought suit.

On the trial in the Court below, there was dispute as to the value of the barn at the date of the fire; also whether a sheep pen and hog pen were part of the buildings insured or were separate structures; also whether the detailed proof of loss furnished by the assured was, under the circumstances, a substantial compliance with the conditions of the policy. The evidence bearing on these questions was submitted to the jury, who found for plaintiff the face of the policy with interest. We now have this appeal by defendant, who prefers twenty-one assignments of error. The third to sixth inclusive, relate to rulings upon offers of evidence. The plaintiff undertook to prove the value at the time of the fire, of different kinds of lumber similar to those which formed part of the structure destroyed, and also what it would cost to rebuild such a barn. To this, defendant objected, on the grounds that under the express terms of the policy, it was only answerable for the cash value of the barn as it stood at the fire, and for the further reason, that the cost of new lumber was no evidence of the value of the old material in the barn. The Court overruled the objection, and defendant excepted.

Under the express terms of the contract, the insurers were only liable for the "actual cash value of the property" at the date of the fire. What was the cash value, must be ascertained from the evidence; the price of oak and pine lumber and shingles at the date of the fire was by no means conclusive as to the cash value of the barn, but it was evidence bearing on the question; what weight it was entitled to, would depend on the dimensions, quality and kind of timber in the barn, as compared with the price of such timber at the time of its destruction. The weight of such testimony could only be properly determined after it was sifted by cross-examination. Nevertheless, it was evidence, whether of great or little weight, for the consideration of the jury, and the Court committed no error in admitting it.

The seventh assignment also relates to a ruling upon an offer of evidence; the plaintiff proposed to ask a witness to state, about what it would cost to rebuild the barn in the same condition in which it was at the date of the fire, to which defendant objected, because the witness was not a carpenter,

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and what it would cost to rebuild at date of trial, was no evidence as to the cost at date of fire. It was not necessary to an estimate of this character, that witness should have been a carpenter; the value of his testimony would depend on his knowledge of the subject, and that could be developed by cross-examination; further, if there was any material change in the cost between the fire and date of trial, a period of less than two years, a question on cross-examination would have elicited that fact. This assignment is overruled.

The eighth assignment of error is to a ruling upon an offer of evidence by defendant. The defendant, on November 1, 1897, had written to the assured, making a formal demand for a more specific statement of the value and kind of lumber in the barn, and for verified plans of the building. This letter, it is admitted, was received by the assured, and he alleged he had responded to the demand as nearly as it was possible for him to do. This was for the purpose of showing that the company had called his attention specifically to the contract and his duty thereunder, which it alleged he had not performed, as a condition precedent to a recovery. The Court overruled the offer. We think this was error. One of the very questions raised on the evidence for the Court was, whether the assured had substantially complied with the condition precedent, and the letter bore directly on it. The letter should have been admitted and considered by the Court. This assignment is sustained.

The ninth, tenth and eleventh assignments complain of the rejection of evidence bearing on the cash value of the property at the date of the fire. Whatever weight the jury might give to the facts proposed to be proved in these offers, that is, the depreciation in value during its existence of a building as old as this, the evidence was not wholly irrelevant; it might have shed some light on the cash value at the time of its destruction, and was therefore admissible. These assignments are sustained.

The twelfth and thirteenth assignments are not sustained. The defendant asked the Court to instruct the jury as follows in its fourth point:

". . . . A clause in a policy of insurance providing that the assured shall, if required, furnish verified plans and specifications of any building destroyed is reasonable, and it is the duty of the assured to comply, and the burden of proof is on him to show that he is unable to furnish the same, and that he made a reasonable effort to do so and was unsuccessful; and if his own evidence shows that he made no effort to comply with the demand of the company or that he could have obtained with reasonable diligence the information required, he cannot recover on this policy."

The defendant's fifth point, in substance, asked the same instructions; the Court negatived both, and this ruling is the foundation of these two assignments of error. Practically in the general charge, the Court did affirm both points; formally negativing them at the close of it was at least verbal inconsistency well calculated to mislead the jury, and the defendant would have the right to complain thereof, if the question had been one for the jury; but as we shall show in considering the first, seventeenth, nineteenth and twenty-first assignments, the question raised by the points was one for the Court.

The fourteenth, fifteenth and sixteenth assignments, all complain of error on the part of the Court in not peremptorily instructing the jury to find for the defendant. First, because the final detailed statement of loss was not delivered within sixty days from date of fire as required by the policy. This argument overlooks the fact that immediate notice of the fire was given, then the adjuster came on, examined the ruins, then a special agent sought to settle the loss, then a detailed statement was furnished in thirty days, with which the company was not satisfied, and a fuller one demanded; this was then furnished, but not quite within the sixty days. The assured is not responsible for the delay; he furnished the first detailed statement of loss within the sixty days as nearly as it could then be made out; the company demanded more by the letter of November 1, he set about complying with the demand, and there is no evidence that he did not furnish the statement within a reasonable time after the demand. It was delivered to the company on November 16, at most, one day after the expiration of sixty days. The defendant was not entitled to a peremptory instruction in its favor, either on these two assignments, or on the sixteenth, which complains of a refusal to give a peremptory instruction on all the evidence.

The Court left it to the jury to determine whether the sheep and hog pens were part of the barn building. This forms the subject of appellant's eighteenth assignment of error. A careful examination of the evidence convinces us, this was a question of fact for the jury, and the Court could not have properly done other than submit it to them.

The first, seventeenth, nineteenth and twenty-first assignments, are to the admission of the proofs of loss as evidence for the consideration of the jury, and the instruction of the Court with regard to them. We held in Kittanning Ins. Co. *v.* O'Neill, 110 Pa. 548, that proofs of loss made out by the assured, cannot be received in evidence for the jury, nor be read to them; that they are

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only evidence for the Court, that it may determine whether a condition precedent to recovery has been sufficiently complied with to warrant the institution of suit. Being nothing but ex parte statements of the assured, they are not for the jury. We repeated this ruling in Cole Bros. *v.* Assurance Co., 188 Pa. 345, and Sutton *v.* Ins. Co., Id. 380, emphatically. The stipulation in the policy requiring them is in writing; the proofs are in writing, and taken together, the interpretation of the contract, and the alleged writing claiming to be a compliance with it, are for the Court. Yet the Court below not only admitted generally as evidence these ex parte proofs, averring the cash value of the barn and pens, but cast them into the jury box, thus:

"The evidence, which is undisputed, shows that the plaintiff did furnish verified plans and specifications, and that they were received by the insurance company without objection as to their sufficiency until this trial. We submit to you, gentlemen, to determine from the evidence, whether the plaintiff substantially complied with all the defendant in this regard had the right to demand of him. You will have plaintiff's answer to this demand, which are plaintiff's supplemental proofs of loss, out with you, and you will determine whether they are a compliance as full as he could reasonably be expected to give under the circumstances, and whether he made a reasonable effort to comply with their demand as fully as he possibly could have done."

If the undisputed evidence showed that the insured had furnished in writing substantially the proofs required by the written contract, as the Court properly decided, that was the end of that matter. Whether he substantially complied, was for the Court, on an inspection of the writings. Questions of fact, as to whether the insurers had waived proofs in strict accord with the contract, or whether insured had been guilty of fraud or false swearing, and like questions, might arise, which would necessitate the submission of the proofs to the jury, but whether the assured had substantially done that in writing which his contract required before he could bring suit at all, was for the Court. If he had, then he could go to the jury with his evidence as to his loss, subject to the scrutiny of the defendant, with the right of cross-examination. In view of our decisions, it was manifest error to submit these ex parte papers to the jury, and these assignments of error are sustained.

The twentieth assignment has no merit which requires notice.

But for the reasons given, the judgment is reversed, and a venire facias de novo is awarded.

W. C. S.

Jan. '99, 64. Supreme Court. May 22, 1899.

Cake v. Cake.

Error—Practice—Decree—Record.

Error must be made to appear in the record; it will not be assumed.

A. held a judgment against B. B., as executor and legatee of C., his late wife, held a judgment of a greater amount against A. B. moved to set off his judgment against that of A. The Court refused the set-off. A. issued execution. B. moved for a stay, which was granted, the decree being simply for stay, with reference to an opinion; an appeal being taken, the opinion was not attached to the record or printed:

***Held*, that as the reason for the stay did not appear, the presumption of correctness in favor of the Court below was not disturbed and the decree must be affirmed.**

Appeal of Maggie Depew, from the decree of the Common Pleas for Northumberland County, granting a stay of execution in the matter wherein Joseph W. Cake to use of C. B. Wilmer and C. M. Clement and Maggie Depew, was plaintiff, and J. A. Cake defendant.

The facts of this case are set out in the opinion of the Supreme Court, infra.

M. L. Snyder, for appellant.

Lewis Dewart, (*H. W. Cummings* with him), for appellee, cited—

Nicholas *v.* Wolfersberger, 5 S. & R. 173.

July 19, 1899. DEAN, J. On April 13, 1881, Joseph W. Cake, the legal plaintiff, executed and delivered to Minnie E. Cake, wife of J. Adam Cake, a judgment bill for $5165.50, which was by her duly entered of record to No. 231, May term, 1891, in the Court of Common Pleas of Northumberland County. Minnie E. Cake died May 10, 1891, having first made a will, of which her husband, this defendant, was made executor and sole legatee. On September 1, 1896, as executor, he had sci. fa. issued to revive and continue the lien of the judgment No. 231, May term; J. Adam Cake, the husband, executor and owner of the judgment under the will, ten years before his wife's death, had delivered to his brother, Joseph W. Cake, a judgment note in the sum of $1331.36, which was duly entered of record to No. 100, September term, 1885, in the same Court. On September 7, 1896, Joseph W. Cake had sci. fa. issued to revive and continue the lien of this judgment against J. Adam Cake; to this sci. fa. J. Adam Cake filed an affidavit of defence; a rule for judgment for want of a sufficient affidavit of defence was made absolute on January 18, 1897, and judgment of revival for $2263.31 entered, from which judgment no appeal was taken. On September 12, 1896, five days after issuing the sci. fa., Joseph W. Cake had issued on the judgment

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an attachment execution, 615 September term, 1896, with notice to J. Adam Cake, administrator of his father, Joseph W. Cake, deceased. On November 12, 1897, Joseph W. Cake, the plaintiff in the judgment against J. Adam Cake, assigned to his counsel, Witmer and Clement, $573.69, amount alleged to be in the hands of J. Adam Cake, administrator, and subject to the lien of the attachment. On November 13, 1897, the day following, he assigned the balance of his judgment, $1689.62, to Maggie Depew, the use plaintiff in this appeal. On May 1, 1897, J. Adam Cake moved to set off the judgment held by him as legatee of his wife, Minnie E. Cake, to the judgment against himself of Joseph W. Cake. The Court refused the set-off. Thereupon, March 1, 1898, Maggie Depew issued execution on that part of the judgment assigned to her by Joseph W. Cake, which execution was stayed by order of the Court with this entry to the decree: "See opinion this day filed in No. 247, December term, 1896, where the questions raised are identical with those raised on this rule." Appellant's argument to reverse the decree is based solely on this record as we have stated; nothing else is before us.

As a general rule, Courts have control of executions issued from their own records, and can for sufficient reasons restrict the levy or set them aside. We are furnished here on the paper books with nothing but the docket entries. The opinion of the Court on which the decree is based, is not printed, nor does it even appear in the record made up and filed in this Court. Whether the execution was stayed because the use plaintiff had been paid her money, or because she sought to levy it out of property not subject to seizure, it is impossible for us to determine. To reverse the decree, we would have to assume the Court below erred, without a spark of evidence to warrant the assumption. If the opinion filed in No. 247, December term, 1896, had been placed before us by appellant, we could have determined whether there was any abuse of authority by the Court below; or any usurpation of power. As the case stands, we are left in the dark; we will not assume error; it must be made to appear.

The decree is affirmed, and the appeal is dismissed at costs of appellant.

H. B.

Jan. '99, 131. Supreme Court. May 17, 1899.

Lefevre's Estate.
Leaman's Appeal.

Decedent's estate—Appeal—Suppression of facts—Re-argument.

On appeal a decision was reversed upon one question presented and order made that the account should be restated and executors surcharged to the extent of the claim. When the record went back to the Orphans' Court an auditor was appointed, and reported that "the relief sought by W. and S. and to which the Supreme Court decides them entitled would be effected by simply in this proceeding surcharging the executors with the amount of money in controversy," but the auditor, without stopping there, inferred that the intention of the appellate Court was to subordinate "mere questions of procedure to the larger effort of carrying out the real purpose and intention of the testator," and proceeded to settle the whole matter in accordance with equity:

***Held,* that this action on the part of the auditor, while laudable in intention, was founded on a mistake, but as investigation brought forth facts of which, had the appellate Court been informed, it would have considered all the rights involved in the estate, which consideration might have affected the appellant's rights, the interests of justice would be best served by a re-argument of the original case, upon which the rights of all parties interested might be settled; re-argument ordered accordingly.**

Appeal of Sarah Leaman, from the decree of the Orphans' Court of Lancaster County, directing the executors of Christian H, Lefevre, deceased, to mortgage land devised to her by the decedent.

This case arose upon the account of the executor of C. H. Lefevre. An appeal from the decree thereon was taken to the Supreme Court, which reversed the decree and directed a surcharge of the executors in favor of George Witmer and Mrs. Shertz (see Lefevre's Estate, 37 WEEKLY NOTES, 116). On the return of the record to the Orphans' Court, the case was referred to an auditor, A. F. Hostetter, Esq., whose report, so far as is necessary for the understanding of this report, is set out in the opinion of the Supreme Court, infra. Exceptions were filed and the Court (LIVINGSTON, P. J.) entered the following decree:

"Now, March 6, 1899, it is ordered by the Court, that Henry C. Harner, John A. Charles and John L. Miller, executors of the last will and testament of Christian H. Lefevre, deceased, are hereby authorized and directed to execute a mortgage to John N. Woods, in trust for the said Henry C. Harner, John A. Charles and John L. Miller, on the farm in West Lampeter township, Lancaster county, for the sum of seven thousand and twenty-nine dollars and fifty-six cents, with lawful interest on four thousand, nine hundred and ten dollars thereof, from August 1, 1897, and

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interest, at 4 per cent., on five hundred and twenty dollars from January 27, 1898; and interest, at 4 per cent., from January 27, 1897, and also, the sum of two hundred and fifty dollars counsel fees disallowed by the auditor, but allowed by the Orphans' Court of Lancaster, on exceptions filed. Said interest to be computed up to the execution of said mortgage. The said farm or tract of land being the same which said Christian H. Lefevre, by his said last will and testament, devised to Sarah Leaman, and this order being in accordance with the recommendation of A. F. Hostetter, Esq., auditor, whose report in said estate was presented to the Orphans' Court of Lancaster county, August 21, 1897, except the allowance of $250 counsel fees on exception."

Sarah Leaman, a devisee under the will of C. H. Lefevre, took this appeal and assigned for error the above decree. Mrs. Leaman also presented a petition for a re-argument of the case, Lefevre's Estate, Jan. T. 1895, No. 128 (37 WEEKLY NOTES, 116).

W. U. Hensel, (*J. Hay Brown* with him), for appellant.

H. M. North, (*A. O. Newpher* with him), for appellees.

October 6, 1899. MITCHELL, J. When this case was here before, 171 Pa. 404, the only question presented was the right of Witmer and Mrs. Shertz to five thousand dollars under the twenty-second clause of the testator's will. It was held that the will gave it to them and it appearing that the executors had received the amount from Franklin Lefevre and applied it to other purposes, the order was made that the account should be restated and the executors surcharged to that extent.

When the record went back to the Orphans' Court an auditor was appointed, and reported that "the relief sought by Witmer and Mrs. Shertz and to which the Supreme Court decides them entitled would be effected by simply in this proceeding surcharging the executors with the amount of money in controversy." That was precisely what this Court intended. The questions whether the executors were entitled to be recouped the amount of the surcharge and if so from what source, were neither presented nor considered. The learned auditor, however, calling attention to the fact that the executors' account had been finally confirmed and was unappealed from, inferred that the intention of this Court was to subordinate "mere questions of procedure to the larger effort of carrying out the real purpose and intention of the testator." He therefore proceeded in a laudable endeavor to settle the whole matter in accordance with equity. But this proceeding was founded on a mistake. There was no such intention on the part of this Court. The Court was not informed of the final confirmation of the account, and the claim of Witmer and Mrs. Shertz being considered good, the order to surcharge was made as if in the ordinary course. Had the Court been made aware of the actual status of the account no such order would have been made without at least consideration of the other rights involved. The course followed by the learned auditor brings up for the first time the rights of appellant, and suggests various questions affecting her interests, on which she has not yet been heard. The testator directed that if the general fund was not sufficient for the payment of his debts, expenses of administration, and certain gravestones, then the necessary money should be raised by mortgage on the farm devised to appellant. The account of the executor purporting to cover the full administration of the estate, was filed, showing a balance due the accountants, and a mortgage was accordingly made on appellant's farm for the proper amount. The account being confirmed finally and the mortgage executed, and no exception or appeal taken to either, the estate, as the auditor's last report correctly states, "appeared to be closed." This Court has not yet intentionally ordered it re-opened, and whether it can do so depends on a number of questions not yet considered. Were Witmer and Mrs. Shertz barred by the confirmation of the account from further claim against the executors? If not, could the executors after such confirmation and the execution of the mortgage on appellant's farm, recoup themselves for a wrongful use of the five thousand dollars due Witmer and Mrs. Shertz, by another mortgage on appellant's farm? And if so can it be done except by a direct proceeding against her for that purpose in the Orphans' Court, under the notice to her directed by the will? These and perhaps other similar questions affect appellant's rights and have not yet been considered. Moreover it now appears that the construction of testator's will adopted in Witmer's Appeal may also affect appellant's rights, and she has not been heard upon it. We are obliged therefore in the interests of justice to grant the petition to open our previous decision reported in 171 Pa. 404, [37 WEEKLY NOTES, 116], and order a re-argument of the whole matter, including the questions above suggested and any others that may affect any of the parties interested in the estate.

Re-argument ordered accordingly.

W. C. S.

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June, '95, 127. Supreme Court. May 8, 1895.

Rothstein v. Pennsylvania R. R. Co.

Negligence—Railroads—Passenger—Damages—Contributory negligence.

It is contributory negligence on the part of a passenger to alight from a moving train, even though it is done at the instance of one whom he believes to be a train man, and although it is done to correct the error on the passenger's part of having gotten on the wrong train.

Appeal of Myer Rothstein, plaintiff, from the judgment of the Common Pleas of McKean County, refusing to take off a non-suit entered in an action of trespass wherein the Pennsylvania Railroad Company was defendant.

On the trial of this cause, before MORRISON, J., the following case was shown by the plaintiff: On March 8, 1892, at about 10.40 o'clock P. M., the plaintiff left a store on Eleventh avenue, at Altoona, Pa., and started for the depot of the defendant company, intending to take the train leaving that night for New York. Upon arriving at the depot he saw a train standing on the track, ready to start, the passenger gates having been closed. He went to the baggage gate and asked a man in charge of the gate if that train was going to New York. The reply was, "Yes, do you want to go?" Plaintiff said, "I do," and showed his ticket from Altoona to New York. He was passed through the gate by the attendant and then walked fast to the train, which started as he got upon the platform of one of the Pullman cars. Plaintiff saw an employé of the train, in a blue uniform and white cap, standing opposite him on the platform, and said to him, "Please give me a berth for New York." The man replied, "You are on the wrong train, sir." Plaintiff then said, "Stop, please, and let me off; I want to go to New York." The employé said, "We cannot stop this train. Step over on your left side and jump off; we are going slow." The left side was opposite from the side plaintiff got on, and obeying the instructions given him, plaintiff went over upon that side and jumped off. That was a minute or a minute and a half after the train had started. It was dark and the train was running so smoothly that plaintiff was deceived as to the speed which it had attained. As it was still in the yard, however, he apprehended no danger in complying with the instructions given him to jump off, and obeyed them.

As soon as his feet touched the ground he was thrown violently by the motion of the train, and rolled under the wheels. His left foot was crushed and afterwards amputated, and he was otherwise bruised and injured. On the conclusion of the testimony on the part of the plaintiff, the Court directed the entry of a judgment of compulsory non-suit, and subsequently refused to take it off on motion. The plaintiff took this appeal, assigning as error, (1) the entering of the non-suit, and (2) the refusal to take it off.

Eugene Mullin, (*T. F. Mullin* with him), for appellant.

While it is negligence under some circumstances for one to attempt to board or jump off a moving train, it is not negligence per se, and if the train is moving so slowly that the danger of getting off is not reasonably apparent, and the passenger acts under the instructions of an employé of the company, then the defence of contributory negligence is unavailing, and it is for the jury to say whether the danger is so apparent as to make it the duty of the passenger to desist from the attempt.

Delaware & Hudson Canal Co. *v.* Webster, 18 WEEKLY NOTES, 339.
Johnson *v.* West Chester & Phila. R. R. Co., 70 Pa. 357.
Fowler *v.* B. & O. R. R. Co., 18 W. Va. 579.
8 American & English R. R. Cases, 480.
Bucher *v.* N. Y. C. & H. R. R., 98 N. Y. 128.
C. R. R. *v.* Perry, 58 Ga. 461.
Curtis *v.* D. & M. R. R. Co., 27 Wis. 158.
Wharton on Negligence, par. 380.
2 Am. & Eng. Ency. of Law, 766.
O'Donnell *v.* R. R., 59 Pa. 239.
Dunn *v.* R. R., 58 Maine, 187.
Edgerton *v.* R. R., 39 N. Y. 227.

It is not contributory negligence if the plaintiff has been injured in the effort to avoid an inconvenience by an act "not obviously dangerous, and executed without carelessness."

Johnson *v.* W. C. & P. R. R., 70 Pa. 357.
Patterson's Railway Accident Law, 16.

J. Ross Thompson, for appellee.

If a passenger is negligently carried beyond the station where he intended to stop and where he had a right to be let off, he can recover compensation for the inconvenience, the loss of time, and the labor of traveling back; because these are the direct consequences of the wrong done to him. But if he is foolhardy enough to jump off without waiting for the train to stop he does it at his own risk, because this is gross imprudence, for which he can blame no one but himself.

Railroad Co. *v.* Aspell, 23 Pa. 147.
Stager *v.* Pass. Ry. Co., 119 Id. 74.
New York, etc., *v.* Enches, 127 Id. 323.

In Railroad Co. *v.* Kilgore, 32 Pa. 292, a recovery was allowed for the reason that the train did not stop long enough to permit the woman with three children to alight after the station was called by the conductor.

In such a case as this something more is required to render the company liable than its employé's consent to the passenger's negligent act.

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Deery *v.* Railroad Co., 163 Pa. 403.
2 Am. & Eng. Ency. of Law, 766.
Penna. R. R. *v.* Langdon, 92 Pa. 21.

Justice TRUNKEY says in Del. & Hud. Canal Co. *v.* Webster, cited by appellant, 18 WEEKLY NOTES, 340:

"When there is a doubt whether the speed of the train was so rapid as to render it clearly dangerous to get off, the fact is for the jury. But if the train is moving so rapidly as to make it clearly dangerous to get off, the passenger who does so is negligent."

November 4, 1895. MCCOLLUM, J. The plaintiff got upon the platform of one of the Pullman cars as the train was moving from the station at Altoona towards Pittsburgh, and having requested a train-man to give him a berth for New York he was told that he was on the wrong train, that it would not stop to let him off, but that it was going slow and he could jump from it. He was on the car about a minute and a half after the train started from the station and the rate of speed it had attained when he stepped or jumped from it is best described in his own language. He said, "The train went so swift that it pulled the feet from under me." It is a reasonable conclusion from his testimony in regard to the speed of the train and the time he was on it that it was moving at the rate of from ten to fifteen miles an hour when he jumped from it. It is well settled that to jump from a moving train is an act of negligence which will defeat a suit for an injury caused by it unless it plainly appears that the circumstances connected with and surrounding it justified or excused it. In this case the plaintiff was safe upon the train and if his getting upon it instead of the New York train was due to the negligence of the company, he might have had an action against the latter for the expenses he incurred and the inconvenience to which he was subjected in consequence of its fault. But his presence on the train through the negligence of the company furnished no warrant or excuse for jumping from it as he did. We must therefore for the purposes of this suit, consider his presence there as due to his own unassisted mistake and regard the act of jumping from the car in the light of what occurred after he had gotten upon it. The sole attempted extenuation of the act lies in the conversation with the person called by the plaintiff a trainman, but whether this person was the conductor of the train, a brakeman, or a Pullman car porter does not appear. It does appear, however, that he did not order the plaintiff to jump from the car and that what he said amounted at most to a suggestion or expression of opinion that he might do so. In this conversation, therefore, there was no warrant of the act under consideration and nothing to subject the company to liability for the consequences of it.

The plaintiff jumped from a rapidly moving train about eleven o'clock at night and when it was so dark that he could not see where the jump would land him. He did so to escape being carried to the next station when he desired to go in an opposite direction. This desire was the sole cause of his rash and entirely voluntary act and he must be considered as having deliberately accepted the risks involved in it. It is essential to the safety of the traveling public that the railroad company shall be held to a strict accountability to its passenger for an injury resulting from its negligence, but common justice requires that it shall not be held liable to him for an injury caused by his own negligence or violation of its rules.

We find nothing in the cases cited by the plaintiff to sustain his contention which is at variance with the views expressed and the conclusion reached by the learned Court below.

The specifications of error are overruled and the judgment is affirmed.

W. D. N.

Superior Court.

Oct. '99, 153. Superior Court.

City of Philadelphia v. Nock.

Benefits—Sewers—Division of abutting tract into separate lots—Main sewer to cover polluted stream—Collateral attack upon viewers' report — When confirmation is conclusive — Lien against tract divided into lots.

Where at the time the report of viewers, assessing sewer benefits, is filed, a tract is divided into many separate lots owned in severalty by various registered owners, a lien filed against the entire tract, with all the registered owners as defendants, is sustainable if when the sewer was constructed the land was not subdivided and abutted on the sewer, though the latter was constructed through private property, and notwithstanding the divided lots have paid for the cost of other sewers in other streets on which they abut.

In such a case, the city need not apportion the lien among the several owners; it is sufficient if it conforms to the viewers' assessment.

The confirmation of the viewers' report is conclusive of an assessment, there being no fraud or collusion, if made with legal authority and the property owner had notice.

Where a tract abutting on a sewer is cut up into lots pending proceedings before viewers, one taking a lot, which does not abut on the sewer, takes with record notice of lis pendens and subject to contribution to the total benefits thereafter assessed against

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the original tract. If he makes no defence pending the proceedings before the viewers, he is concluded by the confirmation of their report.

Though an abutting owner cannot be assessed save for such proportion of the cost of a main sewer as would pay for a branch sewer sufficient to give the benefits of sewerage to his property, he must raise the question by appeal from or exceptions to the viewers' report. He cannot, after report confirmed, raise the question as a defence to a lien for benefits, filed pursuant to the viewers' report.

Appeal of the City of Philadelphia, plaintiff, from the judgment of the Common Pleas No. 3, of Philadelphia County, upon a case stated, wherein Elbridge E. Nock, owner, and fourteen others, registered owners, were defendants.

The case stated set forth:

"That the City of Philadelphia has filed a municipal claim for three hundred dollars, as benefits, occasioned by the construction of the Mill Creek Sewer, to all that certain lot or piece of ground, situate on the south side of Jefferson street and west side of Fifty-fifth and one-half street, in the Thirty-fourth ward of the city of Philadelphia, beginning at the southwest corner of said Jefferson and Fifty-fifth and one-half streets, thence extending westward along the south side of Jefferson street two hundred and nine feet two and three-quarter inches to the east side of Fifty-sixth street, thence extending southward along the east side of Fifty-sixth street four hundred and thirty-seven feet six and seven-eighths inches to the north side of Hunter's avenue, thence extending eastward along the north side of Hunter's avenue one hundred and twelve feet two and three-fourths inches to a point, thence extending northward parallel with Fifty-fifth and one-half street three hundred and thirty eight feet six and seven-eighths inches to a point, thence extending eastward ninety-seven feet to the west side of Fifty-fifth and one-half street, and thence extending northward along the west side of Fifty-fifth and one-half street ninety-nine feet to the said corner, the first mentioned point and place of beginning.

"That in the matter of construction of said Mill Creek sewer, on June 22, 1893, a petition for the appointment of viewers, under the Act of May 16, 1891, was filed to No. 253, June term, 1893, Common Pleas No. 2, Philadelphia.

"That a jury of viewers was appointed by the said Court on July 7, 1893, who, on October 25, 1894, filed a report, by which the land above described was assessed at said sum of three hundred dollars for benefits arising from the construction of said Mill Creek sewer; and said report was, on May 24, 1895, duly confirmed by the said Court of Common Pleas No. 2.

"That on November 23, 1895, the above-mentioned municipal claim for benefits, as aforesaid, was filed in the above-entitled cause.

"That the premises above described were, on June 18, 1892, conveyed by Thomas G. Hunter to Elbridge E. Nock; that the said Elbridge E. Nock, on March 22, 1894, conveyed the premises above described to William A. Arthur; that William A. Arthur afterwards, on the same day, to wit, on the twenty-second day of March, 1894, divided the above-described premises into forty separate lots; and later on the said twenty-second day of March, 1894, conveyed each of said separate lots, by separate deeds, to one Arthur Campbell, reserving out of each of said lots a ground rent; afterwards, on the same day, to wit, on the twenty-second day of March, 1894, the said Arthur Campbell conveyed each of said separate forty lots to James Arthur; that all of said deeds, including the deeds for said forty separate lots, were duly recorded at Philadelphia on the twenty-second day of March, 1894.

"That thereupon, upon the recording of said deeds, said division of said tract into said forty separate lots was made in and appeared upon the books of the survey department of the city of Philadelphia.

"That there have since been various conveyances, by deeds, duly recorded, of the forty lots aforesaid, including the deeds to the above-mentioned registered owners, defendants herein.

"That the said Mill Creek sewer is a main sewer of the city of Philadelphia, and was constructed so as to close in and cover Mill Creek, which was a polluted stream extending from the boundary of Philadelphia county at Overbrook to the Schuylkill river at Forty-second street, Philadelphia, a distance of about five miles. The diameter of the said Mill Creek sewer varies from eight feet at the county line, aforesaid, to twenty feet where it empties in the Schuylkill river; and during its course down Fifty-fifth and one-half street it is nine feet six inches in diameter. The total cost of said Mill Creek sewer exceeded the sum of one million dollars.

"That the said Mill Creek sewer is circular in shape, and built of bricks, and was constructed through private property, in an irregular direction from the county line, and runs obliquely in a southeasterly direction, from Lancaster avenue, until it reaches Fifty-fifth and one-half street, as said street is now laid out and opened; thence the said Mill Creek sewer was constructed southwardly in the middle of what is now Fifty-fifth and one-half street.

"That the said Mill Creek sewer was finished on the twenty-sixth day of February, 1892.

"That Fifty-fifth and one-half street, when said Mill Creek sewer was constructed and completed,

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was not upon the city plan and the land now included therein was, when said Mill Creek sewer was laid out and completed, private property, and so remained until the twenty-sixth day of December, 1892, when said land was, by its owners, dedicated to public use as a highway, and since called Fifty-fifth and one-half street.

"That the said James Arthur, in the month of September, 1894, laid and paid for a fifteen-inch pipe sewer in Jefferson street, between Fifty-fifth and one-half and Fifty-sixth street, for the drainage of the portion of the premises above described and properties fronting on Jefferson street.

"That a public sewer, three feet two inches in diameter, of the city of Philadelphia, was laid in the bed of Fifty-sixth street, between Hunter's avenue and Jefferson street, in December, 1893, and in front of the premises and properties included in the above description which abut thereon, into which said premises and properties drain, which premises and properties have paid their full proportion of the cost thereof, and all charges against them for the same.

"That a public sewer was also, in November, 1893, laid in Hunter's avenue, between Fifty-fifth and one-half street and Fifty-sixth street, for the drainage of the premises and properties included in the above description which abut thereon, and for their just proportionate part of the cost thereof, the premises aforesaid paid.

"That none of the premises and forty properties above described drain directly into said Mill Creek sewer, but all of them drain directly into the said sewers in Jefferson street, Fifty-sixth street, or Hunter's avenue, which latter sewers are sufficient for the entire drainage of the premises and forty lots above described.

"If under the above-stated facts the Court shall be of the opinion that the city of Philadelphia, claimant, is entitled to recover from the defendants, and the owners of the forty separate lots above mentioned, the assessment of benefits, as aforesaid, upon the entire tract of ground above described, for the construction of said Mill Creek main sewer of the city of Philadelphia, then judgment to be entered for the plaintiff for three hundred dollars, with interest thereon from the twenty-third day of November, 1895; otherwise, judgment for the defendants; costs to follow judgment, and both parties reserving all rights of exception and appeal."

Judgment was entered for the defendants.

James Alcorn, assistant city solicitor, (with him *David Lavis*, assistant city solicitor, and *John L. Kinsey*, city solicitor), for appellant.

No proceedings were taken by the defendants to dispute the assessment by filing exceptions to or taking an appeal from the report of the jury of view. The owners of property situate along the line of an improvement, after due and legal notice of the assessment of benefits, and upon failure to appeal from the report of the viewers, are concluded by the confirmation of the report and cannot, ordinarily, in any collateral proceeding, deny the validity of the assessment. The defendant was allowed to set up want of authority as a defence to a scire facias in Breed *v.* Allegheny, 85 Pa. 214, and want of notice was allowed as a defence in Hershberger *v.* Pittsburgh, 115 Pa. 78. Since neither of these defences is raised in the present case, the defendants are concluded by the confirmation of the viewers' report.

West Pa. R. R. Co. *v.* Allegheny, 2 WEEKLY NOTES, 229.
Pittsburgh *v.* Cluley, 74 Pa. 262.

That branch sewers into which defendants' properties drain may have been subsequently constructed, and for the cost of which the defendants may have been required to pay or voluntarily paid, does not relieve their properties from liability for the benefits assessed against them by the jury of view. The Mill Creek sewer was the first one constructed, and the benefits assessed against defendants' properties accrued before the other sewers were built.

That the defendants' properties may be drained by other sewers than the Mill Creek sewer, and that the Mill Creek sewer may not be of any benefit to their properties, is not material.

Michener *v.* City, 118 Pa. 535.

The defendants' properties prior to the subdivision were by a jury of view duly assessed benefits for the construction of a sewer in front thereof in accordance with the Act of Assembly. The defences which the defendants now propose to make were such as should have been made before the jury of view, or in the Court of Common Pleas, on exceptions or appeal. After the confirmation of the report of the viewers it is too late to make those defences.

Whether or not the defendants' properties have been benefited by the construction of the sewer is res adjudicata, and that question cannot be reopened in proceedings upon the lien. The jury of view determined that and the final confirmation of their report concluded the defendants so far as the actual benefit and amount thereof is concerned.

Alfred R. Haig, (with him *William F. Harrity*, *Dwight M. Lowrey* and *Henry C. Thompson, Jr.*), for appellees.

The claim was unauthorized by law, is unconstitutional, and therefore void.

Park Ave. Sewer, 169 Pa. 433.
Beechwood Ave. Sewer, 179 Id. 490.
Borough of Colwyn *v.* Tarbottom, 9 Pa. Super. Ct. 414; 43 WEEKLY NOTES, 503.

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In re Orkney St., 44 WEEKLY NOTES, 9; 9 Pa. Super. Ct. 604.

The rule laid down in Park Avenue, 169 Pa. 433, that the owners of property not abutting on a sewer cannot be assessed for benefits, is not modified by the fact that a water course, which before furnished open drainage, was turned into a closed and covered sewer, thus confining the odors and noxious substances which cause discomfort and injure health. Such a benefit is one enjoyed by the whole city in common with owners of property in the neighborhood of the sewer.

Beechwood Ave. Sewer, 179 Pa. 490.

The Mill Creek sewer is a million-dollar sewer of great dimensions, constructed, not in a highway but through private property, like the Beechwood Avenue sewer (179 Pa. 490)—a vast public improvement to benefit the whole municipality by covering a polluted stream its entire length in the city, from the county line to the river, and the assessment of benefits in this case is void.

The claim being therefore void, the Court is without jurisdiction to enforce it. The confirmation of the viewers' report "amounts to nothing."

Breed *v.* Allegheny, 85 Pa. 214, 217.

It is a settled rule that want of jurisdiction may be taken advantage of at any time.

Stearly's Appeal, 3 Grant, 270, 271.
Breed *v.* Allegheny, 85 Pa. 214, 217.

The claim is fatally defective because the ground liened not only fronts on four streets, but is actually divided into forty separate properties; the city survey books showed the division of the land into forty separate lots at and prior to the filing of the claim; there were when the claim was filed and are different registered owners of the various lots, whose names so appeared upon the city registry when the lien was filed, who are fourteen of the fifteen defendants in this claim covering forty separate properties, divided among and owned in severalty by fourteen different owners, liened as one. The cases in which a lien covering several contiguous lots described as one has been sustained, have been where there were no division lines to mark the different lots and the defendant owned them all.

City of Chester *v.* Eyre, 181 Pa. 642, 655.
City to use of Ryan *v.* Cadwallader, 22 WEEKLY NOTES, 8, 9.

Each of the forty separate properties paid the proper charges for cost of the three sewers into which they drain according to their frontage on Jefferson street, Fifty-sixth street, and Hunter's avenue. These separate lots could only be chargeable for a municipal improvement in the street on which they respectively front.

Dickerson *v.* Lauderbaugh, 4 Legal & Ins. Reporter, 10.
Colwyn Borough *v.* Tarbottom, 7 Dist. Rep. 540; 43 WEEKLY NOTES, 503; 9 Pa. Super. Ct. 414, 417.
In re Orkney St., supra.
Witman *v.* Reading, 169 Pa. 375, 391.
Appeal of Verona Borough, 4 Pa. Super. Ct. 608.
West Third St. Sewer, 187 Pa. 565.

November 20, 1899. W. W. PORTER, J. According to the case stated, on June 22, 1893, the petition for the appointment of viewers was presented. On October 25, 1894, the report of the jury was filed, assessing the land described three hundred dollars for benefits arising from the construction of the Mill Creek sewer. On May 24, 1895, the report was confirmed by the Court. On November 23, 1895, the claim was filed in this case. On March 22, 1894, the land was conveyed by Nock to William A. Arthur, who on the same day divided the tract into forty separate lots, and conveyed them separately to Campbell, reserving ground rents. Campbell on the same day conveyed the lots to James Arthur. All of these deeds were recorded on March 22, 1894, and the division into lots subsequently appeared upon the books of the survey department of the city. Since then there have been some conveyances of the said lots.

These dates are important in that they show that, at the inception of the proceedings before the viewers, the land was an undivided tract abutting upon the sewer, and that, at the time the conveyances were executed, splitting the tract up, the report of the jury had not been filed.

The contention of the appellant is, that the finding of the jury of view is conclusive upon the defendants in this proceeding on the lien filed pursuant to the confirmed report. In Pittsburgh *v.* Cluley, 74 Pa. 262, Mr. Justice WILLIAMS makes clear the effect to be given to the report of a jury of view. He says: "The confirmation of the report has all the legal effects and incidents of a judgment or a decree of a Court of competent jurisdiction, one of which is, that it must be treated as valid and binding until reversed or set aside, and cannot be assailed except for fraud or collusion. . . . . The defendant had notice of the proceedings and did not appeal to the councils or apply to the Court of Quarter Sessions to have the assessment set aside or abated on the ground that it was inequitable or unjust. . . . . The confirmation of the report must be regarded as conclusive of the assessment." (See also Railroad Company *v.* City of Allegheny, 2 WEEKLY NOTES, 229.)

The Court below filed no opinion. We are thus not informed as to the ground upon which they entered judgment for the defendant. From the appellee's argument it appears that he seeks to sustain the judgment on the ground,—first, that

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the lands of the defendants, since the division of the tract into separate lots, are not property abutting upon the sewer improvement, are not specially benefited, and, therefore, that the jury of view were without jurisdiction to assess. When the proceedings before the jury were commenced, and for a part of the time that they were pending, the tract of land against which the lien is filed was abutting upon the sewer and liable to assessment. The fact that it was benefited has been finally determined by the report of the jury as confirmed. The doctrine asserted in Morewood Avenue, 159 Pa. 20, is that, "assessment for benefits to pay for public improvements can only be defended upon the ground that the benefits are local and essentially peculiar to the very property assessed, and then it can only be done once. This can only be the case where the property assessed abuts directly upon the line of the improvement." "Morewood Avenue," as was said by RICE, P. J., In re Orkney Street, 9 Pa. Super. Ct. 611, "has been followed and the principle upon which it was decided applied to sewer assessments, notwithstanding the argument that a public sewer is a special benefit to all of the properties situated in the same watershed." See cases cited. By the division of the original tract some of the lots created became non-abutting. Does this relieve them from bearing their share of the assessment? We think not. The proceeding was to charge the tract as it abutted when the work was done, and the benefits accrued. When the division was made, had the lots remained in the same owner without marks of subdivision upon the ground, they would not have escaped liability, even though the division had been noted upon the city register: City of Chester *v.* Eyre, 181 Pa. 642. When the title to the lots passed to others, they took with record notice of lis pendens and subject to contribution to the total benefit assessed. If the new owner had defence to make by reason of the severance of his lot from the main tract, it was his duty to intervene in the proceeding pending or be barred by the report when confirmed. See Hersey *v.* Turbett, 27 Pa. 428. True, there remained to such an one, or to any property owner whose land is assessed for benefits, the right to defend against the lien on the ground of want of authority for the original proceeding: Breed *v.* City of Allegheny, 85 Pa. 214. Here, however, the only ground for such a defence is that the defendants' lots were non-abutting and therefore non-assessable. To this we answer, the lots were parts of the whole tract which abutted, and, so far as the proceedings to assess benefits are concerned, they remained so. If then they are parts of the abutting tract they are assessable and the plea of want of jurisdiction fails.

The appellee urges further that the lien itself is defective because it is filed against one tract instead of against forty lots in the names of several persons.

The lien as filed conforms to the assessment as made by the jury. The assessment was against the abutting tract as it stood when to it accrued the benefits found by the jury. To require the city solicitor in such a case to apportion the lien among the several holders of portions of the tract would be imposing duties beyond his powers. The adjustment of proportions would be a determination by him of the rights of contribution among the several owners. This would lead to endless disputes and inequitable results. It would be in effect the assumption by the city's law officer of judicial powers with which he is not clothed.

Again it is said that the sewer constructed was larger than was required for the use of adjacent property, and was in fact a section of a large public improvement. From this it is argued that the lien is invalid. There are cases (as Park Ave. Sewers, 169 Pa. 433) which hold that the abutting owner cannot be assessed for the whole cost of a main sewer intended to drain lands further removed from the point of discharge, and that such an owner is liable only for such proportion of the cost as would pay for a branch sewer sufficient to give the benefits of sewerage to his property. This, however, has been held in cases of appeal or exceptions to the report of the jury of view. After the report has been confirmed, such a re-adjustment of amounts, if entered upon in a defence to the lien, would be in disregard of the effect to be given to the record of the confirmed report of the jury of view.

This is an answer to the appellees' argument, but it may not be amiss to add that the amount of the assessment would seem to indicate that the jury of view had in contemplation the standard of obligation contended for by the appellees.

It is further urged that some of the lots of the defendants front on other streets; that upon these streets sewers have been constructed and paid for by the defendants; that these sewers sufficiently drain the defendants' lots and that the defendants therefore should not be required to pay the present assessment. This position is not tenable. If, as we have shown, the land is liable for the assessment, the fact that other and adequate sewers have been constructed on other streets and have been paid for, does not relieve: Michener *v.* Philadelphia, 118 Pa. 535.

The judgment of the Court below is reversed and judgment is now entered for the plaintiff for three hundred dollars with interest from November 23, 1895, in accordance with the terms of the case stated.

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WEEKLY NOTES OF CASES.

VOL. XLIV.] *FRIDAY, DEC 8, 1899.* [No. 36.

Supreme Court.

Oct. '98, 176. Supreme Court. October 26, 1898.

Waits v. Bailey et al.

Ejectment—Mortgage—Construction of.

In an action of ejectment it appeared that S., owner of a large tract of land, permitted a school district to use one-half acre of it for school purposes. The school district never claimed title to this half acre, and in subsequently selling the school building which it had erected thereon, expressly restricted the sale to the building. The purchaser did not remove the building, and the defendants were in possession of it under the purchaser. The grantees of S., prior to the abandonment of the half acre for school purposes, had executed a mortgage of all their right, title and interest, "the said right being the fee simple in all the coal and other minerals contained therein . . . . together with all and singular the buildings and improvements," etc. Plaintiff claimed under a purchaser at a sheriff's sale under the mortgage:

***Held*, the plaintiff was entitled to the half acre lot without any restriction.**

Appeal of T. S. Bailey, A. G. Hoovler, W. A. Egbert and M. L. Kelly, defendants, from the judgment of the Common Pleas of Venango County, in an action of ejectment in which John W. Waits was plaintiff.

Upon the trial of the case, before CRISWELL, P. J., the following facts appeared: The half-acre lot, the piece of land in controversy, was a portion of a seventy-five-acre tract owned in 1853 by Joseph Simcox. In that year, with the permission of Simcox, the school district fenced the half acre and erected a school house thereon, which it occupied for school purposes until 1878. In 1869, Simcox died intestate, and his title to the seventy-five acres became vested in D. B. Irwin, who by instrument dated July 22, 1871, mortgaged it to S. P. McCalmont. Upon a sale under this mortgage the land was sold to one Samuel Plumer, under whom the plaintiff claims title. In 1878, the school board sold the school house, the sale being expressly restricted to the building only. The defendants are in possession of the school house under the purchaser.

The Court charged the jury in part as follows:

"[The rule in the construction of deeds is that they shall be construed most strongly against the grantor.] (First assignment of error.) The mortgage in this case grants 'all the right, title, interest and claim of the parties of the first part,' and then, parenthetically, there is inserted these words, 'said right being the fee simple in all the coal and other minerals contained therein, of, in to or out of all that certain tract of land,' etc., the mortgage then describing the larger tract, which includes the half acre in controversy. The subsequent language in the mortgage is that ordinarily used in a mortgage of real estate, 'together with all and singular the buildings and improvements, streets, lanes, alleys, passages, ways, water-courses, rights,' etc. [We incline to the opinion that the mortgage covered all the interest of the mortgagors in the property, that is, in the lot in question; that it not only covered the coal right, or title to the coal and other minerals, but that, as far as this half acre is concerned, it covered all the interest of the mortgagors therein.] (Second assignment of error.) . . . .

"Having concluded, therefore, that the mortgage covers all the interest of the grantors therein, and that their interest passed by the mortgage and foreclosure thereof to Samuel Plumer, and from Samuel Plumer, under the evidence, to the plaintiff, Mr. Waits, and the defendants not having shown any title in themselves, we are of the opinion that the verdict should be for the plaintiff for the land described in the writ, and we so instruct you.]" (Third assignment of error.)

Verdict accordingly. Defendants appealed and filed the assignments of error as above.

J. S. Carmichael, (with him *F. A. Sayers* and *R. W. Dunn*), for appellants.

John O. McCalmont, (*Bryan H. Osborne* with him), for appellee.

October 6, 1899. MCCOLLUM, J. The plaintiff claims title to the half acre of land described in the writ, and the defendants claim that his interest in it is limited to "the fee simple in all the coal and other minerals contained therein." The half acre is a part of the seventy-five acres in the possession of Joseph Simcox in 1841, and of which he died seised in 1869. It seems that in 1854, Simcox, on the request of the school board, consented to the use of the half acre for school purposes. In pursuance of the consent thus secured, a building was erected in which a school was maintained until 1878, when the location of the school was changed and the building was disposed of at public sale. The right of the school district to the possession of the lot for school purposes was terminated by the sale, and all that the purchaser acquired by it was the right to the building on his removal of it from the half acre within a reasonable time. As the school district made no claim to the land and expressly restricted the sale to the building upon it, there is no ground

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for assuming that the purchaser or his successors acquired by the sale any title to or interest in the lot. In this connection we may add that the undisputed evidence shows that the school district never claimed title to the land, or a right to occupy it for other than school purposes.

It is not shown by the defendants that they have any title to or lawful interest in the land in question. They have no deed or deeds from parties having a title to or interest in it, and they have no valid warrant or claim on which to base their possession of it. The right of the parties under whom they claim is not the right which Joseph Simcox conceded to the school district, but the right acquired by the purchaser of the school building at a public sale of it. As we have already seen, the right of the school district was terminated by its abandonment of the lot and its sale of the building upon it, and the right of the purchaser was limited to the building and enforceable only by a prompt removal of it from the land on which it was erected.

On the trial of the case in the Court below the defendants disclaimed title to all the land described in the writ, except the surface, the gas and petroleum. As already stated, they have not shown any warrant for their possession of the land or any right to any of the minerals underlying it. Their sole defence to the plaintiff's claim is that the surface of the lot, and the gas and petroleum beneath it, did not pass to the purchaser at the sale on the Irwin mortgage. The defence is therefore based on the construction of said mortgage which they allege does not include matters excepted in their disclaimer. It will readily be seen that their construction of the mortgage leaves to the mortgagors the right to the surface of the half-acre lot, and the right to the gas and petroleum oil which may be obtained therefrom, while the mortgagors have made no claim to either, and never intimated to anyone that they had any right in the lot after the sale upon the mortgage. That the mortgagors prior to the execution of the mortgage had a valid title to the lot, subject only to the privilege conceded by Joseph Simcox to the school district, is a fact which cannot be denied, and that they intended by the mortgage to pledge all their right and interest in the property as security for the sum of ten thousand six hundred dollars which they owed to McCalmont is clearly shown by the circumstances referred to in the preceding sentence. The mortgagors conveyed to McCalmont as security aforesaid all their right, title, interest and claim . . . . of, in, to or out of the seventy-five acres which the heirs of Joseph Simcox conveyed to Mason and Holmes and the latter conveyed to Irwin who with Angell joined in the execution of the mortgage to McCalmont. It will be observed that the half-acre lot was expressly reserved by Irwin in his deed to Robinson. Is it a reasonable construction of the parenthetical clause that the mortgagors reserved to themselves the surface of the half acre and the gas and petroleum oil beneath it, while mortgaging the coal and other minerals underlying it, as security for the debt they owed to McCalmont? It seems to us that the defendants' construction of the clause in question is directly opposed to the plain intention of the mortgagors and to the general terms of that part of the mortgage which includes it. We conclude, therefore, that the facts and circumstances we have referred to are sufficient to defeat the defendants' contention and to entitle the plaintiff to a judgment in accordance with his claim. We may add also that independent of the facts and circumstances to which we have referred, the conclusion arrived at by the learned Judge of the Court below is sufficiently sustained by the reasons given and the cases cited in his opinion discharging the rule for new trial.

Judgment affirmed.

Oct. '98, 104. Supreme Court. November 3, 1898.

Wall v. The Royal Society of Good Fellows.

Insurance—False answers—Evidence—Weight of, for jury.

Answers by an applicant for insurance to questions addressed to him in connection with his application are prima facie true, and if alleged by the insurer to be untrue, the burden of proof is upon the insurer.

When a beneficial society, against which an action is brought to recover a sum due on the death of a member, sets up as a defence that the deceased in his application falsely asserted that he had not been attended by a physician for one year prior to the application, and gave false answers as to the hereditary disease in his family, which defence is supported by the testimony of a physician that he had attended the member within a year, and by that of other witnesses as to the hereditary disease, the credibility of the witnesses for the defence, and the weight to be given them as against the testimony produced in rebuttal, are for the jury.

Appeal of the Royal Society of Good Fellows, defendant, from the judgment of the Common Pleas No. 3, for Allegheny County, in an action of assumpsit brought by Ellen J. Wall.

This was an action by Ellen J. Wall, mother of Edmund F. Wall, to recover the amount due to her upon his death by virtue of a benefit certificate issued to him by the Royal Society of Good Fellows, a beneficial society of which he was a member.

The case was tried before KENNEDY, P. J. The

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nature of the defence and the points involved in the case, appear by the opinion of the Supreme Court, infra.

Verdict and judgment for plaintiff, $2489. The defendant took this appeal.

Lev. McQuistion and *S. A. Weil*, for appellant.

William Yost, for appellee.

October 6, 1899. McCollum, J. The plaintiff has a right to the money mentioned in the certificate, provided the answers of her son, Edward Wall, to the questions addressed to him in connection with his application for insurance are true answers. Prima facie the answers are correct, and the burden of showing their falsity rests on the defendant company. The principal questions to which it is alleged false answers are made appear in the first, second, third, fourth and fifth assignments. The question addressed to the applicant in the first is as follows: "When last attended by a physician and for what cause?" and the answer to it is, "One year ago." The question addressed to him in the other assignments is, "Have any or either of your parents, brothers, sisters, grandparents, uncles, aunts, or cousins been afflicted with consumption or with pulmonary or any hereditary disease?" and the answer to it is "No." The answer to the question contained in the first assignment is characterized by the company as false, and the testimony of Dr. L. C. Wiggins is relied on to sustain the accusation. The answer to the question included in the other assignments is declared by the company to be untrue and the testimony relied on to support the declaration is that of Dr. J. A. Miller, Dr. J. B. Black and Dr. J. L. Penny. The testimony of Dr. Wiggins is that he attended Edward Wall professionally several times during the year preceding his application for insurance, and the testimony of Dr. Black is that Johanna Hickey, an aunt of Edward Wall, died of consumption in December, 1891. Dr. Miller testified in substance that he was called in 1892 to examine Thomas Hickey and Mary Hickey, cousins of Edward Wall, and upon his examination of them he was of the opinion that they had consumption; but he did not express this opinion to them or anyone else. His call was brief and not repeated.

It must be conceded that the testimony of Wiggins, Miller and Black has a tendency to discredit the answers to the questions contained in the five assignments. But there is nothing in the testimony of Penny which discredits them. On the contrary his testimony has a decided tendency to maintain their integrity. He was called by the plaintiff in rebuttal and it is a perversion of his testimony to attribute to it the effect claimed for it in the fifth assignment.

In addition to the three physicians who testified in behalf of the company as above stated, we note that W. R. Spooner, the company's premier, testified that he had interviews with the plaintiff in which she made admissions in accordance with the contention of the company and fatal to her demand upon it. He conceded, however, that her husband was present at and participated in these interviews. In this connection it is proper to state that Spooner's testimony respecting the alleged admissions of the plaintiff is directly opposed to the testimony of her husband in rebuttal.

The testimony of the four witnesses called to sustain the company's contention is contradicted by the testimony of the sixteen witnesses called by the plaintiff in answer to it. Four of these witnesses are reputable physicians, qualified to testify intelligently and without prejudice respecting the matters to which their attention was called. Two of them examined Edward Wall in 1892 with reference to an application for insurance, and the conclusion they reached was that he was then in good health and a good risk. The examinations were made on the 4th of June and the 14th of November. The testimony of the remaining twelve witnesses in rebuttal, together with that of the four physicians referred to, meets every phase of the company's contention and constitutes, if credited, a complete answer to it.

All the questions in the case are questions of fact and determinable by a jury upon the evidence. The questions and the evidence were fairly and clearly presented to the jury by the learned Court below and we discover no error in the instructions relating to either. We therefore overrule all the assignments of error.

Judgment affirmed.

H. B.

Superior Court.

Oct. '98, 63. Superior Court. October 7, 1898.

Erthal v. Glueck.

Building associations—Application of dues—Assignment of stock in trust to apply.

Payments upon building association stock pledged to secure a loan also secured by a mortgage will not be applied to the mortgage debt, in the absence of an appropriation thereto by the debtor, or by the association, if the right to make such application is delegated to it by the debtor; such appropriation cannot be compelled by a purchaser at sheriff's sale.

Where stock in a building association is assigned

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as collateral security for a loan secured also by a mortgage, and an agreement is executed reciting that the assignment is in trust to appropriate the value of the stock towards the payment of the mortgage, there is such an appropriation of the payments upon the stock as will be binding upon the owner thereof and those who stand in his shoes; therefore where the land mortgaged is sold under a judgment junior to the mortgage, and on another judgment an attachment execution is issued on the stock, the purchaser of the land will have a right to a clear title on paying the mortgage less the value of the stock, and if that value is less than the mortgage with unpaid interest thereon, the attaching creditor will take nothing. SMITH, J., dissents.

Appeal of Sophia L. Glueck, defendant, from the decree of the Common Pleas No. 1, for Philadelphia County, in a proceeding in equity by John Erthal, president of the Manner Unterstutzungs Verein zur Enthracht No. 2, against the said Sophia L. Glueck and the Glenwood Mutual Building and Loan Association.

In this case a bill was filed by Erthal, president, etc., praying that a certain mortgage of $1400, given to the Glenwood Mutual Building and Loan Association by Joseph Wolf, upon premises on Nevada street, Philadelphia, be declared a first lien thereon for the full amount, and that the association be decreed to assign the said mortgage to Erthal on being paid the amount thereof, and that thereupon seven certain shares of stock, assigned to said association as collateral security therefor, be released.

Sophia Glueck filed a cross bill, setting out payment to the said association of the amount of mortgage less the value of said stock, and praying satisfaction of said mortgage.

This case was heard on bill, cross bill, answers and testimony, by BREGY, J., before whom the facts appeared as follows: Joseph Wolf, on January 5, 1889, mortgaged certain premises on Nevada street, Philadelphia, to the Glenwood Mutual Building and Loan Association for the sum of $1400, and assigned to it seven shares of stock of said association as collateral security, said mortgage constituting a first encumbrance on said property. The assignment was in the usual form of such assignments as collateral security, and Wolf also executed a paper dated January 11, as follows:

Know all men by these presents, That I, Joseph Wolf, have transferred, assigned and set over and by these presents do transfer, assign, and set over to the Glenwood Mutual Building Association, Philadelphia, all my right, title and interest, in Certificate No. 25, of the Third Series, for seven shares of the capital or joint stock of said association or joint stock company, in trust that the said the Glenwood Mutual Building and Loan Association, Philadelphia, shall have and hold the same as collateral security for the payment of a certain mortgage debt of one thousand four hundred dollars for which I have this day executed to said association a bond and warrant of attorney and indenture of mortgage, and in trust that the said the Glenwood Mutual Building and Loan Association, Philadelphia, will appropriate the value of said stock toward the payment of the principal sum of said mortgage debt and for no other intent or purpose whatever.

Witness my hand and seal the 11th day of January, A. D. 1889.

JOSEPH WOLF. [L. S.]

Sealed and delivered in the presence of
L. A. HUBBS.

On January 20, 1893, John Jacob Wolf, brother of said Joseph Wolf, obtained a judgment against him for the sum of $525, which became a second encumbrance on said property.

On May 9, 1896, John Erthal, president, etc., obtained a judgment against the said Joseph Wolf et al., in the sum of $420.66, which became a third encumbrance on said property. An attachment execution was afterwards issued thereon, and on July 29, 1896, the said association was summoned as garnishee.

On August 23, 1896, the said premises were exposed to sheriff's sale as the property of Joseph Wolf, by virtue of an execution issued by John Jacob Wolf, and bid in by him for $650.

John Jacob Wolf agreed to sell said premises to Sophia L. Glueck for the sum of $1450, clear of encumbrances, and accordingly assigned to her his bid.

Sophia L. Glueck employed the Land Title and Trust Company to examine the title, and paid it the entire purchase money, less the amount of hand money theretofore paid, with instructions to issue a title insurance policy and make settlement.

On September 24, 1896, the secretary of the building association, upon the request of the trust company, furnished it a statement in the usual form, of the amount of money necessary to satisfy said mortgage, including satisfaction fee, for the purpose of enabling said company to make settlement thereon.

On the same day the said company made settlement with the sheriff, who duly acknowledged a deed to Sophia L. Glueck, and paid to the treasurer of said building association by check drawn to the order of the association, the amount shown by said statement to be due on said mortgage, including satisfaction fee thereof, and said treasurer receipted therefor as satisfaction of the said mortgage, and said check was duly deposited and paid.

The treasurer of said association was subsequently advised that the attachment execution aforesaid rendered such a settlement detrimental, and called at once at the office of the trust company, and stated to the settlement clerk that said check should have been drawn to the order of the secretary, and that the treasurer had no right to

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receive it drawn as it was to the order of the association, and as a personal favor requested the clerk to accept his personal check for the said sum, and have the company draw a new check for a like sum to the order of the secretary of the association, and that said secretary would call therefor. The treasurer thereupon cancelled said receipt. The secretary accordingly called and stated that, by reason of the attachment execution aforesaid, he would not receive said check nor satisfy said mortgage of record.

On March 25, 1897, John Erthal, president, etc., issued an alias attachment execution on his judgment against said Joseph Wolf, and summoned the said association as garnishee. Answers to interrogatories were duly filed, stating the cancellation value of the said seven shares of stock held by it as collateral security for said mortgage debt. Said execution was proceeded in, and on May 24, 1897, said seven shares of stock were sold by the sheriff, subject to the rights of said building association, to the plaintiff in the execution, for the sum of ten dollars.

The Court made a decree, declaring the mortgage a valid and existing encumbrance to the full amount thereof with interest, fines and costs, viz., $1678.90, and directing the Glenwood Mutual Building and Loan Association to assign said mortgage to the plaintiff upon payment within thirty days of the sum of $716.26, and the cancellation by plaintiff of the seven shares of stock which formerly stood in the name of Joseph Wolf, and which had been sold to plaintiff by the sheriff. And in the event of failure to pay within thirty days, that the building association have leave to proceed with the foreclosure of the mortgage, and to hold the stock as collateral until the whole amount of the mortgage debt should be paid, and that the cross bill be dismissed, and that Sophia L. Glueck pay the costs.

Exceptions were filed, which were dismissed by the Court in banc.

Sophia L. Glueck took this appeal, assigning as error, inter alia, the decree (eighth assignment of error).

J. H. Brinton, for appellant.

Under the agreement of July 11, 1889, the building association was obliged to appropriate the value of the stock "towards the payment of the principal sum of said mortgage debt," and can apply to no other purpose. Such an assignment of stock does not constitute a collateral, but a direct assignment for the payment of the association's loan, and the stock fund is primarily liable. The two assignments bearing even date must be construed as one agreement, and being so construed show that the contracting parties regarded the stock payments as the primary fund. That building association stock may be so assigned cannot be successfully disputed. Hemperley *v.* Tyson et al., 170 Pa. 385, squarely determines that question.

The case at bar is squarely ruled by the York Trust, etc., Co. *v.* Gallatin, 186 Pa. 150.

Frederick J. Shoyer, for Erthal, President, etc., appellee.

Payments to stock are not ipso facto payments on the mortgage.

Spring Garden Ass'n *v.* Tradesmen's Loan Ass'n, 46 Pa. 493.

N. A. Building Ass'n *v.* Sutton, 35 Id. 463.

There must be an actual application to work that effect. Here the association, whatever its right to apply, had made no application; and the appellant, who purchased the property with full record notice that it was subject to a first mortgage held by the building association without any abatement or reduction upon the record, being a perfect stranger to the contract between the building association and Joseph Wolf, has no standing to compel such application.

E. O. Michener, for the Glenwood Mutual Building Association, appellee.

July 28, 1899. W. D. Porter, J. Joseph Wolf, being the owner of the premises 3020 Nevada st., Philadelphia, and a stockholder of the Glenwood Mutual Building and Loan Association, in the month of January, 1889, borrowed of the association the sum of $1400, for which amount he gave a mortgage upon the Nevada street property and assigned as collateral security seven shares of stock in the Association. In transferring the stock to the association he executed contemporaneously two assignments which were delivered to and accepted by the association. One of the assignments (exhibit "B") was filled in on the form printed on the back of the certificate of stock, and simply assigned the stock as collateral security for the payment of the loan. The other assignment (exhibit "A") was attached to the certificate and embodied all the material parts of exhibit "B," but contained in addition this provision, viz., "And in trust that the said the Glenwood Mutual Building and Loan Association, Philadelphia, will appropriate the value of said stock toward the payment of the principal sum of said mortgage debt and for no other intent or purpose whatever." This arrangement was never afterwards changed and Joseph Wolf gave no further directions as to the manner in which the payments upon his stock should be applied. Joseph Wolf paid the regular instalments of dues, interest and premiums upon the stock and mortgage up to June, 1896.

A judgment for $525 was entered, on January 20, 1893, against Joseph Wolf and in favor of John

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Jacob Wolf, which became a second encumbrance upon the real estate. On May 9, 1896, John Erthal, president, etc., obtained a judgment against the said Joseph Wolf and others, in the sum of $420.66, which became a third encumbrance upon said property. John Jacob Wolf issued an execution upon his judgment, under which the Nevada street property was duly sold at sheriff's sale, on the 3d day of August, 1896, the purchaser being the said John Jacob Wolf, who, the same day, transferred his bid to Sophia Glueck, one of the defendants, to whom a sheriff's deed was duly executed, acknowledged and delivered, on September 26, 1896. John Erthal, president, etc., issued an execution attachment, upon his judgment against Joseph Wolf, which was served upon the Glenwood Mutual Building and Loan Association as garnishee, on August 1, 1896, and on the 26th of the same month served upon the association a written notice alleging that he had by virtue of the attachment a lien on the stock of Wolf which had been assigned to the association, and notifying them to do nothing whereby his lien should be jeopardized, especially to do nothing toward the satisfaction of the mortgage, as he intended to prosecute his rights against said stock, and would tender them the amount due on their lien and ask to be subrogated to their rights as mortgagee. The learned Judge of the Court below who heard this case finds that a judgment was entered against the garnishee, upon its answer, for leave to sell the seven shares of stock, subject to the rights of the garnishee, and that the stock was so sold, upon a writ of fieri facias, and bought by the plaintiff in this proceeding. There is nothing in the abstract of the bill and answer, or evidence, as printed, which warrants such finding, but, as no steps were taken by any of the parties which affected the questions now involved prior to the issuing and service of the alias execution attachment, that finding is not material. Before the plaintiff issued this first attachment he had not filed an affidavit and entered a bond, as required by the Act of Assembly, and he seems to have concluded that it would be safer to start over again. He issued, on March 25, 1897, an alias execution attachment, which was served on the building and loan association as garnishee on the 26th of March, and the same day he served a written notice on the association of his claim to a lien upon the stock and his intention to tender the balance due the association and demand subrogation to its rights as mortgagee. In this execution attachment all the requirements of the Act of Assembly were observed and the plaintiff obtained judgment for leave to expose the stock for sale, subject to the rights of the association. A writ of fieri facias was issued and the seven shares of stock were sold, on May 24, 1897, to the plaintiff for the sum of ten dollars.

Sophia Glueck, upon the assignment to her of the bid of John Jacob Wolf at the sheriff's sale of the real estate, made application to the Land Title and Trust Company for a policy of title insurance on said premises, and the trust company acted as her agent in the settlement and conveyance of the property to her, the said John Jacob Wolf having agreed that the title should be marketable and free from encumbrances. The trust company, on September 25, 1896, sent an agent to the secretary of the building and loan association to ascertain the amount owing upon the mortgage. The secretary furnished a statement showing the amount of the loan, interest, premium and fines, as of October 6, 1896, to be $1422.77, and the cancellation value of the seven shares of stock to be $834.19, and adding $3 for satisfaction fee, left a balance of $591.58 due upon the mortgage. It must be observed that this statement was not correct, unless the value of the stock was to be appropriated in reduction of the loan. The trust company assumed that it was correct, paid the amount of the bid to the sheriff, accepted the sheriff's deed and settled with John Jacob Wolf on that basis. The trust company, on September 28, 1896, delivered to the treasurer of the building association a check payable to the order of the association for the sum of $591.58, but the directors of the association declined to accept the same and the money was returned by the treasurer to the trust company.

The plaintiff, on June 15, 1897, filed this bill in equity, making Sophia Glueck and the building and loan association respondents, reciting the making of the loan to Joseph Wolf, the execution of the mortgage by Wolf, and that the stock had been assigned as a collateral security for the loan, the purchase of the real estate by Sophia Glueck at sheriff's sale and the purchase of the stock by the plaintiff under the proceedings in attachment. He prayed that the mortgage of $1400 be declared a first encumbrance upon the land for the full amount thereof, and that the association be directed to assign said mortgage and accompanying bond to him, upon being paid the full amount of said mortgage and the lawful moneys due thereon, and upon payment as aforesaid the said seven shares of stock held as collateral by said association, be released. Sophia Glueck filed an answer. The building and loan association permitted judgment to be entered pro confesso, for want of an answer. Sophia Glueck filed a cross bill against the building and loan association, to which an answer was filed. The case then proceeded in regular order, and the Court below, after hearing, entered a decree declaring the mort-

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gage to be a valid and existing encumbrance for the full amount thereof, with interest, fines and costs due thereon, which amount was found to be $1678.90; the value of the seven shares of stock was found to be $962.64, and the building and loan association was directed to assign and transfer the mortgage and accompanying bond to plaintiff upon payment of $716.26 and cancellation by the plaintiff of the seven shares of stock. It was further decreed that in the event of the failure of the plaintiff to make said payment within thirty days, the association should have leave to proceed on the mortgage to judgment and execution for the collection of the whole amount due upon said mortgage, and to hold the stock as collateral security for the payment of said mortgage debt, until the whole amount thereof should be paid. The cross bill was dismissed and it was decreed that Sophia Glueck pay all the costs of the proceedings.

Sophia Glueck appealed and now assigns for error certain findings of fact, the dismissal of the cross bill and the entry of the decree by the Court below. The first three specifications of error refer to the findings, by the Court below, of the facts in connection with the statement of the amount owing upon the mortgage, furnished by the secretary of the building association to the agent of the trust company; and the subsequent delivery, by an officer of the trust company to the treasurer of the association, of a check for the balance which the statement set forth to be due. These three specifications are without merit for two reasons. First, while the treasurer of a building association is usually the proper person to receive money owing to the association, the trust company and its officers had specific notice that the treasurer of *this* association did not have authority to receive money on this particular class of claims, and the proper officers of the association having declined to ratify the unauthorized act of the treasurer that officer promptly returned the money to the trust company. Second, there was an entire absence of evidence or allegation of authority in the secretary to settle claims due the association, or to bind the association by statements as to amounts due upon its mortgages. There is no such authority implied from the nature of the office, and the only evidence upon the subject in this case was to the effect that such settlements were required to be made by the finance committee. There being no evidence of authority, the admission of the secretary was not binding upon the association: Johnston *v.* Elizabeth Building & Loan Ass'n, 104 Pa. 394.

The fourth, fifth, sixth and seventh specifications refer to the action of the Court in dismissing the cross bill. The cross bill relied upon the unauthorized acts of the secretary and treasurer of the association to estop it from proceeding to collect the amount due upon the mortgage, and the prayer was that a decree be entered ordering the association to forthwith satisfy said mortgage of record. As the acts of the officers were without authority and not within the line of their duties, the association was not estopped and the plaintiff in the cross bill was not entitled to relief thereunder. There was no error in dismissing the cross bill.

The eighth specification is against the decree entered by the Court below, and raises the only substantial question involved in the determination of this appeal, viz., Was Sophia Glueck, the purchaser of the real estate, entitled to have deducted from the mortgage debt the value of the seven shares of stock assigned to the association, by Joseph Wolf, as collateral security for the loan? If she was, then the plaintiff took nothing by his purchase of the stock under his attachment proceedings, and he is not entitled to the relief which he seeks and which was decreed by the Court below. The peculiar manner of dealing, with regard to loans, between building and loan associations and their stockholders, led the Courts, in the early cases, to hold that the loan was a mere advance of the stock to which the borrower expected to be entitled at the close of the concern; and when the instalments or dues upon the stock and the interest on the advances were fully paid, the loan or advance was paid, and the borrower could claim only profits on the dissolution of the association. Upon this ground it was decided that all stock payments were, so far as they went, a compliance with the terms involved in the transaction, and that a purchaser, at sheriff's sale, of land subject to a building association mortgage was entitled to credit for the value of the shares of stock assigned to the association as collateral security for the mortgage debt: Kupfert *v.* The Guttenberg Building Association, 30 Pa. 465; Hughes's Appeal, 30 Pa. 471. The question was presented in a new form in the case of North American Building Ass'n *v.* Sutton, 35 Pa. 463. Sutton had executed a mortgage to the association and assigned his stock as collateral security for the loan. He defaulted in payment of interest on the loan and a scire facias was issued upon the mortgage, a plea of payment with leave was put in, and a verdict and judgment was rendered in favor of the association, which Sutton paid. Sutton did not seek to apply the payments on the stock in discharge of the mortgage, and no credit for them was allowed to him on the trial of the scire facias. Both parties continued to treat the stock as still subsisting after the verdict, and Sutton paid and the association

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received all fines and dues down to the time when a transfer of the stock was demanded. Sutton having demanded a transfer of the stock, which the association declined to permit, brought an action to recover the amount which he had paid as dues upon the stock and the association defended upon the ground that the record of the proceedings upon the scire facias sur mortgage established conclusively that Sutton recovered and was allowed, under his plea of payment to the scire facias, the full value of his stock, that he must be presumed to have then had credit for all the instalments which he had paid and that he was consequently estopped from a recovery in an action for the said instalments. In support of this position the association relied upon the cases reported in 30 Pa. above recited, which had been decided subsequently to the entry of judgment in the scire facias upon the mortgage. The Supreme Court, in an opinion by Mr. Justice STRONG, explained the earlier cases and laid down the rule that payment of dues upon the stock does not, ipso facto, work an extinguishment of so much of the mortgage; the debtor may so apply it, but the payment itself is not an application of the money to the reduction of the mortgage. The debtor is not compelled to give up his stock, whenever suit is brought upon his bond or mortgage. The law does not, against the consent of the debtor, apply the instalments paid by him upon his stock to the discharge of his indebtedness for the money borrowed. This was the decision reached in Association *v.* Sutton, and it has not since been questioned. The avowed purpose of these decisions was to protect the borrowing community from the rapacity of money-lending associations, and the result was to clearly establish the right of the debtor to elect the manner in which the payments of dues upon the stock assigned as security for the loan should be applied. The association may apply the payments when, by the terms of the assignment of stock, a discretion to make the applications is delegated to it. But in order to effectuate the application of payments on the stock to the debt, it requires an act of appropriation by one or other of the parties. In the absence of an appropriation by either party, a purchaser at sheriff's sale of the mortgaged premises cannot compel an application of the collateral security to reduce the mortgage: Spring Garden Ass'n *v.* Tradesmen's Loan Ass'n, 46 Pa. 493; Economy Building Ass'n *v.* Hungerbuehler, 93 Pa. 258. If before there has been an appropriation of the payments, the stock is attached, at suit of a creditor of the borrower, and sold, the purchaser succeeds to the rights of the borrower and may require the association to exhaust the mortgage security before resorting to the stock, or he may, upon surrender of the stock and payment of the difference between its value and the amount of the mortgage debt, demand subrogation to the rights of the association under the mortgage. If an appropriation has been made before the stock becomes bound by the attachment, then the attachment binds nothing but the balance, if any, that remains after the stock has paid the debt: Economy Building Association *v.* Hungerbuehler, supra; Early and Lane's Appeal, 89 Pa. 411.

The contest in this case is between a creditor of the borrower, who attached and sold the stock, and a purchaser at sheriff's sale, upon a junior judgment, of the real estate upon which the mortgage remains a lien. The amount of the mortgage debt exceeds the value of the stock, and if the stock is to be applied to the payment of the debt the attaching creditor took nothing. The case must turn upon this question, Was there an application of the payments upon the stock, to the debt secured by the mortgage, before the stock became bound by the attachment? Nothing was done, by either of the parties, after the original assignment of the stock as collateral security which could be construed as an act of appropriation. The rights of these litigants are, therefore, fixed by the terms of the assignments executed by Wolf and accepted by the association. Unless in those instruments, which evidence the agreement of the parties upon which the whole transaction was founded, there was an appropriation of the stock to the payment of the debt secured by the mortgage, the decree entered by the Court below was free from error.

It is not necessary to enter into speculation and refinement as to which *one* of the papers, exhibit "A" or exhibit "B," constituted the real contract between the parties, as *both* can stand together we are not free to disregard either. Exhibit "B" was the printed form on the back of the certificate, with its blank spaces filled in and signed, and it carried notice to all persons into whose hands the certificate of stock might come. It was an assignment of the stock as collateral security for the loan, but it contained no stipulation as to the manner in which the value of the stock should be appropriated. We must assume that the parties had some purpose in cotemporaneously executing the assignment exhibit "A" and attaching it to the certificate. The legal effect of the papers, respectively, is the same save in this respect, exhibit "A" contains the provision: "And in trust that the said the Glenwood Mutual Building and Loan Association, Philadelphia, will appropriate the value of said stock toward the payment of the principal sum of said mortgage debt and for no other intent or purpose whatever,"

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which is not found in exhibit "B." There is no conflict between the agreements, for exhibit "B" left Wolf free to appropriate the stock to payment of the mortgage debt, and it was competent for the parties to make a supplemental agreement as to the appropriation of the payments upon the stock. This supplemental agreement was entered into and embodied in exhibit "A." The whole agreement of the parties was evidenced by the two assignments taken together. The stock was assigned as security for the loan. Wolf elected to appropriate the value of the stock to payment of the mortgage debt, and the association accepted the stock upon the express trust that it should be so applied. This was an agreement mutually binding upon the parties, and was manifestly intended to operate as an express appropriation, and not a direction to appropriate: Chase *v.* Bank, 66 Pa. 169.

The election of Wolf shows that it was his purpose to make the stock fund primarily liable for the loan, and the acceptance by the association of the assignments subject to the election involved an agreement on its part to so regard it. The application of the payments having been thus explicitly agreed upon at the inception of the contract, the instalments paid upon the stock are to be taken as paid upon the loan: Hemperley *v.* Tyson et al., 170 Pa. 385; York Trust, etc., Co. *v.* Gallatin, 186 Pa. 150. Sophia L. Glueck, the purchaser at sheriff's sale, took title to the land subject to the balance unpaid upon the mortgage, which was to be ascertained by allowing credit upon the loan for the value of the stock which the parties by their agreement had appropriated to its payment. The Court below held that the payments upon the stock were not to be applied in reduction of the mortgage debt, and decreed accordingly; in this the learned Court erred. The eighth assignment of error is sustained.

We have nothing in the evidence as printed from which we can determine the value of the stock, nor the amount of the mortgage with its unpaid interest, but it is conceded that the value of the stock is less than the amount due upon the mortgage. The plaintiff was, therefore, entitled to nothing and his bill must be dismissed. Under the record and evidence here presented we must also dismiss the cross bill, without prejudice to the right of Sophia Glueck to have the value of the seven shares of stock, held by the association as collateral security, credited upon the mortgage debt, in any proceeding upon the mortgage. Decree reversed.

And now, July 28, 1899, it is ordered and decreed that plaintiff's bill be dismissed; that the cross bill be dismissed, without prejudice to the right of Sophia Glueck to have credit for the value of the seven shares of stock of the Glenwood Mutual Building and Loan Association, held by the association under the assignment from Joseph Wolf, upon the mortgage which is a lien upon her land. And it is ordered that the appellee, John Erthal, president, etc., pay the costs in the Court below and upon this appeal.

SMITH, J., dissents.

H. B.

April, '98, 188. Superior Court. May 16, 1898.

Rotsell v. Warren Borough.

Negligence — Highway — Steps connecting two grades.

Where the alleged cause of an accident is a mere conjecture unsupported by proved facts exclusively applicable to it, there can be no recovery of damages therefor.

Where a municipality, in the exercise of its judgment, connects two grades of a sidewalk by steps, it is not, if the steps are properly constructed, chargeable with negligence if a person makes a misstep at the steps and is hurt.

Appeal of the Burgess and Town Council of the Borough of Warren, defendants, from the judgment of the Common Pleas for Warren County, in an action of trespass in which Martha J. Rotsell was plaintiff.

This was an action to recover for injuries suffered by the plaintiff through the negligence of the defendant. The negligence alleged was the allowing of a portion of a sidewalk "to be out of repair, and so deficiently and inadequately constructed, as to then and there, form and leave an abrupt elevation about twenty inches high, extending across the entire width of the said footway, pavement or sidewalk, in the bed surface or traveling bottom thereof by then and there, wrongfully, improperly and negligently, allowing and suffering the bed surface or traveling bottom of all that portion of the said footway, pavement or sidewalk aforesaid lying in front of and along and near the northern end of said lots owned by Mrs. C. I. Beck to be about twenty inches higher and of that height above the bed surface and traveling bottom of all that portion of said footway or pavement and sidewalk, in front of and along and near the northern end of said lot owned by the Warren Steam Laundry in said borough of Warren, and then and there wrongfully, improperly and negligently, allowed and suffered the same to so be and remain in said dangerous and unsafe condition as aforesaid, without placing or causing to be placed any guards, lights or signals, near such an abrupt elevation in and upon the bed or traveling bottom of said footway, pavement or sidewalk as aforesaid, to denote

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or show that the same was so then as aforesaid," in consequence whereof the plaintiff fell down the abrupt elevation and was seriously injured.

On the trial, before NOYES, P. J., the facts appeared as follows: Royal street, or Pennsylvania avenue, in Warren borough, commenced at the intersection of Water and Short streets and extended in a southeasterly direction to the Conewango creek, which it crossed by an iron bridge, and thence extended, southeasterly, through a part of the borough on the southeasterly side of the creek. From said intersection the ground descended gradually for about 120 feet to where a deep race, spanned by a bridge, crossed the street. From the race to the iron bridge, over the creek, was some 800 feet. This ground was low and subject to overflow from the creek. The ground rose immediately on the other side of the creek, to the height of some twenty-five feet, and then extended southeasterly, upon which that part of the borough is principally built. This street over the low ground was upon an embankment filled in to carry the roadbed above overflow, and to attain the elevation of the roadbed of the iron bridge. Prior to June, 1896, three buildings were erected, between the intersection and the race, upon the right hand side of the street, going towards the race, and a plank footwalk constructed on that side of the street to the race, and from the race to the iron bridge. Beyond the race half way to the bridge there were no buildings, and from that point to the bridge that side of the street was solidly built up. There was no footwalk upon the other side of the street, and only four buildings between the race and the iron bridge.

Prior to June, 1896, one Beck, who owned the southwest corner, at the intersection of Royal with Water street, erected a two-story brick block thereon. Beck asked of the town council a grade for his building and walk. He desired to put down in front of his building, a permanent concrete sidewalk. Thereupon the borough authorities established a grade for the sidewalk, and for the street. This grade raised the walk about twelve inches, and Beck built a concrete walk on this grade, and the grade of the street was raised and filled in to correspond.

A building was next to Mr. Beck's block and flush with the original walk, and the threshold upon grade with that walk; and also the two other buildings between the laundry building and the race. The race bridge was not raised. To carry out the grade of this walk to the race bridge would bring the walk against these buildings, and one foot above the threshold of the entrances, and cause great injury to the buildings, and business conducted therein. The borough authorities, after due consideration, determined to put a step in the walk at the end of Beck's walk, thus connecting it with the old walk. A step was therefore put in the walk, at the end of Beck's walk, which corresponded in construction and material with numerous steps in the sidewalks in town, absolutely necessary by reason of steep grades. The walk at this point was built of 2-inch hemlock plank, seven feet wide. The offset was between eleven and twelve inches. This offset was divided equally by a step, made of 2-inch hemlock plank, with twelve inches tread, or width, and five to six inches of a rise in each step and a width of walk of seven feet, and corresponded in its construction with ordinary steps, in the approach to buildings, and in buildings, and in the sidewalks in the borough. At the intersection of these streets hung an electric light, which illuminated this walk and step at night, the light from which, at the step, was entirely unobstructed.

This walk of Beck's was built and step constructed in June of 1896. A large number of people passed over this walk, night and day, going and coming, between the parts of the borough divided by the Conewango creek. The plaintiff, Mrs. Rotsell, resided on Pennsylvania avenue, some blocks beyond the iron bridge. From the date of the construction of this step, in June of 1896, up to November 21, 1896, she passed over this walk frequently, both by night and by day, and was entirely familiar with its location and construction.

The business portion of the borough is largely on the northwest side of the Conewango creek, and "coming over to town" means coming over the creek from that part of the borough in which Mrs. Rotsell resided.

On November 21, 1896, Mrs. Rotsell, accompanied by her sister, Mrs. Bernstein, about 8 o'clock P. M. came over to town, passing over the steps and walk. The electric light was burning that illuminated the walk, and step, and they saw the step. They returned about 9.30. It had been raining quite hard and the wind blowing, and quite dark, and, for some unexplained reason, the electric light was out. When they returned, the storm had slackened and it was raining "a little bit then." The ground outside the walk was wet, water had run down the depression between the walk and the roadbed and over the walk, beyond the step, near the race bridge. They approached the step, Mrs. Bernstein carrying an umbrella over both; Mrs. Rotsell felt along with her feet, knew she was at the step, went to step down and fell. She fell, by some reason or other. According to her own testimony: "I don't knew how it did happen. I fell so quick." She did not fall or tumble down, over the step, but fell off the side

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of the walk into the mud. She was seriously injured.

The defendants presented, inter alia, the following point:

"9. Under the pleadings and evidence in this case the plaintiff is not entitled to recover." Which was thus answered: "The defendants' ninth point asks us to take the case from the jury and is answered in the negative." (Fifth assignment of error.)

Verdict for plaintiff $500 and judgment thereon. The defendant took this appeal, and assigned error, inter alia, as above indicated.

W. W. Wilbur, (*Schnur* with him), for appellants.

No negligence on the part of the borough authorities was shown. There was no evidence of improper construction of the step; and the borough had the right to overcome the offset in the way which seemed best, if the way was a reasonable one.

Easton *v.* Neff, 102 Pa. 474.

There is no evidence that the step caused the accident. The plaintiff's testimony is, "As I stepped down I fell by some reason or other; I don't know just how it did happen, I fell so quick. . . . I don't know just exactly what caused me to fall I fell so quick."

Where there is a failure to show how the injury to the plaintiff occurred, there should be peremptory instructions for defendant.

Ford *v.* Anderson, 139 Pa. 261.
Welsh *v.* Railroad, 181 Id. 464.
R. R. Co. *v.* Schertle, 97 Id. 450.

William J. Knupp, for appellee.

It was the duty of the defendants to keep the walks in such condition that ordinary persons using reasonable care and prudence could travel over them with safety.

Merriman *v.* Phillipsburg, 158 Pa. 78.
Fritsch *v.* Allegheny, 91 Id. 226.
Nanticoke *v.* Warne, 106 Id. 373.
Alcorn *v.* Philadelphia, 44 Id. 351.
Erie *v.* Schwingle, 22 Id. 384.
Rapho *v.* Moore, 68 Id. 404.
McDade *v.* Chester City, 117 Id. 426.

The abrupt descent should have been guarded by a rail; its absence showed negligence.

Forker *v.* Sandy Lake Borough, 130 Pa. 124.
Bauerle *v.* Philadelphia, 184 Id. 545.

There was an abundant evidence which showed what caused the injury to the plaintiff. It was falling from the Beck walk to the laundry walk. What caused her to fall no one will dispute; it was this inequality in the walk which was not properly protected. The jury have said so by their verdict.

Two persons beside the plaintiff testify where she was injured. That the plaintiff fell at this point and was injured will not be disputed by the defendants themselves. Just how her foot was injured, whether it struck on the step or whether it was hurt when she struck the laundry walk will make no difference.

When the jury found the defendant's negligence there was no question that the plaintiff's injury resulted from it.

Where the facts are not clear and simple and where the existence of contributory negligence depends upon inferences to be drawn from the evidence, the question must go to the jury for decision.

Ready et al. *v.* Shamokin Bor., 137 Pa. 92.
Davidson *v.* R. R., 179 Id. 227.
Davis *v.* Corry City, 154 Id. 598.
Schively *v.* Jenkintown, 180 Id. 196.

May 15, 1899. ORLADY, J. The plaintiff received injuries by falling on a sidewalk in the defendant borough, and on the trial of the cause in the Court below, she described the accident as follows: "I was walking along and was looking out for the step, and I stepped off, and as I stepped down I fell by some reason or other, I don't know just how it did happen I fell so quick and I lay there and couldn't get up." The borough authorities had established a uniform grade for one of its principal streets and its sidewalks, and in conformity with this grade a property owner put down a concrete pavement which was twelve inches higher than the old grade of the adjoining pavement. To remedy this abrupt break in the sidewalk, the street committee and sidewalk committee of the council, with their engineer, had a conference on the ground, and after mature deliberation, concluded that the most efficient method to assure the safety of persons using the sidewalk would be to construct a step at the end of the concrete pavement. In accordance with this plan the defendant placed a heavy hemlock plank, twelve inches in width, midway between the pavement levels, so as to make two steps with a rise of between five and six inches each, the length being the width of the pavement.

From the time the step was placed in the pavement in June until the plaintiff received her injuries in the following November, she had passed over the sidewalk frequently, and was familiar with the location of the step and of its construction. On the evening of November 21 she passed over it in safety, and on returning in the direction of her home, about ten o'clock during a storm, she fell and was injured. She does not remember whether an electric light, which was located nearby, was lit or not, but testified that even when the light was burning, "it flickers and makes it wavy and you can't see; especially

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when the wind is blowing you can't see at all there;" and that on this night "it was very dark there." The foundation of the action against the borough is a neglect of performance of some duty of the authorities. It was the duty of the defendant borough to require the abutting property owners to construct and maintain a reasonably safe sidewalk, and in the exercise of its control over the sidewalk it had the undoubted right to construct and maintain some expedient at the end of the concrete pavement so as to make the sidewalk reasonably safe for persons traveling over it. The borough authorities recognized the necessity for action, and using their best judgment, in good faith they adopted what they believed to be the best plan for relieving the obstruction. It is not contended that the step was inadequate or defective in its original construction. The arrangement was a satisfactory one, as it had been continuously used for six months. The borough is not to be held liable for an error of judgment in devising the remedial structure without further proof than that which is adduced by the plaintiff.

Moreover, her own evidence fails to disclose the cause of the accident. The most friendly interpretation of it suggests no more than a conjecture that she may have fallen down over the step, or, from the pavement into the street, but there is fully as much warrant for the inference that she slipped on some object on the pavement. At most, whatever conclusion is reached as to the cause of the accident, it is based upon a presumption unsupported by proven facts which are exclusively applicable to it. Her own knowledge of the accident is so uncertain as to justify her only in saying, "I don't know how it did happen, I fell so quick," and a jury should not be permitted to supply the additional facts and inferences to be drawn from them. The fifth assignment of error is sustained and the judgment is reversed.

H. B.

Common Pleas.

C. P. 4. April 8, 1899.

Harriet De Rustafjaell v. National Bank of Commerce.

Courts of Common Pleas—Distribution of business —Rule of Court III.

Where a suit is pending in one Court of Common Pleas to determine the rights of the parties thereto as to certain property, including choses in action, and an action is brought in another Court by one of said parties, to recover property affected by said contract, and the defendant does not deny liability, but sets up the pendency of the first suit and that a bill has been filed against him by the other party thereto to prevent his payment of said debt to the first party, the action, on such facts being made to appear, will be transferred to the Court in which the first suit is pending.

Rule for judgment for want of sufficient affidavit of defence.

Petition that parties interplead and for leave to pay into Court.

This was an action brought by Harriet De Rustafjaell to recover a sum due, on the winding up of the bank defendant, on certain stock standing in her name. The bank filed an affidavit of defence, setting up that rights in said stock were claimed by Robert De Rustafjaell, husband of the plaintiff, under an ante-nuptial contract, to enforce which a suit was pending in the Court of Common Pleas No. 1, and that Robert De Rustafjaell had filed a bill against the bank to enjoin it from paying out the sum claimed in the present action. The bank also filed a petition setting out in effect the same case and praying the parties be directed to interplead and that the bank have leave to pay the money into Court.

F. F. Brightly, for plaintiff.

John Sparhawk, Jr., for the Bank, defendant.

James C. Stillwell and *Henry Budd*, for Robert De Rustafjaell.

THE COURT directed the case to be transferred to the Court of Common Pleas No. 1.

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OF

ALL THE CASES REPORTED IN THIS VOLUME

BY

HENRY BUDD, Esq.

ABORTION. Where a life insurance policy contains a provision that it shall be void if the insured shall die "in violation of or attempt to violate any criminal law of the United States or of any state or country in which the insured may be," and the insured voluntarily submits to a criminal abortion, it is error for the court to leave it to the jury whether or not the death was attributable to another or intervening cause happening between the abortion and the death. Wells *v.* New England Mut. Life Ins. Co., 157.

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ADMINISTRATOR. If an administrator continue a contract of his decedent, under the mistaken belief that it is binding after the death of one of the parties to it, he has a right to terminate it, without liability thereafter; unless by an agreement or by his conduct he treat the contract as in force, for his convenience and assistance in caring for and closing up the estate in his charge. (Super. Ct.) Zinnel *v.* Bergdoll, 54.

The amount of the estate administered is not necessarily a criterion in measuring the compensation of the administrator or executor; the true test is the amount of care and trouble involved in the proper exercise of his duties, and where the compensation has been fixed by the lower court, which, in the adjudication of the account, has the opportunity to ascertain all the facts in the case, it will not be disturbed by the appellate court. Wistar's Estate, 391.

See COMMISSIONS; EXECUTOR.

ADMISSION. An agreement between counsel in a suit on a policy of fire insurance that the amount claimed by plaintiff was what defendant owed, if liable at all, relieves plaintiff of the necessity of

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ADMISSION—*Continued.*
proving the adjustment or extent of his loss. (Super. Ct.) Jacoby *v.* No. British & Mercantile Ins. Co., 226.

ADVERTISING. There is no material difference in the direction, as to advertising sheriff's sales of real estate, between the act of March 27, 1824, and the act of June 16, 1836, the former directing the sheriff to advertise "once a week *for* three successive weeks," and the other to advertise "once a week *during* three successive weeks;" in either case, it is sufficient if the advertisement be inserted in three successive periods of a week each, although the insertions may not be on the same day of the week, and may not cover twenty-one full days between the first advertisement and the sheriff's sale. McKee *v.* Kerr, 541.

AFFIDAVIT OF DEFENCE. Where a rule of court provides that with the plaintiff's statement shall be filed averments of the essential facts set forth therein, and requires that these averments shall be specifically denied by affidavit, an affidavit which sets up other than a specific denial is insufficient to prevent judgment for plaintiff. (Super. Ct.) Jacoby *v.* Providence Washington Ins. Co., 224.

The specific averment and affidavit of defence are competent evidence on the part of the plaintiff, where the latter does not deny the specific averments of facts. Id.

Under a rule of court which provides: "If the plaintiff shall file with his declaration or statement, separate and apart from his declaration or statement, a specific averment of facts sufficient to support his claims, verified by affidavit, and serve a copy thereof on the defendant or his counsel of record, such items of claim and material averment of facts as are not denied by the defendant, by affidavit filed with or before plea pleaded, shall be taken as admitted," the affidavit of defence is not admissible as defendant's evidence of the facts set forth in the affidavit. (Super. Ct.) Jacoby *v.* North British & Mercantile Ins. Co., 226.

To render an allegation, in an affidavit of defence, that assessments sued for are unnecessary, excessive and illegal, sufficient to prevent judgment, the facts upon which the allegation depends must be set out so as to enable the court to draw the conclusions; mere inconvenience is no excuse for not so setting out, especially in view of the fact that the defendant as a member of the company has a right of access to its books. (Super. Ct.) Sparks *v.* Vitale, 150.

When the defence relied on in an affidavit of defence is set-off, the claim must be alleged with exactness, not only as to source and character but also as to amount. (Super. Ct.) Anderson *v.* Williams, 418.

Where, in an action to recover the contract price of certain oranges, the affidavit alleges that but a "few" of the boxes were in accordance with the contract, that the defendant "put them up for sale by auction" and then found that the oranges were inferior and were worth "at least fifty cents per box less than they would have been worth had they been the kind of oranges ordered by the defendant," the affidavit is insufficient, in that it does not state the circumstances of the sale by auction, the price brought, or the market value of the kind of oranges alleged to have been ordered. Id.

AMENDMENT. Where a "copy of claim" set out merely certain premiums specified as due upon certain specified policies as due from defendant to plaintiff, an amended statement setting out a contract by the terms of which the defendant was to collect and pay over premiums, and alleging his

AMENDMENT—*Continued.*
failure to pay over certain specified premiums, being the same as those set forth in the "copy of claim," does not introduce a new cause of action, and is properly allowable as an amendment. (Super. Ct.) Susquehanna Mut. Fire Ins. Co. *v.* Clinger, 261.

APPEAL. Upon an appeal from a decree of the court of Quarter Sessions granting a liquor license, the evidence given at the hearing in support, in denial or in rebuttal of an allegation of fact contained in a remonstrance, is not a part of the record and cannot be considered. (Super. Ct.) Re Donovan's License, 34.

The Superior Court act contemplates appeals to the Supreme Court on constitutional grounds, only as to actual, open and unsettled constitutional questions, not as to so-called questions that have theretofore been raised, fully considered and more than once definitively settled. De Walt's Appeal, 79.

It is the duty of the Supreme Court or one of its justices, to be satisfied preliminarily, that the case appealed is one to which a right of appeal is contemplated by the Superior Court act. Id.

The refusal of the court to grant a petition for the appointment of an auditor to distribute a fund in its custody is not such "final judgment or decree" as will sustain an appeal. Hopper's Estate, 345.

After the record has been remitted to the court of original jurisdiction by that of final resort, the judgment entered in the original court, by direction of the decree of the appellate court, is the judgment of the appellate court and is final; an appeal taken therefrom will not lie and must be quashed. Melon Street, 361.

See PRACTICE. (Super. Ct.) Mintzer *v.* Hogg, 484.
See PRACTICE, Supreme Court.

APPEAL FOR DELAY. The penalty prescribed by the 21st section of the act of May 19, 1897, P. L. 67, should not be imposed upon an appellant who was one of many defending similar claims, chiefly on questions of fact, which, although determined adversely to them by the court below, were such that an appeal was entirely consistent with good faith. (Super. Ct.) Jacoby *v.* Providence Washington Ins. Co., 224.

ARCHITECT'S CERTIFICATE. See CONDITION. Pittsburgh Terra Cotta Lumber Co. *v.* Sharp, 5.

ASSIGNEE'S SALE. Although a sale under the act of February 17, 1876, by an assignee for the benefit of creditors, discharged of liens, is for the purpose of obtaining the best price, there are not the same interests to be protected as in an Orphans' Court sale, and the question of a resale rests in the sound discretion of the court. Where such a sale is regular and a fair price is paid and the only person to be benefited by a resale is a relative who is a judgment creditor, the court will not order such resale. Myers's Appeal, 329.

A grantee, under a deed which imposed on the land a charge for the support of A. and his wife, made an assignment of all his property for the benefit of creditors, and the assignee obtained an order of court, under the act of February 17, 1876, to sell said premises at public sale; at the sale public notice was given of the above stipulation, and the deeds to the purchasers were made subject to the rights contained therein. After this sale A.'s widow removed from the premises and subsequently brought a bill in equity, praying a decree requiring the purchasers to pay to her a certain sum annually for her maintenance and support. The answer denied this right, claiming that the purchaser at the assignee's sale

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ASSIGNEE'S SALE—*Continued.*
took the premises discharged from "all liens except first mortgages, ground rents and purchase money due the commonwealth": *held*, (1) all that was intended by the act of February 17, 1876, was to put a public sale by an assignee upon the same plane as a judicial sale; (2) by such an enactment it is not to be presumed that the legislature intended to make any innovation upon the common law further than was absolutely required; (3) by analogy from the decisions under a judicial sale, this lien for support was not discharged, as it was one that was incapable of being actually computed and the deeds of the purchasers were made expressly subject to the same. Bonebrake *v.* Summers, 489.

ASSIGNMENT. The fact that, after the exercise of the right of eminent domain has destroyed the value of a lease for the purposes to which the lessee was putting the land, the lessee assigns the same, does not destroy the right of the lessee to recover for the impairment of the value of his lease, by reason of such exercise, or confine him to nominal damages. Witman *v.* Reading, 143.

An assignment for benefit of creditors is an act of bankruptcy. (U. S. D. C.) Re Mercur, 424.

ASSIGNMENTS OF ERROR. Error assigned to the confirmation of the report of viewers that the jury, having been re-appointed, were not sworn in again, is too broadly stated as "because the said report was contrary to law." (Super. Ct.) In re Troubat Avenue, 53.

Assignments of error which raise merely questions of fact will not be considered by the appellate court. Id.

An assignment of error that the court erred in allowing plaintiffs to show declarations of an alleged testatrix prior to the date of the alleged will as to her intended disposition of her property, is not in compliance with the rules of the Supreme Court and will not be considered. Swope *v.* Donnelly, 57.

An assignment of error as to part of a charge of the court, must express the whole spirit of the particular point to which the attention of the appellate court is directed; a mere excerpt from the charge of the court is not sufficient. (Super. Ct.) Osborne *v.* Del. Co. & Phila. Elect. Ry. Co., 199.

Where error is assigned to the charge of the court, the part of the charge referred to must be quoted totidem verbis, and when the error assigned is to the admission or rejection of evidence, the specification must quote the full substance of the bill of exceptions or copy the bill in immediate connection with the specification. Com'th *v.* Heidler, 310.

ATTACHMENT. Where a writ of attachment is prematurely issued, it is not necessarily illegal, but is a proper and precise writ where the facts are sufficient to authorize its issue. Humphreys *v.* Sutcliffe, 266.

A bill of discovery, under the act of June 16, 1836, P. L. 755, unaccompanied by a scire facias, gives no lien against attachments. People's Nat. Bank *v.* Kern, 457.

The answers of a garnishee to interrogatories filed in support of an attachment execution, are not construed with the same strictness as an affidavit of defence. (Super. Ct.) Bell *v.* Phila. Binding & Mailing Co., 48.

To justify the entry of judgment on answers there must be such a distinct admission of liability as to leave no doubt. Id.

An absolute judgment cannot be entered against a garnishee upon an answer that he has executed and

ATTACHMENT—*Continued.*
delivered to defendant negotiable notes which are not yet due. Id.

A note not due may be attached, but if it passes into the hands of a bona fide purchaser before maturity, and without notice of the attachments, the attaching creditor will take nothing. Id.

It seems in such a case, the court has power to prevent the negotiation of the notes by defendant by requiring that the same be placed in such custody as will prevent their misapplication. But until it appears by the record that the notes are so deposited, judgment cannot be entered on the answers, although the execution be restricted until the notes are deposited with the prothonotary. Id.

AUDITOR. See APPEAL. Hopper's Estate, 345.

BANKRUPTCY. An assignment for the benefit of creditors is an act of bankruptcy, but that an adjudication may be based upon it, the petition must set it out as a ground for the court's action. (U. S. D. C.) Re Mercur, 424.

A petition which does not describe the claims of the petitioner with sufficient definiteness to make it appear that the claim is provable against the alleged bankrupts is defective. Id.

A partnership creditor may file a petition in bankruptcy against any member of the debtor partnership. Id.

BANKS AND BANKING. When a bank, on settlement of depositor's bank book, returns the checks it has paid to the depositor, it is his duty to examine them, and, if he find any checks which are not his, to return the same to the bank within a reasonable time. If he do not do so, he cannot, after a lapse of considerable time, hold the bank responsible for the payment of forged checks, which were amongst those returned to him by the bank. Myers *v.* Southwestern Nat. Bank, 477.

A neglect of a depositor to disown a signature to checks may have the effect of recognizing it, so that the bank paying other checks with the same signature may be held harmless. Id.

A. deposited in a bank; all his banking business was attended to, for a number of years, by a confidential clerk. The clerk forged two checks, which, on settlement of bank account were returned to him for A. by the bank. These checks the clerk destroyed, and he also falsified A.'s accounts, so as to make the apparent balances in the check book and deposit book correspond. He afterwards forged several checks and covered his tracks in the same way. A., receiving from his clerk only the genuine checks, inspected them, but did not discover that certain checks, necessary to make up the real, though not the forged, balance, were missing. Two and a half years after the first forgeries, during which time there had been some twelve settlements of A.'s bank book, A. discovered the forgeries. In an action by A. to recover from the bank the amount paid upon the forgeries: *held*, (*a*) that the delivery of the checks by the bank to the clerk was a delivery to A., and, not receiving the checks back, the bank was justified in believing they were all checks of A.; (*b*) that while A. was not chargeable with the knowledge of his clerk, that the latter had committed forgery, he was responsible for the acts and omissions of his clerk in the line of his duty, viz., to receive the checks from the bank, take them to A.'s office, compare the amounts thereof with the amounts in the bank book and check book, etc.; (*c*) that after the first settlement the bank had a right to presume that the signature to the two forged checks was genuine,

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BANKS AND BANKING—*Continued.*
and hence to honor it in the future; (*d*) that the checks being destroyed and there being no evidence of the character of the forged signature, there was no evidence of negligence on the part of the bank; (*e*) that the plaintiff could not recover. Id.

It is not required of the bank holding a note and at the same time funds of the maker sufficient to meet the said note, to apply the said fund in payment, or, failing to do so, lose the right of recovery against the endorser; such requirement exists only when at maturity of the note the bank has sufficient funds of the maker. (Super. Ct.) Farmers' Nat. Bank *v.* Marshall, 68.

BENEFICIAL SOCIETY. A member of a beneficial association has a right to change the beneficiary named in the certificate at his will, upon surrender of certificate. The provisions in the by-laws of the association in case of loss or destruction of the certificate are for the protection of the association itself and do not create any right in the beneficiary or any other person by the mere possession of the certificate. Heasley *v.* Heasley, 384.

The question who may take as a beneficiary under a certificate issued by a beneficial society incorporated by another state, is to be determined by the law of that state. (C. P.) Fodell *v.* Royal Arcanum, 498.

Under the law of Massachusetts a creditor of a member of a beneficial society cannot take under the description of a "dependent friend" of a member. M. was a member of the R. A., a beneficial society incorporated in Massachusetts but having lodges in Pennsylvania, of one of which M. was a member; he became indebted to F., and to secure him procured an issue by the R. A. of a beneficial certificate in favor of F., by the name of a "dependent friend." F. was not in any way related to M. or dependent upon him for support. After the issue of certificate F. paid M.'s dues to the R. A. for some sixteen years, at the expiration of which time M. died. The fund due upon the certificate was claimed by M.'s widow and by F.: *held*, that F. could not take under the certificate as "dependent friend," but as he had in good faith paid M.'s dues and so raised the fund which was before the court, equity required that he should be reimbursed the amounts paid by him with interest from the dates of the several payments to the time the fund became payable by the R. A. Id.

The proper method of enforcing payment of benefits by an unincorporated beneficial society is by bill in equity. (Super. Ct.) Fletcher *v.* Gawanese Tribe, 293.

An action at law cannot be maintained by a member of an unincorporated beneficial association to recover, from the association, benefits alleged to be due, the relation arising out of membership in the association being a quasi partnership. Id.

BILL OF REVIEW. Where the cestui que trust, on reaching the age at which he becomes entitled to a share in the estate absolutely and to the income of another share for life, receives from the trustee, for examination, the account to be filed, together with a copy for his own use, and retains the said account for some days, returning it with a declaration of his approval endorsed thereon, he being of an age to understand the account and familiar with business matters, and nothing being concealed from him, an application for the review of said account, five years thereafter, is without merit. Appeals of Roland and Halberstadt, 31.

BILL OF SALE. See FRAUD. McCullough *v.* Willey, 364.

BOND. Indebtedness other than that which a bond was given to secure, arising between the obligor and obligee, since the date of the bond, cannot be regarded as within the protection thereof. Creighton *v.* Scranton Lace Curtain Mfg. Co., 233.

The only judgment on a bond which can be supported is that for the debt which was the subject of the bond. Id.

That one of several obligors on a bond omits to join in the execution thereof, although named as an obligor in the body of the instrument, is no defence to the obligors who did sign. Gleeson's Estate, 321.

Where a bond given, on appeal in ejectment, for damages "for the use and detention of the property and the costs of the suit and just damages for the delay and costs and interest on the appeal," with the provision that "it be void if the appellant should prosecute the said writ to effect, and answer all damages and costs if he fail to make his plea good," the obligors are bound to respond for all damages arising from the use and detention of the property pending the appeal. Id.

The act of June 24, 1895, P. L. 248, providing that any receiver, assignee, guardian, trustee, etc., required by law to give a bond as such, may include as a part of the lawful expense of executing his trust, such reasonable sum paid a company for becoming his surety, is unconstitutional. (Super. Ct.) Clark's Estate, 470.

BUILDING. A monument is not such a building as is contemplated by the provisions of the act of April 19, 1895, P. L. 38. It may take the shape of a memorial hall or other architectural construction, but that is not the general use of the word and will not be presumed. Van Baman *v.* Leithiser, 389.

BUILDING ASSOCIATION. Payments upon building association stock pledged to secure a loan, also secured by a mortgage, will not be applied to the mortgage debt in the absence of an appropriation thereto by the debtor, or by the association, if the right to make such application is delegated to it by the debtor; such appropriation cannot be compelled by a purchaser at sheriff's sale. (Super. Ct.) Erthal *v.* Glueck, 563.

Where stock in a building association is assigned as collateral security for a loan secured also by a mortgage, and an agreement is executed reciting that the assignment is in trust to appropriate the value of the stock towards the payment of the mortgage, there is such an appropriation of the payments upon the stock as will be binding upon the owner thereof and those who stand in his shoes; therefore, where the land mortgaged is sold under a judgment junior to the mortgage, and on another judgment an attachment execution is issued on the stock, the purchaser of the land will have right to a clear title on paying the mortgage, less the value of the stock, and if that value is less than the mortgage with unpaid interest thereon, the attaching creditor will take nothing. Id. SMITH, J., dissents.

BURDEN OF PROOF. Answers by an applicant for insurance to questions addressed to him in connection with the application are prima facie true, and if alleged by the insurer to be untrue, the burden of proof is upon the insurer. Wall *v.* Royal Society of Good Fellows, 562.

CASES FOLLOWED, DISTINGUISHED AND EXPLAINED.

Bradwell *v.* Ry. Co., 27 WEEKLY NOTES, 264, followed, 411.

Brooke *v.* Philadelphia, 162 Pa. 123, distinguished, 217.

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CASES FOLLOWED, DISTINGUISHED AND EXPLAINED—*Continued.*
Bruce *v.* Pittsburgh, 166 Id. 152, distinguished, 217.
Burnett *v.* Pa. R. R. Co., 176 Id. 45, followed, 331.
Comly's Estate, 185 Id. 208, followed, 109.
Com'th *v.* Wireback, 190 Id. 138, followed, 310.
Crosson's Appeal, 125 Id. 380, explained and syllabus disapproved, 201.
Durkin *v.* Coal Co., 171 Id. 193, followed, 290.
Ellis *v.* Ins. Co., 7 Pa. Super. Ct. 264, followed, 227.
Haven *v.* Bridge Co., 151 Pa. 620, distinguished, 305.
Hydraulic Works *v.* Orr, 83 Id. 332, distinguished, 65.
Keller's Private Road, 154 Id. 547, followed, 53.
Kittanning Ins. Co. *v.* O'Neill, 110 Id. 548, followed, 549.
Klauder *v.* McGrath, 35 Id. 128, followed, 290.
Lyon *v.* Cleveland, 170 Id. 611, explained, 517.
Montgomery County's Appeal, 148 Id. 640, followed, 53.
Pepper *v.* Philadelphia, 181 Id. 566, followed, 217.
Richard *v.* Brehm, 73 Id. 140, followed, 109.
Roemer *v.* Denig, 18 Id. 482, followed, 104.
Schuylkill Nav. Co. *v.* Thoburn, 7 S. & R. 411, followed, 442.
Vanatta *v.* C. R. R. of N. J., 154 Pa. 262, followed, 14.

CARRIER. A common carrier owes to a passenger the utmost degree of care, and if the passenger is injured by one of the carrier's cars, while occupying that relation, the presumption is that it was through the negligence of the carrier. Madara *v.* Shamokin & Mt. Carmel Electric Ry. Co., 520.

Where it is claimed in defence that the accident was caused by a mere intruder acting without authority, the burden is upon the carrier to rebut the presumption, and not upon the passenger to show the negligence of the carrier. Id.

CHANGE OF GRADE. Damages upon change of grade. See MEASURE OF DAMAGES. Phila. Ball Club *v.* Philadelphia, 442.

CHARGE OF COURT. If the charge of the court contain nothing erroneous and omit nothing favorable to a party which the points call for, it is entirely within the discretion of the court to decline to answer the points for charge as offered. Carey *v.* Buckley, 358.

Where the judge at the close of the general charge returns points submitted by counsel, stating he believes that he has answered them in his general charge, it is the privilege as well as the duty of counsel to except thereto and have them made part of the record, if the points were not covered by the general charge, or were insufficiently answered. Ensminger *v.* Hess, 366.

It is the duty of the court below, when plaintiff's counsel has made an erroneous statement of the law on the question of the measure of damages, to give more ample instruction on the point than merely to say, "the amount stated by plaintiff's counsel in his argument is not the measure of damages." Todd *v.* Traction Co., 523.

In an action of trespass to recover damages for injuries received, a charge which does not explicitly instruct the jury what are proper items of expense incurred by plaintiff in the illness caused by the accident from which the action arose, is inadequate; and an instruction that the plaintiff is "entitled to what the jury consider a reasonable and proper allowance for the pain and suffering which he has already endured and is likely to endure in the future," is erroneous. Id.

CHARGE OF COURT—*Continued.*

The judge in commenting upon the testimony of the witnesses, said to the jury, "And if you take the version given by the defendant, that the car had not come to a stop when the plaintiff undertook to get out, then you might find her guilty of contributory negligence, and in that case she would not be entitled to recover": *held*, that, while the use of the word "might" by the trial judge was entirely unintentional, and that he did not design to convey a doubtful meaning, the instruction should have been absolute and peremptory, and not in the qualified and conditional form in which it was presented. Neff *v.* Harrisburg Traction Co., 402.

By a contract the plaintiff granted to the defendants the right to construct and use a machine for drying bricks, and agreed to sell them the parts of the machine and appliances necessary for its use, at a stated price. After the machine was set up it was to be tested, and then accepted or rejected. If accepted, it was to remain the property of the plaintiff until paid for, with the right to remove it if payments were not made as provided by the agreement. If rejected, it was to be removed by the plaintiff at its expense, and all moneys which had been paid or notes which had been given were to be returned, the contract was to be cancelled, and neither party was to have any claim against the other. Before the machine was delivered, defendants inquired of plaintiff whether the machine would dry bricks made by the stiff-mud process without cracking them, and the correspondence relating thereto, the defendants claimed, so modified the original agreement as to abrogate the agreement entirely, and they refused to retain the machine or to pay for it, alleging a breach of warranty. The court charged the jury that the correspondence, read in connection with the agreement, did not indicate an intention to change the original contract sufficiently to vary its terms: *held*, not to be error. Wolff Dryer Co. *v.* Bigler, 367.

CHARGE ON LAND. Where the habendum in a deed reads as follows: "Nevertheless the maintenance of D., and R. his wife, during their natural life, is a part of the consideration herein mentioned, therefore this title does not become clear of all encumbrance until at the death of the said D., and R. his wife," the maintenance of said D. and his wife, the grantors, is charged upon the premises conveyed as a continuing lien. Bonebrake *v.* Summers, 489.

CHARITY. The admission of an applicant for membership in an eleemosynary institution is necessarily conditioned upon his acceptance of the rules and regulations prescribed by proper authority for the government and management of such institution. Brooks *v.* Hastings, 333.

Equity will not assist such an applicant in avoiding a regulation prevalent in a community to which he seeks admission at the time the admission is actually sought and with which since his admission he has complied. Id.

COAL MINE. Where the size of the plant is in proportion to the area of coal to be mined, and "a plan of the mining operations to be pursued in the mining of the coal" has been formulated and followed, the plant, the plan of operation, and the area of coal with which they are connected, may be designated as a coal mine. Rodgers's Appeal, 275.

COMMISSIONS. Where an allowance in excess of the usual commission of 5 per cent. is made to the trustee as compensation, after a full investigation of

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COMMISSIONS—*Continued.*
all the accounts and of the conduct of the trustee from the time of his appointment, and is based on the nature of his services and the manner in which they are performed, which appear to be exceptional, the Supreme Court will not hold the compensation to be too large. Appeals of Roland and Halberstadt, 31.
See ADMINISTRATOR. Wistar's Estate, 391.

COMMITTEE. See LUNACY. Equitable Trust Co. *v.* Garis, 41.

COMMON CARRIER. See CARRIER.

CONDITION. In an action on a mechanics' lien filed for material furnished and work done in pursuance of a building agreement which contains a provision: "It being understood that the final payment shall be made within ninety days after this contract is completely finished; provided, that in each of the said cases the architect shall certify in writing that all the work upon the performance of which the payment is to become due has been done to his satisfaction," the production of an architect's certificate is not essential to the establishment of plaintiff's case, if the plaintiff show by his evidence that his part of the conditions of the agreement were fulfilled. Pittsburgh Terra Cotta Lumber Co. *v.* Sharp, 5.
If the contractor honestly perform his covenants, the provision is not intended to protect the owner from an honest payment of the price by a capricious or fraudulent withholding of the certificate. Id.
See CHARITY. Brooks *v.* Hastings, 333.

CONDUCTOR. The acts of a conductor in charge of a train, so far as concerns the recognition of the status of a person, presenting a ticket, as a passenger, are the acts of the railroad company, and are binding upon it. Case *v.* D. L. & W. R. R. Co., 137.

CONFLICT OF LAWS. Matters connected with the performance of a contract are governed by the law prevailing at the place of performance; and if, upon the trial of a case, it is shown by the laws of the place of performance that a contemporaneous parol agreement is not available as a defence to a written contract, it is sufficient to rebut the presumption that the law of the forum is the same as the law of the place of the performance of the contract. Musser *v.* Stauffer, 331.
The question who may take as a beneficiary under a certificate issued by a beneficial society incorporated by another state, is to be determined by the law of that state. (C. P.) Fodell *v.* Royal Arcanum, 498.
The rights of creditors of a foreign corporation with reference to unpaid subscriptions upon the stock of the same, as they depend upon the charter of said corporation, are not altered by the fact that the amount of said subscription has been paid into court in this state. (Super. Ct.) Jagode *v.* Smalley, 543.

CONSIDERATION. Where the defence to a scire facias sur mortgage is that the defendant received but a part of the face of the mortgage and that the balance of the fund was, without defendant's authority or knowledge, applied to the liquidation of the debt of another to the plaintiff, the question whether information was imparted to the defendant to the effect as above described, at the time of the execution of the mortgage or prior thereto, is a question of fact to be determined, under proper submission, by the jury. Carey *v.* Buckley, 358.

CONSTABLE. See DISTRESS. (Super. Ct.) Hazlett *v.* Mangel, 116.

CONSTITUTIONAL LAW. An act of legislature which is complete in itself, the purpose, meaning and full scope of which are apparent on its face,

CONSTITUTIONAL LAW—*Continued.*
is valid although it may operate to alter, extend or even repeal a prior act, or may provide the means of carrying its provisions into effect by a reference to a course of procedure established by other acts of legislature. Greenfield Avenue, 249.
The restrictions of the constitution as to special legislation, refer to direct legislation and not to the incidental operation of statutes. In re Sugar Notch Borough, 473.
An act providing that where a borough, which is also a school district, is divided, the rights of the two divisions in the school property, etc., may be ascertained and adjusted in a certain way, is not unconstitutional as regulating the affairs of certain school districts to the exclusion of the others. Id.
The act of June 24, 1895, P. L. 248, providing that any receiver, assignee, guardian, trustee, etc., required by law to give a bond as such, may include as a part of the lawful expense of executing his trust, such reasonable sum paid a company for becoming his surety, is unconstitutional, being in violation of Art. III., § 7. (Super. Ct.) Clark's Estate, 470.
The act of April 17, 1846, P. L. 364, (extended by act of April 13, 1854, P. L. 328, to the county of Lycoming), prohibiting in certain counties the peddling or hawking of any foreign or domestic goods under penalty of $50 for each offence, is constitutional as an exercise of the police power of the state. Com'th *v.* Dunham, 101.
Whilst a prohibition of unlicensed peddling which operates impartially and without distinction between classes, or residents of different civil subdivisions, or of different states, is a proper exercise of the police power of the state, yet a prohibition which arbitrarily excepts certain classes, or residents of certain localities, from its operation, is invalid, as a denial of the equal rights of others. (Super. Ct.) Brownback *v.* North Wales, 258.
An ordinance which provides for the licensing of all persons selling or offering to sell on the streets, or soliciting orders from house to house, and makes no discrimination on any ground, but bears upon all persons impartially, conforms to all the requirements essential to the validity of such a provision as a police regulation. Id.
The act of June 24, 1895, P. L. 236, providing for the survival of actions for personal injuries, is constitutional. Rodenbaugh *v.* Traction Co., 105.
The increase of municipal indebtedness of 2 per cent. on the rateable value of taxable property within a municipality, authorized to be made by the second clause of the 8th section of Art. IX. of the constitution, may not be made except by authority of a popular vote, and this is true whether the increase has been made by successive additions, each less than 2 per cent., or at one time and by one municipal act alone. Houston *v.* City of Lancaster, 217.
Art. IX., §§ 8 and 10, of the constitution, and the act of April 20, 1874, P. L. 65, are not violated where it is shown that the annual taxes levied by the commissioners for the year, together with the cash on hand in the county treasury, are in excess of the county's liability including an expenditure proposed to be made, and to enjoin the making of which suit is brought. Van Baman *v.* Leithiser, 389.
The act of May 12, 1897, (direct inheritance tax act), is an act imposing taxes on the personal property therein specified; and as such it must comply with the fundamental principles of taxation, and the provisions of the constitution relating thereto. It is of the very essence of taxation

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CONSTITUTIONAL LAW—*Continued.*
that it should be relatively equal and uniform. This right to equality is insured to the people by the constitution, Art. IX., §§ 1 and 2, which provides that, "All taxes shall be uniform upon the same class of subjects," and prohibits the exemption of any property from taxation, except as therein set forth. Cope's Estate, 89; Hagy's Estate, 94; Graff's Estate, 94; Lacey's Estate, 95; D'Almbert's Estate, 95; Smith's Estate, 95; Bell's Estate, 95; Eshleman's Estate, 96.

Even if the act were one imposing a bonus on the devolution of decedents' estates it would, in its present form, still be unconstitutional as violating Art. III., § 7, of the constitution. Id.

The exemption in the collateral inheritance tax law is not a precedent, as the statute making that exemption was enacted in 1826, when the constitution did not impose the present limitations, as to exemptions, on the power of the legislature. Id.

The purpose of the act of May 22, 1895, to enlarge the occasions on which the power to assess property owners for improvements which benefit their property, is within the constitutional power of the legislature, and is in harmony with the settled policy of the state that certain improvements incident to the growth and extension of cities shall be paid for in part at least by those who are specially benefited thereby. Greenfield Avenue, 249.

Where an act is a supplement of a former act, if the subject of the original act is sufficiently expressed in its own title, and the provisions of the supplement are germane to that subject, the subject of the supplement is sufficiently covered by a title containing a specific reference to the original by its title, with the date of its approval. Rodgers's Appeal, 275.

The title of the act of July 9, 1897, P. L. 237, viz.: "A supplement to an act of the general assembly approved the 17th day of March, 1869, entitled 'An act relative to fraudulent debtors,' authorizing the court to inquire into the validity of judgments confessed and alleged to be fraudulent, and providing the practice therefor,' sufficiently fulfills the constitutional requirements as to definiteness. Page *v.* Williamsport Suspender Co., 153.

That portion of the act of May 23, 1893, P. L. 123, which provides that streets placed upon the city plan shall thereupon become public streets, is unconstitutional so far as regards private ways placed upon said plan, as the title of the act, viz,: "An act to authorize councils . . . . to place on the plans of public streets of such cities all streets laid out and opened prior to June 6, 1871, and which are less than thirty feet in width or have dead ends or do not extend in a straight line from one street to another," suggests no intent to make private ways, ipso facto public streets. (Super. Ct.) MacKellar *v.* Seeds, 182.

Where the general title, sufficient to cover all the provisions of an act, is followed by specifications of the particular branches of the subject with which it proposes to deal, the scope of the act is not limited nor the validity of the title impaired, except as to such portions of the general subject as legislators and others could naturally and reasonably be led by the qualifying words to suppose would not be affected by the act. In re Sugar Notch Borough, 473.

A title, "A further supplement to an act for the regulation of boroughs . . . providing for the adjustment of indebtedness and government of the boroughs, township and school districts affected by change of limits, of any borough in the commonwealth," is sufficient to cover a clause authorizing the court, on the creation of a new borough out of the part of an old one, to ascertain the value of the property retained by the old borough and that transferred to the new respectively, and to decree a money payment by the one having an undue proportion of the former joint property. Id.

An escheator is not such an officer as is removable under the provisions of Art. VI., § 4, of the constitution. (O. C.) Kelly's Estate, 531.

The act of assembly entitled, "An act to restrain and regulate the sale of vinous and spirituous, malt or brewed liquors, or any admixture thereof," approved May 13, 1887, is constitutional. De Walt's Appeal, 79.

The attitude of the courts is not one of hostility to acts whose constitutionality is attacked, but on the contrary all the presumptions are in their favor, and courts are not to be astute in finding or sustaining objections. In re Sugar Notch Borough, 473.

CONSTITUTION OF PENNSYLVANIA.
Art. 1, § 9, 153.
Art. III., § 3, 182, 473.
Art. III., § 6, 249.
Art. III., § 7, 89, 471, 473.
Art. VI., § 4, 531.
Art. IX., § 1, 89, 94.
Art. IX., § 2, 89, 94.
Art. IX., § 8, 217, 389.
Art. IX., § 10, 389.

CONTRACT. Where, in a contract, partly printed and partly written, there is a conflict between a printed clause and a written one, the written one will prevail; if it is subsequent in order to the printed clause, there is an additional reason for finding that it expresses the meaning of the parties. Commonwealth T. I. & T. Co. *v.* Ellis, 427.

Where the instrument upon which an action is brought is the usual printed "blank" form adopted in similar transactions, the fact that certain words in the printed form had been erased will not invalidate the agreement if it appear that the erasure was the same in the duplicate copies of the agreement retained by each party at the time the contract was signed, unless it be proved that in making the erasure the agent of the defendant exceeded his authority. Tapper *v.* Sunlight Oil & Gasoline Co., 469.

One who disables himself to perform an entire contract cannot recover for part performance, unless his disability was with the defendant's consent. Easton *v.* Jones, 490.

A municipality cannot by ordinance provide a new remedy in the nature of an attachment, lien or trust of any kind, whereby sub-contractors may enforce payment of their claim out of money due the principal contractor. Lesley *v.* Kite, 537.

The mere fact that it is intended to execute a more formal writing to the same effect does not prevent a writing which is definite as to the terms of a bargain, when acted upon by one party, from taking effect as a contract until the execution of a more formal writing. Witman *v.* Reading, 143.

A specification in a building agreement that the houses, the subject of the contract, should not be built within a certain distance of the city building line, is a mere personal agreement between the owner of the land and the contracting builder, and is not a covenant that runs with the land, or an easement of the other properties subject of the same agreement. Hutchinson *v.* Thomas, 77.

A contract was made for the building of a tunnel, the expense of which was to be borne by one party,

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CONTRACT—*Continued.*
and interest was to be paid by the other on one-third of the amount expended. The contract omitted to state the time from which the interest should be computed. The contention of one party was that the interest should not commence until the tunnel was completed, while that of the other was that it should run from the commencement of the work upon the instalments as paid: *held*, that, as the parties were jointly interested in defraying the actual cost of construction, interest should be allowed as the expenditures were made, and the proper mode of ascertaining the time from which the interest payments should be computed was by equating the date of all the expenditures on account of construction and allowing interest from that date. Union Improvement Co. *v.* Markle, 255.

In interpreting a contract, the intention of the parties must be sought, not alone from the exact words but from what should be reasonably implied from the undisputed circumstances existing at the time, and which necessarily must have operated on the minds of the parties. Canavan *v.* Neeld, 45.

Where a contract stipulates that on failure of one party to furnish material as specified, the other party may make up the deficiency from other sources and charge the expenses to the defaulting party, a failure justifies the exercise of an option on the part of the party of the second part as to whether he shall manufacture the material himself or buy it already prepared in the open market. Id.

Though an agreement reduced to writing be not signed by the parties thereto, yet, if they proceed to carry it into effect under its terms, it is sufficient to sustain the validity of the contract as though completely executed. Id.

A contract whereby one party is to manufacture an appliance for another, and, in case of any difficulty as to the work giving satisfaction, the other is to make it entirely satisfactory or take it away and replace it with one that will be so, contains by implication a provision that a reasonable opportunity shall be afforded the manufacturers to make the machine, if unsatisfactory, satisfactory. Schleicher *v.* United Security Life Ins. & Trust Co., 188.

See ENTIRE AND SEVERABLE CONTRACT. Easton *v.* Jones, 490.

See ADMINISTRATOR. (Super. Ct.) Zinnel *v.* Bergdoll, 54.

CONVERSION. Equitable conversion is a fiction by which, for certain specific purposes, and to the limited extent required for such purposes, realty may be treated as personalty or personalty as realty. Robinson's Estate, 174.

Land held by partners as partnership assets is to be treated as if it were personalty to the extent demanded by the purpose with which it is put into the common stock, but no further. How far that shall go is largely a matter of intention, but the presumption is that it shall extend to all the regular and legitimate uses of the business, and it may be that as to creditors this presumption must be held conclusive. Id.

Where a conversion is worked by a will, though the real estate sold be not actually conveyed to the purchaser until after the death of the legatee named in the will, the share of such deceased distributee is properly paid to his personal representatives. Klotz's Estate, 7.

CORPORATION. The ownership in fee by a corporation of land upon which its superstructure rests, gives it no right to exclude subsequent grantees of the commonwealth from the use of the highway which crosses it. Williams Valley R. R. Co. *v.* Lykens & Williams Valley Street Ry. Co., 393.

It is an implied condition of the grant of all corporate franchises of even quasi-public nature, that they shall be exercised without individual discrimination, in behalf of all who desire to avail themselves of the company's services. Baily *v.* Fayette Gas Fuel Co., 505.

A corporation, to which by its charter is given no express authority to issue capital stock, and the purpose of whose creation can be fulfilled without such issue, has no right to issue capital stock. Cooke *v.* Marshall, 159.

A corporation can increase or diminish its capital stock beyond the limit fixed by its charter only when the power to do so is expressly conferred upon it. Id.

The rights of creditors of a foreign corporation with reference to unpaid subscriptions upon the stock of the same, as they depend upon the charter of said corporation, are not altered by the fact that the amount of said subscription has been paid into a court of this state. (Super. Ct.) Jagode *v.* Smalley, 543.

Where one is induced to subscribe to the capital stock of a company by fraudulent representations as to material facts by an agent of the company appointed to obtain subscriptions, the contract may be avoided by the subscriber, but to properly state such defence in an action to recover an assessment, the defendant must set forth what the representations were and wherein they were false, and that he was deceived. (Super. Ct.) Acetylene Light Co. *v.* Smith, 86.

The interest which a subscriber is liable to pay for delay in payment of instalments called upon his stock, is fixed by the act of May 9, 1889, P. L. 180, at one-half of one per cent. per month, which is equal to the legal interest on the amounts due, but is not in addition to interest, for the act limits the amount for which suit may be brought to the amount called for and unpaid and, in addition, one-half of one per cent. per month upon said amount for delay. Id.

A., a construction company, agreed to erect and equip a plant for an electric railway company, B., in consideration of certain stocks and bonds, which were duly delivered to A. Subsequently, A. applied to C. for certain pumps, which C. agreed to sell to A., and further agreed to take in payment a note of A., provided the latter would secure a satisfactory endorser. A. thereupon had its note endorsed by the president of B., and the pumps were delivered. In a suit by C. against B., on this note: *held*, (1) that in the absence of any by-law or resolution of the board of directors to that effect, the president of B. had no authority to bind B. by this endorsement; (2) that C., having accepted the note without any inquiry into the authority of the president of B. to make the endorsement, B. was not estopped from setting up the defence that its president had no authority to pledge the credit of the company as security for a debt of its contractor when the latter had received full consideration for the work and materials it was to do and furnish; (3) the fact that the president had endorsed other notes of A. and that these had been paid did not establish "a course of dealing" under which B. could be held liable, when it did not appear when and how the other notes were paid or that any of B.'s officers, other than the president, knew of these transactions. (Super. Ct.) Worthington *v.* Schuylkill Electric Ry. Co., 118.

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COVENANT RUNNING WITH LAND. A specification in a building agreement that the houses, the subject of the contract, should not be built within a certain distance of the city building line, is a mere personal agreement between the owner of the land and the contracting builder, and not a covenant that runs with the land or an easement of the other properties subject of the same agreement. Therefore, equity will not enjoin a subsequent owner of one of the properties in the chain of title, from continuing his building to the city building line. Hutchison *v.* Thomas, 77.

CREDITOR'S BILL. A creditor's bill cannot be sustained where the plaintiff has an adequate remedy by attachment execution. People's Nat. Bank *v.* Kern, 457.

DAMAGES. Control of by court. See NEW TRIAL. Lehr *v.* Brodbeck, 411.

DEBTOR AND CREDITOR. A release is a matter of contract, and cannot be forced upon an unwilling debtor, and while its acceptance may ordinarily be presumed, yet a refusal to accept deprives it of all effect. Fisler *v.* Stewart, 121.

The act of June 9, 1897, P. L. 237, gives a general creditor a standing to inquire into the bona fides of a judgment confessed by his debtor, such as he would have had if he had had a lien before the passage of the act, and to facilitate his inquiry into an alleged fraud; it does not change the settled rule that a judgment fraudulent as to creditors is nevertheless good between the parties. Page *v.* Williamsport Suspender Co., 153.

DECEDENTS' ESTATES. Where a conversion is worked by a will, though the real estate sold be not actually conveyed to the purchaser until after the death of the legatee named in the will, the share of such deceased distributee is properly paid to his personal representatives. Klotz's Estate, 7.

Decedent lived with plaintiff under a contract to provide him a home and render him certain services. After his death, claim was made for extra services and board for a longer period than six years: *held*, that all amounts claimed for more than six years were barred by the statute of limitations, and that the strictest proof is required to recover claims for such services. Rosencrance *v.* Johnson, 177.

DELIVERY. M. agreed, on February 2, to sell to W. a raft described in the agreement, upon the terms of one hundred dollars paid in cash, balance of half the amount on April 1, and a ninety days' note for the remainder. One hundred and fifty dollars was paid by W., but when the raft was ready the parties had a dispute, W. claiming that M. was indebted to him, and that this should be credited on the purchase money. M. denied the claim, alleging that he had paid it. W. having taken possession of the raft, M. recovered it by force, and finally sold and delivered it to A. In an action of assumpsit brought by W. against A. to recover the value of the raft: *held*, that there had been no delivery by M. to W., and that title thereto was in M. when he sold the raft to A. Woolsey *v.* Axton, 299.

DEVISE. The act of April 8, 1833, providing "that all devises of real estate shall pass the whole estate of the testator in the premises devised although there be no words of inheritance or perpetuity, etc.," was intended to carry out, not to defeat, the testator's actual intention, and when it appears from the whole will that it was the intention not to grant an estate in fee, this act is not to be invoked to defeat such intention. Estate of Louisa Nevins, 297.

DEVISE—*Continued.*

That a devise is in trust, is some evidence that it was not testator's intention to grant a fee, and when this is followed by the words, "It is my wish and desire that she shall live in this house free of rent," and there is a blending of the devise with a gift of personalty, which latter is manifestly for life only, and, further, a direction that the trustee shall pay taxes and insurance, a clear intent to grant a life estate only is established. Id.

DIRECT INHERITANCE TAX. The act of May 12, 1897, is an act imposing taxes on the personal property therein specified; and as such it must comply with the fundamental principles of taxation, and the provisions of the constitution relating thereto. It is of the very essence of taxation that it should be relatively equal and uniform. This right to equality is insured by the provision of the constitution, Art. IX., §§ 1 and 2, that "All taxes shall be uniform upon the same class of subjects;" and prohibits the exemption of any property from taxation, except as therein set forth. Cope's Estate, 89; Hagy's Estate, 94; Graff's Estate, 94; Lacey's Estate, 95; D'Aimbert's Estate, 95; Smith's Estate, 95; Bell's Estate, 95; Eshleman's Estate, 96.

Even if the act were one imposing a bonus on the devolution of decedents' estates, it would, in its present form, still be unconstitutional as violating Art. III., § 7, of the constitution. Id.

DISCOVERY. A bill for discovery in aid of an execution does not draw the whole case into equity; the jurisdiction given by such bill is for discovery only, and ends with it. People's Nat. Bank *v.* Kern, 457.

Where a bill for discovery is filed, under the act of June 16, 1836, P. L. 755, without being accompanied by a scire facias, no lien is acquired as against attachments. Id.

See EQUITY. Equitable Trust Co. *v.* Garis, 41.

DISCRIMINATION. It is an implied condition of the grant of all corporate franchises, of even quasi-public nature, that they shall be exercised without individual discrimination, in behalf of all who desire to avail themselves of the company's services. Baily *v.* Fayette Gas Fuel Co., 505.

A corporation chartered, under the act of May 29, 1885, P. L. 29, for the purpose of supplying natural gas for heat, light or other objects, has no right to make a difference in the price of gas according to the use to which it is put by the consumer, and a court of equity will issue an injunction against an attempt to exact a greater price for the gas when put to one use from that charged for it when put to another, the cost of supplying the gas being the same in each case. Id.

DISTRESS. The right of a landlord to sell the chattels on the leased property, distrained for rent in arrears, is bestowed by the statute of March 21, 1772, which requires an appraisement of the goods before the sale. (Super. Ct. Hazlett *v.* Mangel, 116.

Where, without appraisement, the goods are sold by the constable making the distraint, he is liable to the tenant in trespass. Id.

DIVORCE. A suit for divorce is a civil proceeding, the interests of the parties clearly conflict, and if the respondent appear and defend, either party may testify fully against the other, and may be compelled by the adverse party to testify as if under cross-examination. Costello *v.* Costello, 202.

Where the libel charges the respondent with adultery with one named, evidence showing the aban-

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DIVORCE—*Continued.*
donment of an action by libellant against such person is admissible. Id.

A libel was in the usual form, averring adultery on the part of the respondent, but without stating times or persons. A more specific bill of particulars alleged that: "Libellant's knowledge of the fact of adultery by the respondent with said B. was derived from confessions by the respondent and from correspondence between her and said B.; especially letters written July 1, 1883, April 23, 1895, undated letters written subsequent to February 19, 1894, and subsequent to July 2, 1894. In neither said confessions nor correspondence was the time or place of the adulterous practices specified more particularly than above set out, and the libellant does not know and cannot specify the same." The respondent, in her answer, "fully and unqualifiedly denies the averments contained in said libel as to each averment therein contained." The libellant testified to a confession by the respondent of an intimacy with the co-respondent, which confession was corroborated by several witnesses, and denied by the respondent: *held*, that a mere denial by the respondent that the confession was made as claimed, was not a satisfactory answer to the testimony of libellant so corroborated. Gruninger *v.* Gruninger, 205.

DOWER. When a dowress purchases the fee, although as between herself and the heir it is intended that there shall be no merger of the dower, yet as to third parties such intention cannot prevent the legal effect of the conveyance; hence, a purchaser of the land at sheriff's sale on execution against the grantee (dowress) takes the land discharged of the dower. Kreamer *v.* Fleming, 201.

Where a guardian of children entitled to a fee conveys the same to the dowress, who covenants that the principal of her dower shall remain charged on the land until her death, she, in the meantime, retaining the interest, the effect is to make the part of the gross price of the land which represents the dower, not payable until the widow's death, and then without interest. Id.

The interest taken by a widow in lieu of her dower at common law, is an interest in land and not a mere charge or lien. Kunselman *v.* Stine, 409.

When an Orphans' Court decree directs sale of land of decedent to be made, and that one-third of the purchase money shall remain during the life of the widow in the hands of the purchaser, and that interest thereon shall be paid by him, his heirs and assigns holding the said premises, to be recovered by distress or otherwise as rents are recoverable, the owner of the land during his ownership is personally liable by privity of contract for the interest accruing, which may be recovered in a personal action, which is transitory in its character, and execution upon which will not be restricted to the land. Id.

EJECTMENT. Where a bond is given on appeal in ejectment for damages "for the use and detention of the property and the costs of the suit and just damages for the delay and costs and interest on the appeal," with the provision that "it be void if the appellant should prosecute the said writ to effect, and answer all damages and costs if he fail to make his plea good," the obligors are bound to respond for all damages arising from the use and detention of the property, pending the appeal. Gleeson's Estate, 321.

ELECTION LAW. The act of June 10, 1893, P. L. 419, ("Baker ballot law"), bestows no jurisdiction on the Common Pleas to issue a mandamus to

ELECTION LAW—*Continued.*
the county commissioners as to how instruction shall be given to voters under § 16 of the act, nor are the commissioners bound by the opinion of the Common Pleas in such case. The giving of instruction to voters is exclusively vested in the unhindered judgment of the county commissioners. Com'th *v.* Mercer et al., 242.

Each elector is entitled to vote for as many candidates for office as the election is held to choose; if the ballot do not contain the entire number in one of the columns, the marking of the X at the head of the column in conformity with the terms of the law, whereby every one of the candidates in such column receives that vote, does not preclude the elector from voting in another column, by marking the X opposite the name of another candidate, the additional candidate being omitted in the first column. Gulick's Appeal, 327.

When voters are entitled to vote for two assessors and the column of nominees of one party contains the name of but one, the elector may vote for all of the nominees in such column by marking at the top, and also for one of the nominees for the office of assessor in another column. Id.

EMINENT DOMAIN. A railroad corporation cannot appropriate land previously appropriated by a gas and water corporation, and essential to its present or future needs, unless the necessity is so absolute that without it the railroad company's franchise will be defeated. No consideration of expense or inconvenience, in the absence of such necessity, will warrant such taking, under the claim of eminent domain. Scranton Gas & Water Co. *v.* Northern Coal & Iron Co., 281.

A municipality appropriated not only land of the plaintiff, but a sewer already constructed by him so that his contribution to the improvement was the easement thus created and the expense of constructing the sewer from which the borough was by the act of appropriation relieved: *held*, the damages were to be measured by the whole extent of the servitude to which the land was thus subjected rather than by actual quantum of use at any particular time. (Super. Ct.) Hays *v.* Borough of South Easton, 432.

The appropriation of a sewer is taking of private property for public use, for which the owner is entitled to compensation, though the taking may leave the land across which it was built worth as much as before. Id.

Where a railroad company condemns land for railroad purposes and the damages for such taking have been assessed and paid, the railroad acquires a complete title in the nature of a base or conditional fee (terminable on the cesser of the use for the railroad purposes), in the surface of the land, and so much of the land beneath the surface as may be necessary for support of the surface; and coupled with that interest it acquires the right to the exclusive use of the land so taken and to deal therewith within the limits of railroad uses as absolutely and as uncontrolled as an owner in fee. (C. P.) Speese *v.* R. R. Co., 493.

The owner in fee of land which has been condemned for railroad uses retains in the land taken only such interest and rights as have not been acquired by the railroad company by such condemnation. Id.

The fact that, after the exercise of the right of eminent domain has destroyed the value of a lease for the purposes to which the lessee was putting the

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EMINENT DOMAIN—*Continued.*
land, the lessee assigns the same, does not destroy the right of the lessee to recover for the impairment of the value of his lease, by reason of such exercise, or confine him to nominal damages. Witman *v.* Reading, 143.

When a street railway company, in a street already occupied by another company, lays tracks between those of the previously constructed railway and the curb, and close to the latter, the tracks may be regarded as a structure which imposes a permanent servitude upon the land. (Super. Ct.) Osborne *v.* Del. Co. & Phila. Electric Ry. Co., 199.

In such a case the difference in the value of the property before and after the construction of the track and operation of the road is the proper measure of damages. Id.

Where the owner of property, fronting on a certain street and having upon it buildings, purchases lots, adjoining it in the rear but having outlets on other streets, upon which she erects dwelling houses for the purpose of rental, which houses are connected by a common sewer which connects with the public sewer in the street, upon which the front lot fronts, and receive gas and water through service pipes connecting with the mains on said streets, and these appliances are used by the tenants of all the houses in common, the lots do not become one, so as to enable the owner to claim damages for injury to the rear lots by the erection of a public work in the street on which the front lot fronts. Gibson *v.* Fifth Avenue & High Street Bridge Co., 236.

The ownership in fee by a corporation of land upon which its superstructure rests, gives it no right to exclude subsequent grantees of the commonwealth from the use of the highways which cross it. Williams Valley R. R. Co. *v.* Lykens & Williams Valley Street Ry. Co., 393.

ENTIRE AND SEVERABLE CONTRACTS. The distinction between entire and severable contracts is based on difference in intent; the severable nature of the subject may assist in determining the intent, but will not overcome the intent to make an entire contract when that is shown. Easton *v.* Jones, 490.

A contract may be severable from one point of view and entire from another, as where it is entire as to the work to be done, but severable as to payment by instalments. Id.

Where a contract provides for the delivery of a number of logs, which are to be paid for at a certain sum per thousand feet "when loaded on cars," the contract partakes of a double character; so that while a failure in ability or intention to deliver the whole number will be a good defence even to an action for the payment stipulated to become due when a certain portion is loaded on cars, yet a refusal to make such payment, without legal excuse, is such a breach of contract as will entitle the plaintiff to rescind the contract and recover pro tanto for the portion delivered. Id.

EQUITY. Where a bill sets out that plaintiff, being indebted to defendant, transferred to him certain property as collateral security, that defendant had realized from a portion of the property more than enough to pay the debt, and still holds the rest of the property and refuses to account, and prays a reformation of the agreement under which the property was transferred, an account and reconveyance, a sufficient case for equitable interference is shown. Kane *v.* Laughlin, 60.

The rule that equity will not take jurisdiction to

EQUITY—*Continued.*
decree specific performance respecting goods, chattels, stocks and other things of a merely personal nature, is limited to cases where a compensation in damages will furnish a complete remedy. When the wrong is a betrayal of confidence, equity will decree restitution, which may be specifically enforced against the wrong-doer. Steinmeyer *v.* Siebert, 61.

Where the trial of an issue to determine what, if anything, is due on a judgment, will necessarily involve collateral matters of such a nature and so complicated that they cannot be satisfactorily determined by the verdict of a jury, it is proper to file a bill for an account, and to ask for an order restraining proceedings to collect the judgment until such account has been settled and the amount due thus ascertained. Loughlin *v.* Conn, 235.

A court with equity powers, having a fund in its custody, may require a claimant to proceed diligently to ascertain how much is due him. Hopper's Estate, 345.

In proceedings for the erection of a monument to soldiers and sailors of the war of the rebellion, if the record show that the provisions of the act of May 22, 1895, P. L. 96, have been strictly complied with, the mere averment in a bill to restrain the execution of the contract for the erection of the monument by the county commissioners, that extravagance will be committed and that favoritism was shown in the selection of a particular artist, is insufficient to sustain an injunction. Van Baman *v.* Leithiser, 389.

A creditors' bill cannot be sustained where the plaintiff has an adequate remedy by attachment execution. People's Nat. Bank *v.* Kern, 457.

A bill for discovery in aid of an execution does not draw the whole case into equity; the jurisdiction given by such bill is for discovery only, and ends with it. Id.

A bill will lie, in appropriate circumstances, for discovery and delivery of deeds and other muniments of title, certificates of stock, negotiable securities, and other personalty having special and peculiar value, which is not adequately represented by market price. Equitable Trust Co. *v.* Garis, 41.

When it appears that the husband of a lunatic has, in a box at a safe deposit company, securities of his wife, and also property of his own, a preliminary injunction, on the prayer of the committee, that the husband and the company be enjoined from opening the box, that the company discover and exhibit the contents to the committee, that the husband make and present a detailed inventory of said contents, and make discovery of all moneys received or deposited by him in behalf of his wife, and deliver to the committee all the personal property of the lunatic wherever situated, including a note from the husband to the wife, is too broad in requiring the delivery of property whose title and even whose existence have not been ascertained. Id.

The proper decree in such case is for discovery and inspection of the contents of the box, in the presence of both parties; the immediate delivery of the contents admitted to be the property of the lunatic; an injunction until further order against selling, assigning, removing or otherwise interfering with such contents as are claimed by both sides, with leave to the husband to apply for leave to resume possession thereof on giving security that the same or their value shall be forthcoming to abide the result of the case; that the husband be at liberty to remove the property not claimed as the property of the lunatic, and thereafter that the husband be not allowed ac-

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EQUITY—*Continued.*
cess to the box except in the presence of the representative of the committee. Id.

EQUITY PRACTICE. Where the appellant in equity has neglected to file in the lower court the brief statement of errors required by the equity rules, but has filed assignments of error in the appellate court, he may be permitted to file the required statement nunc pro tunc. (Super. Ct.) Swoope *v.* Wakefield, 209.

When a bill is filed as a bill for discovery, and, after answer and testimony taken, the plaintiff attempts to treat it as a creditor's bill, he cannot thereby prevent an objection being raised to the jurisdiction, by alleging that the defendant waived the objection by failing to demur or raise the question of jurisdiction by answer. People's Bank *v.* Kern, 457.

ERROR. Error must be made to appear in the record; it will not be assumed. Cake *v.* Cake, 552.

A. held a judgment against B. B., as executor and legatee of C., his late wife, held a judgment of a greater amount against A. B. moved to set off his judgment against that of A. The court refused the set-off. A. issued execution. B. moved for a stay, which was granted, the decree being simply for the stay, with reference to an opinion; an appeal being taken, the opinion was not attached to the record or printed: *held*, that, as the reason for the stay did not appear, the presumption of correctness in favor of the court below was not disturbed and the decree must be affirmed. Id.

See CHARGE OF COURT; ASSIGNMENTS OF ERROR.

ESCHEAT. The auditor-general having appointed an escheator, has no right, thereafter, to revoke his commission and appoint another escheator in his place. (O. C.) Kelly's Estate, 531.

ESTOPPEL. Where payment of a mortgage has been guaranteed to an assignee thereof, who is, for the purpose of foreclosure, made the plaintiff in the summons, and the property is bought in in her name, the legal plaintiff being, however, the mortgagee, the assignee is not estopped from showing that she knew nothing of the foreclosure, that she did not purchase and did not authorize anyone to purchase for her, but that her only connection with the matter was that the guarantors having asked her for the mortgage for the purpose of collecting the sum due upon it, she, assuming they had a right to it for that purpose, gave it to them; and if she establish this, the record of the foreclosure will not affect her rights as against the guarantors. Crawford *v.* Pyle, 1.

A corporation sued upon an endorsement by its president, is not estopped from setting up his want of power to endorse as against one who has taken the note without inquiry into the president's authority. (Super. Ct.) Worthington *v.* Schuylkill Electric Ry. Co., 118.

When a street has been stricken from the plans of the city of Philadelphia, by the revision of the plan embracing such street, under authority of an ordinance, and thereafter the portion of such street so stricken from such plan is occupied by the abutting property owners with the knowledge and acquiescence of the city, and permanent improvements are thereon erected, whereby the general public and the owners of property having a special property right in such portion of such street are deprived of the use of such portion, the city is estopped from asserting that such street has never been legally vacated. Melon Street, 361.

EVIDENCE. The devisees and legatees of a widow are incompetent to sustain her claim against the heir of her husband claiming the latter's title by devolution. (O. C.) Marschall's Estate, 407.

Testimony of those who are not experts is not admissible upon a hypothetical case. Beardslee *v.* Columbia Township, 336.

A plaintiff who claims to recover land by virtue of a sheriff's deed based on a levy and sale of said land as the property of a decedent, who has conveyed the land in his lifetime, is not a competent witness against the decedent's grantee, to prove that the deed was given by the decedent in fraud of creditors. Baldwin *v.* Stier, 172.

The failure to produce a witness may be explained by the return to an attachment issued against him. Costello *v.* Costello, 202.

The plaintiff offered to prove by the scrivener of a contract that it was the understanding of the contracting parties that the purchaser was to assume all debts of an estate for which the interest of plaintiff was liable, and that the failure to set this forth in the agreement was attributable to the mistake of the scrivener; and it was further proposed to prove that his omission to specifically mention in the stipulation the agreement respecting the payment of a mortgage was a mistake. The plaintiff also offered to prove declarations and admissions of defendant clearly and positively corroborative of the agreement claimed by him: *held*, admissible, because the witness was competent and disinterested. Schotte *v.* Meredith, 542.

In a suit for divorce, if the respondent appear and defend, either party may testify fully against the other: Act of May 23, 1887, § 5, cl. (*c*); and under § 7 may be compelled by the adverse party to testify as if under cross-examination. Costello *v.* Costello, 202.

Where the instrument upon which an action is brought is the usual printed "blank" form adopted in similar transactions, the fact that certain words in the printed form had been erased will not invalidate the agreement if it appear that the erasure was the same in the duplicate copies of the agreement retained by each party at the time the contract was signed, unless it be proved that in making the erasure the agent of the defendant exceeded his authority. Tapper *v.* Sunlight Oil & Gasoline Co., 469.

Where the instrument upon which action is brought is offered in evidence and objection made thereto because of incompleteness, in that a certain drawing or map which, by the terms of the instrument, is made part of it, is omitted, a subsequent offering of the map in evidence cures the incompleteness of evidence. (Super. Ct.) Jacoby *v.* West Chester Fire Ins. Co., 219.

Under certain rules of court, the specific averment and affidavit of defence are competent evidence on the part of the plaintiff, where the latter does not deny the specific averments of facts. (Super. Ct.) Jacoby *v.* Providence Washington Ins. Co., 224. See AFFIDAVIT OF DEFENCE, S. C.

A delay, caused the plaintiff by another contractor whose work was a pre-essential, may be established as a fact by the production of an affidavit of defence averring that as a fact, filed by the same defendant to a claim of the other contractor. Pittsburgh Terra Cotta Lumber Co. *v.* Sharp, 5.

Under a rule of court which provides: "If the plaintiff shall file with his declaration or statement, separate and apart from his declaration or statment, a specific averment of facts sufficient to support his

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EVIDENCE —*Continued.*
claims, verified by affidavit, and serve a copy thereof on the defendant or his counsel of record, such items of claim and material averments of facts as are not denied by the defendant, by affidavit filed with or before plea pleaded, shall be taken as admitted," the affidavit of defence is not admissible as defendant's evidence of the facts set forth in the affidavit. (Super. Ct.) Jacoby *v.* North British & Mercantile Ins. Co., 226.

A photograph of the deceased may be admitted in rebuttal of testimony that the defendant in a murder case was a smaller man than the deceased, but before it is admitted there should always be proof of care and accuracy in taking the picture and of its relevancy to the issue before the jury; that is to say, where the size of the original of the picture is the object of its introduction, this accuracy can be secured, if the witness identifying the picture is included in the photograph and in such an attitude that his own size relative to that of the deceased is shown. Com'th *v.* Keller, 273.

Before photographs are admitted in evidence in an accident case, it is requisite that there should be preliminary proof of care and accuracy in the taking of them, and of their relevancy to the issue before the jury, and that they were taken at or about the time of the accident upon which the action is based. Beardslee *v.* Columbia Township, 336.

A notice of protest is prima facie evidence that it was received by the person to whom it was addressed, but that prima facie proof may be rebutted by evidence showing that it was not received. The question is one of fact solely for the determination of the jury. (Super. Ct.) Farmers' National Bank *v.* Marshall, 68.

The acts, protests and attestations of notaries public, are by statute prima facie evidence, but the power of a notary cannot be extended by the language of the official protest. Id.

Declarations of a testator, not a part of the res gestae, but so connected in point of time with the testamentary act as to justify the inference that they indicate the testator's state of mind when the will was executed, are admissible in evidence as direct proof of testamentary capacity, but are without force as tending to establish the fact of undue influence. Swope *v.* Donnelly, 57.

Declarations of a testator as to his intentions are admissible where the will is disputed on the ground of fraud or forgery, but proof of such declarations is not of itself sufficient either to establish the execution of a will or to overcome the testimony of subscribing witnesses, but is admissible only for the purpose of corroboration. Id.

The admission of such testimony should be carefully guarded and its effect as corroboration only should be clearly defined. Id.

In a contest as to the execution of an alleged will on a particular date, evidence that testatrix had said, some five years before, that she was going to a lawyer to have a will made and was only going to leave her husband what the law allowed him, and the testimony of another witness that a few months before the date of the alleged will testatrix had declared she then had a will in which she did not leave her husband any money, is too vague and remote to be considered as corroborative of the testimony of witnesses to the execution of the writing offered as a will. Id.

Declarations by a grantor, made after a grant, that at the time of the grant she was indebted, are not, without more, admissible to impeach the grant; the fact that the consideration recited in the grant is nominal is not sufficient evidence of combination to render such declarations admissible. Baldwin *v.* Stier, 172.

EVIDENCE—*Continued.*

Where statements of both defendants in one indictment for murder have been admitted in evidence upon affirmative testimony, that they were voluntarily made, the testimony of one of the defendants that the confessions with statements were extorted by promises and threats, has merely the effect of raising a question for the jury; such confessions or statements are properly admitted, but instructions should be given to disregard them if the jury find they were not voluntarily made. Com'th *v.* Shew, 360.

Insinuations and suspicions are not evidence and have no place in it, and certainly do not constitute a proper basis for a verdict in accordance with them; so, where a miner brings an action of trespass against his employer for using false weights on the scale by which the plaintiff's compensation is determined, not only the falsity of the weights must be proved but also that the defendant fraudulently used them knowing them to be so. Nelson *v.* Steen, 480.

Evidence to show quo animo a judgment was confessed by a testator is admissible, although its effect may be to show whether it was or was not intended as an ademption of a legacy. (Super. Ct.) Ritter's Estate, 194.

Where a libel charges the respondent with adultery with one named, evidence showing the abandonment of an action by libellant against such person is admissible. Costello *v.* Costello, 202.

It is not error to sustain objections of libellant in divorce to questions by respondent put to a witness as to whether certain letters had been received by witness, embodying in the questions quotations from such letters. Id.

An agreement between counsel in a suit on a policy of fire insurance that the amount claimed by plaintiff was what defendant owed, if liable at all, relieves plaintiff of the necessity to prove the adjustment or extent of his loss. (Super. Ct.) Jacoby *v.* North British & Mercantile Ins. Co., 226.

Under the act of June 27, 1883, P. L. 165, evidence of proof of loss which is sent to the agent of the fire insurance company who countersigned the policy when issued is sufficient. Id.

Proofs of loss made out by the insured cannot be received in evidence for the jury or be read by them; they are only evidence for the court that it may determine whether a condition precedent to recover has been sufficiently complied with to warrant the institution of suit. As the stipulation in the policy requiring them is in writing and the proofs are in writing, the interpretation of the contract and the alleged writing claiming to be a compliance with it, are for the court. Cummins *v.* German American Ins. Co., 549.

Where, under the terms of the contract, the insurers are only liable for the "actual cash value of the property" at the date of the fire, it is necessary to ascertain this from the evidence, and whilst the price of timber at the date of the fire is by no means conclusive as to the cash value of the barn, it is evidence on the question, and the weight to which it is entitled will depend upon the dimensions, quality and kind of timber in the barn as compared with the price of such timber at the time of its destruction,

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EVIDENCE—*Continued.*
and such weight of such testimony can only be properly determined after cross-examination. Id.

To prove the cost of rebuilding a destroyed barn in the condition in which it was at the date of a fire, it is not necessary that the witness should be a carpenter, as the value of his testimony depends on his knowledge of the subject. Id.

In an action on an insurance policy, where the assured alleges that he had made proofs in accordance with the demands of the insurer contained in a letter received by the assured, it is error to exclude the letter when offered in evidence by the insurer to show that the assured's attention was specially called to special requirements with which he had not complied. Id.

In an action on a fire insurance policy, the plaintiff may introduce in evidence the affidavit of defence to show that the defendant adjusted the loss payable by it at a certain amount. (Super. Ct.) Jacoby *v.* West Chester Fire Ins. Co., 219.

Where the defence in an action on a fire insurance policy is that the insured set fire to the property, evidence of a conversation between others than the plaintiff and in his absence, significant of an early destruction of the property by fire, is inadmissible. Id.

A witness may be asked on cross-examination as to his making, on other occasions, statements different from that of his testimony at the trial. (Super. Ct.) Jacoby *v.* North British & Mercantile Ins. Co., 226.

Where a witness for plaintiff in an insurance case has given to the goods destroyed a value which differs from that stated by himself in the proofs of loss, he may be cross-examined to show that he had made an intentional misstatement as to double insurance in another proof of loss to the same company on goods lost in the same fire; for the purpose of testing the truthfulness of his testimony the two matters are sufficiently parts of the same transaction. Fairfield Packing Co. *v.* Southern Mutual Fire Ins. Co., 533.

Where an explanation of a contradiction is given, it is error for the judge to assume that it is true; that is for the jury. Id.

Reputation and cohabitation as evidence of marriage. See MARRIAGE. (Super. Ct.) Hine's Est., 109.

EXECUTION. The issue of execution upon a judgment entered by confession, one day too soon, is a mere irregularity which may be waived by the defendant either by actual agreement or by acquiescence, and where defendant makes no objection to such issue for a considerable time (in this case thirty days) and then only after he has confessed judgment and authorized execution against himself in favor of other persons, the court may well refuse to set aside the execution. (Super. Ct.) Morrison *v.* Baker, 104.

The provision of the U. S. R. S. § 4747, that pension money due or to become due to a pensioner "shall enure wholly to the benefit of such pensioner," does not exempt from execution land, in the purchase of which the pensioner has used such money. (Super. Ct.) Aubrey *v.* McIntosh, 164.

The act of April 17, 1869, P. L. 70, giving the owner of contingent interest in the personal property of a decedent the right to require an executor or administrator to file an account of the trust in one year, does not confer upon one, who has not established the possession of such an interest with reasonable certainty, the right to interfere. A proceeding

EXECUTION—*Continued.*
will not be sustained where the manifest purpose is not to protect a right, but to establish one. Wagoner's Estate, 265.

A lien upon real estate may be acquired by a levy under an execution issued upon a judgment more than five years old, notwithstanding the fact that no revival by scire facias has taken place; such lien will prevail over that of a subsequent levy made under execution upon a judgment less than five years old, but which was not a lien on the particular real estate prior to the levy; and can be set aside only upon the motion of the execution defendant. Sherrard's Ex'rs *v.* Johnston, 517.

EXECUTOR. J., the testator, was the son of L., who died in 1887, leaving a will of which she appointed her son J. executor, and wherein she gave to him all the residue of her estate for life, and at his death provided that it should go to his children C., L. and J. At her death, L., with other stock, owned seventy-six shares of stock of the H. Company, which was part of her residuary estate, and which at the time of her death was pledged for a loan of $12,000 borrowed on her promissory note from a savings institution. J., as executor, gradually paid off this loan, so that in about four years after L.'s death the debt was entirely extinguished and the collateral was returned and became part of her residuary estate in the hands of her son and executor, in which he was entitled by the terms of the will to a life interest. Soon after, he began to borrow from the same bank, pledging this stock as collateral, until the sum for which the stock stood pledged at the time of his death amounted to $9100, the notes being signed by him individually and as executor of L. The money borrowed was used, according to his own statement to P., made when he asked him to permit the insertion of his name as one of the executors of his will, partly in carrying on his business in Philadelphia and partly in the purchase of bonds of the H. Co., for which stockholders had the right to subscribe. At his death, he had in his possession these bonds to the value of $9850, which the executor sold and applied the proceeds to the payment of the notes, thus releasing the seventy-six shares of stock from pledge. The life estate of J. in this stock terminated by his death; the executor delivered it to the executor of L. for J.'s children, to whom it had been bequeathed by his mother, L. The appellants claimed that the stock was pledged by L. in her lifetime for her own debts, which in substance, through all the subsequent renewals, continued the same debt until J.'s death: *held*, that there was no evidence that after the release of the stock J. borrowed one dollar upon it for his mother's estate, but, on the contrary, that he borrowed for himself, and used the money for his own purpose to the amount of $9100, which debt was unpaid when he died. This being the case, it was the duty of his executor to pay this debt and, then, hand over the seventy-six shares of stock to the executor of L., to be disposed of as her will directed. These bonds were unquestionably J.'s bonds, and the executor had the right to sell them for his debt. Orne's Estate, 482.

EXEMPTION. A waiver of the debtor's exemption under the act of April 9, 1849, as to any lien enures to the benefit of all prior liens. (Super. Ct.) Hoerner *v.* Cordell, 213.

From taxation. See TAXATION. (Super. Ct.) City of Pittsburgh *v.* Third Presbyterian Church, 215.

Of pension from execution. See EXECUTION. (Super. Ct.) Aubrey *v.* McIntosh, 164.

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EXTINGUISHMENT. See GROUND RENT; SHERIFF'S SALE. (Super. Ct.) Sergeant *v.* Fleckenstein, 115.

FAMILY SETTLEMENT. A. died in September, 1890. By his will he devised land to his two sons, whom he made executors, but directed them to pay to each of his daughters a sum equal to one-sixth of the value of the coal under the devised land. Two months later the children made an amicable division of the personal property left them by the will, which had not at that time been admitted to probate, and four months later they met again and executed a formal sealed agreement of liquidation of the value of the coal so far as it affected the amount of the legacies to two of the daughters, who at that time had full opportunity to examine and consider the agreement before signing; the two sons advised their sisters as to the effect of the agreement, and also suggested that they obtain outside advice; they did not misrepresent the value of the coal, but one of them had information upon that subject which he did not communicate. Four years later, on the filing of the executors' account, the value of coal having greatly advanced in the meantime, the sisters attempted to set aside the settlement: *held*, the agreement of 1891, entered into as a family settlement and carried out without objection for four years, should stand. Brownfield's Appeal, 466.

A. by will gave a legacy to the appellant, equal to one-sixth the value of the coal under the land devised to his sons, and provided, "I direct my executors to invest in some safe way the bequest of my daughter Anna and to retain control of the same, allowing her the use of the same, or if the said investment should be an interest or dividend-bearing investment, to pay over to her semi-annually the interest thereon during her life, and if she should die without leaving lawful issue surviving her" then over, and if issue, then to hold until they should reach full age: *held*, that the trust thus imposed by the testator was not disturbed in any way by the agreement of the children in 1891 (see foregoing case), which was merely to liquidate the amount of the legacy which the will made dependent upon the value of the coal, was in affirmance, not in antagonism to, the will, and in no way affected the trust. Crossland's Appeal, 468.

FEE SIMPLE. See WILL. Reimer *v.* Reimer, 453.

FOREIGN CORPORATIONS. The fact that the agent of a foreign corporation comes into this state and makes contracts for the delivery of machinery here, does not constitute a doing of business within this state within the inhibition of the act of 1874. Wolff Dryer Co. *v.* Bigler, 367.

See CONFLICT OF LAWS. (C. P.) Fodell *v.* Royal Arcanum, 498.

FRAUD. The fact that a mutual insurance company, at the time of the contract with the defendant, evidenced by a policy, fraudulently concealed its true condition, is no defence to an action for an assessment when the rights of innocent third persons have intervened, as by the issue of policies subsequent in date to that upon which recovery is sought. (Super. Ct.) Sparks *v.* Vitale, 150.

The title of the act of July 9, 1897, P. L. 237, viz.: "A supplement to an act of the general assembly approved the 17th day of March, A. D. 1869, entitled 'An act relative to fraudulent debtors,' authorizing the courts to inquire into the validity of judgments confessed and alleged to be fraudulent, and providing the practice therefor," sufficiently fulfills the constitutional requirements as to definiteness. Page *v.* Williamsport Suspender Co., 153.

FRAUD—*Continued.*

Where a bond is in a penal sum "as security for such sums as may be owing to the obligees from time to time," and the condition is that the defendant should pay such sums of money as should be owing or deliver such goods as the creditor should order, and in default judgment is authorized to be entered "for any sum or sums that may be due or owing to the said obligees," and judgment is entered upon the bond for the penalty and execution immediately issued for the full amount, there is sufficient to put the plaintiffs in execution to an explanation. Creighton *v.* Scranton Lace Curtain Mfg. Co., 233.

A judgment entered on a bond given to secure indebtedness by a corporation to a firm a member of which was a director in the defendant corporation, if attacked by another creditor of the defendant, puts the plaintiff in execution to an explanation. Id.

Where, at a sheriff's sale under executions on confessed judgments, the personalty is bought in by the attorney for the execution creditors, who on the same day deliver the same to the defendant's wife, who has neither property, credit nor competency to conduct the business, taking her judgment notes covering the defendant's entire indebtedness to such preferred creditors, and she thereupon appoints the defendant to manage the business, from which the preferred creditors are eventually paid in full, it is not error, in a contest between the unsecured creditors of the defendant and the wife, as garnishee, to leave to the jury the question of fraudulent purpose, notwithstanding no witness contradicts the testimony of the defendant, his wife, a preferred creditor and the attorney for the execution plaintiffs, that there was no understanding that the defendant's wife should become the purchaser, and that no benefit to the defendant or his family, or disadvantage to his unsecured creditors, was contemplated. Thornburn *v.* Thompson, 348.

In a sale of personal property, regard must be had, not only to the character of the property, but to the nature of the transaction, the position of the parties and the intended use of the property. No such change of possession as will defeat a fair and honest object of the parties is required. A transfer of personal property, void as to existing creditors, is not necessarily void as to subsequent creditors. It is fraudulent only as to those it was intended to defraud. McCullough *v.* Willey, 364.

B. executed, on October 12, 1895, a bill of sale for certain machinery to M., for the purpose of securing him in regard to notes endorsed by M. for B., amounting to $1500. On the same day, M. leased the machinery to B., with the ordinary conditions of a lease and a stipulation that if the lessees should pay to the lessor a sum equal to $1500 with the payments of rent included, the lessor should execute and deliver a bill of sale of the property to the lessees. There was no provision in the lease that such a bill of sale should be made to the lessees, in the event that they should pay the notes endorsed for them by the lessor, and in point of fact they never did pay any of them. Subsequently, W. entered judgment against B. on a single bill dated February 16, 1896, and levied on the machinery: *held*, (*a*) that the bill of sale being an absolute one, the entire title to the machinery was transferred to the grantee. The fact that the consideration was the protection of the grantee from loss did not convert an absolute sale

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FRAUD—*Continued.*
into a conditional or qualified one; (*b*) that the defendant being a subsequent creditor, the transfer was not a fraud in law as to him, and if a fraud in fact, the question was one for the jury. Id.

While there is no fraud, per se, in a sale of personal property to a creditor, not intended to hinder, delay or defraud other creditors, but simply to prefer the vendee as a creditor, unless there is some change of possession as to the property, either actual or symbolical, so as in some public manner to manifest the change of ownership, the sale is constructively fraudulent as to creditors. Lehr *v.* Brodbeck, 411.

A. purchased from B. a brickyard, the consideration for which was the conveyance of certain real estate and $1000 in cash. The conveyance was executed and, about ten months later, a note for the price, payable in three months after date, was given. At the maturity of the note, A. declined to pay, and upon suit brought, filed an affidavit of defence in which he set up that he had been induced to the original contract by the false representations of B. as to the value of the brickyard: *held*, not to be sufficient, as A. was in possession of the property for a sufficient time before the giving of the note to make full examination and inquiry as to the value of the property, and was late in complaining of any results which may have flowed from his omission, or that he had been deceived by the vendor's misrepresentations. (Super. Ct.) Cote *v.* Christy, 438.

GRADE CROSSINGS. The purpose of the act of 1871, which is not altered by the act of 1889, is to discourage grade crossings, and to absolutely prohibit them where it is reasonably practicable to avoid them; and reasonable practicability is to be determined, largely, by what is physically practicable, and not by what is practicable to the treasury of the road seeking to cross. Williams Valley R. R. Co. *v.* Lykens & Williams Valley St. Ry. Co., 393.

It is error to hold that it lies with the party objecting to a grade crossing to show that another crossing is practicable, and that, in the absence of such evidence, the court should allow the crossing; it is the duty of the court to inquire into the matter in the interest of the public, which is not directly a party to issue, and ascertain whether it is reasonably practicable to avoid a grade crossing. Id.

Where a strip of land taken by exercise of the right of eminent domain completely severs a lot of ground into two portions, the owner of the two parts thus divided is entitled, under the act of February 19, 1849, P. L. 79, to a convenient mode of access from one part to the other across the railroad, and where the owner and the railroad company have agreed upon a grade crossing, the owner will be enjoined from subsequently erecting an overhead crossing. (C. P.) Speese *v.* R. R. Co., 493.

GROUND RENT. The purchaser at a sheriff's sale of land charged with a ground rent, takes the land free from the lien of arrears, and a judgment, subsequently obtained against the covenantor for arrears of ground rent, acquires no lien on the property which will support a sheriff's sale and carry the title; and such a purchaser is entitled to an extinguishment of the rent under a covenant (in the deed reserving the same) that the rent should be extinguished upon payment of the principal and arrearages, by paying the principal and arrearages from the time he took title to the land. (Super. Ct.) Sergeant *v.* Fleckenstein, 115.

GROUND RENT—*Continued.*
The act of June 12, 1878, P. L. 205, does not affect the personal liability of owners of land subject to ground rent, where the rent is reserved by a deed antedating said act; and the owner of the land out of which a rent so reserved issues is liable on the covenants for its payment without any express assumption of the same by himself. Hopple *v.* Hutchinson, 441.

One who, subsequently to the act of June 12, 1878, P. L. 205, takes title to land subject to a ground rent, created by deed, containing the usual covenants, made prior to said act, is personally liable for the rent falling due during his ownership of the premises. (C. P.) Conway *v.* R. B. Salter B. & L. Ass'n, 440.

GUARANTEE. Where a guarantor is interested in the debt guaranteed, an oral guarantee will bind him. Crawford *v.* Pyle, 1.

One who holds a mortgage with a blank assignment signed by the mortgagee, and who sells it to a third person, may make a binding guarantee of the payment of said mortgage by parol. Id.

Where there is evidence that an employé of the defendants, in soliciting the plaintiff to purchase securities offered for sale by them, said that the defendants would guarantee such securities, that the defendants subsequently guaranteed to the plaintiff other securities of the same character, and that, after default upon the first securities, the plaintiff wrote to the defendants, asserting their guaranty of them, to which assertion no reply was made, there is evidence to submit to the jury from which they may find that a guarantee was made by the defendants through their agent. Id.

HABEAS CORPUS. See SUPERIOR COURT. Com'th *v.* McAleese, 207.

HIGHWAY. The right of the public to the use of a highway is subordinate to the right of the public authorities to make repairs for public benefit. (Super. Ct.) Hookey *v.* Oakdale Borough, 372.

When the dangerous character of a public highway is manifest, it is the duty of a traveler, who has a knowledge of its condition, to use due care to avoid possible injury. Bailey *v.* Brown Twp., 148.

Where damages have been recovered from a municipality for injuries received by a citizen by reason of a defective sidewalk, the corporation may bring suit against the owner of the land abutting the sidewalk, to recover the amount of damages paid in former suit. (Super. Ct.) City of Chester *v.* First Nat. Bank, 180.

The obligation of property owners to keep the sidewalk in repair implies a liability for damages resulting from failure to do so. Id.

The remedy by lien and an action to collect the expense of the repairs are separate and independent of the liability of and duty imposed upon the owner of the land. Id.

It is the primary duty of an owner of property to keep the sidewalk of a public street in front of his premises in repair; he is not relieved from this duty by the fact that the premises are leased to a tenant. Mintzer *v.* Hogg, 484.

See MUNICIPALITY; NEGLIGENCE; ROAD LAW; STREETS.

HUSBAND AND WIFE. A husband has an insurable interest in the life of his wife and may assign a policy thereon to a creditor. Wheeland *v.* Atwood, 386.

The act of June 3, 1887, P. L. 332, conferring upon married women the right to sue and be sued as if

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HUSBAND AND WIFE—*Continued.*
single, repeals the proviso in the act of March 27, 1713, which prevents the statute of limitations from running against married women until they become discovert. Nissley *v.* Brubaker, 425.

Where a married woman had the right of action at the time of the passage of the act of June 3, 1887, P. L. 332, the statute of limitations must be held to have begun running against her from and after the date of that act. Id.

See DIVORCE; MARRIAGE.

INDEPENDENT CONTRACTOR. A municipal corporation is not responsible for an injury occasioned by the neglect of the employés of a contractor who has in charge the repair of a street, the reason being that the principle of respondeat superior applies to the contractor alone, and in such case there cannot be two superiors severally responsible. (Super. Ct.) Hookey *v.* Oakdale Borough, 372.

INFANT. A child of tender years may be a trespasser and subject to the consequences of his trespass if injured in the course thereof. (Super. Ct.) Feehan *v.* Dobson, 65.

INSANITY. To convict of murder in the first degree, the commonwealth must prove beyond a reasonable doubt the unlawful killing and the fully-formed purpose to kill; no evidence of the sanity of the defendant need be adduced; the law presumes that, and the presumption is conclusive in the absence of evidence to rebut it. If insanity be the defence it must be established like any other fact, by fairly preponderating evidence. Com'th *v.* Heidler, 310.

INSOLVENCY. The insolvency of a mutual insurance company is no defence in an action to recover, from a member, an assessment payable by the terms of the policy and by-laws. (Super. Ct.) Sparks *v.* Vitale, 150.

INSURANCE. Answers by an applicant for insurance to questions addressed to him in connection with the application are prima facie true, and if alleged by the insurer to be untrue, the burden of proof is upon the insurer. Wall *v.* Royal Society of Good Fellows, 562.

Insurance—Fire. Where, by the contract, the insurers are only liable for the "actual cash value of the property" at the date of the fire, it is necessary to ascertain this from the evidence, and whilst the price of timber at the date of the fire is by no means conclusive as to the cash value of a barn, it is evidence on the question, and the weight to which it is entitled depends upon the dimensions, quality and kind of timber in the barn, as compared with the price of such timber at the time of its destruction. Cummins *v.* German American Ins. Co., 549.

In an action on an insurance policy, where the assured alleges that he had made proofs in accordance with the demands of the insurer contained in a letter received by the assured, it is error to exclude the letter when offered in evidence by the insurer to show that assured's attention was specially called to special requirements with which he had not complied. Id.

Under the act of June 27, 1883, P. L. 165, evidence of proof of loss which is sent to the agent of the company who countersigned the policy when issued, is sufficient. (Super. Ct.) Jacoby *v.* North British & Mercantile Ins. Co., 226.

Under the provision in a policy that it shall be void if the insured make misstatements as to encumbrances on the property, defendant is not relieved of liability by a mere failure on the part of

INSURANCE—*Continued.*
the insured to enumerate the encumbrances at the time the application for insurance is made. It must appear that misstatements as to encumbrances were made willfully and knowingly. Id.

Where oil in an oil stove takes fire and burns in a way not intended or in a place not appropriate in the mechanism of such stove for such burning, and damage results to articles insured against fire, such damage is within the contract of insurance against loss by fire. (Super. Ct.) Collins *v.* Insurance Co., 230.

In the contract of fire insurance, the intention of the parties is to insure against loss where the cause insured against is a means or agency in causing the loss, even though it was entirely due to some other actual efficient cause which makes use of it, or sets it in motion, if the original efficient cause be not itself made a subject of separate insurance. Id.

Where a fire policy required that additional insurance shall be endorsed on it, or the policy shall be void, notice of additional insurance, sent before a fire, but not received until after the fire, is not sufficient to save the forfeiture of the policy. Fairfield Packing Co. *v.* Southern Mutual Fire Ins. Co., 533.

Insurance—Life. A husband has an insurable interest in the life of his wife and may assign a policy thereon to a creditor. Wheeland *v.* Atwood, 386.

C., wife of A., took out a policy on her own life, in the sum of $5000; she was then 43 years of age, with an expectancy of almost twenty-six years of life; she assigned the policy to her husband, who assigned to F., to whom he was indebted in the sum of $1900. F. had paid two premiums on the policy when C. died: *held*, that the circumstances did not show a mere speculation on C.'s life, and that F. was entitled to the proceeds of the policy. Id.

Where a life insurance policy contains a provision that it shall be void if the insured shall die "in violation of or attempt to violate any criminal law of the United States or of any state or country in which the insured may be," and the insured voluntarily submits to a criminal abortion, it is error for the court to leave it to the jury whether or not the death was attributable to another or intervening cause happening between the abortion and the death. Wells *v.* New England Mut. Life Ins. Co., 157.

The term "good health" when used in a policy of life insurance, means that the applicant has no grave, important or serious disease, and is free from any ailment that seriously affects the general soundness and healthfulness of the system. Therefore, when the application for insurance contains a statement "that I am in good health and free from any and all diseases, sickness, ailments or complaints, trivial or otherwise," the death of the insured a month later is not of itself sufficient to take from the jury the question whether the insured was ill two days before his death of the disease which proved fatal, at which time the premium on the policy was paid, which, according to its provisions, was essential to the validity of the policy. Barnes *v.* Fidelity Mutual Life Ins. Ass'n, 286.

Insurance—Mutual. The insolvency of a mutual insurance company is no defence in an action to recover from a member an assessment payable by the terms of the policy and by-laws. (Super. Ct.) Sparks *v.* Vitale, 150.

The fact that the company, at the time of the contract with the defendant, fraudulently concealed its true condition, is no defence to an action for an assessment when the rights of innocent third persons have intervened, as by the issue of policies subse-

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INSURANCE—*Continued.*
quent in date to that upon which recovery is sought. Id.

The presumption of law is in favor of the regularity of proceedings to assess and of the legality of an assessment upon a mutual insurance policy. Id.

INTEREST. Where a guardian of children entitled to a fee conveys the same to the dowress, who covenants that the principal of her dower shall remain charged on the land until her death, she in the meantime retaining the interest, the effect is to make the part of the gross price of the land, which represents the dower, not payable until her death, and then without interest. Kreamer *v.* Fleming, 201.

JOINT LIFE ESTATE. A. by his will bequeathed to the F. Co., in trust for the benefit of his brother E., and his sister M., all his estate, to collect the income therefrom and pay over the same into the hands of his said brother and sister or their duly authorized agent or attorney, declaring as follows: "I hereby declare it is my will that my brother . . . . and my sister . . . . shall receive the income of my said estate absolutely, and the survivor of them, with power to them or the survivor of them, to devise by any last will and testament they or either of them may choose to make": *held,* (1) a legal estate was created in the trustee for the lives of the brother and sister and the survivor of them, and they thereby had an equitable joint life estate during their joint lives, and that the entire income should go to the survivor; (2) that the survivor had a power of appointment by will as to one-half of the estate and that upon his or her death the other half would go as already appointed by the will of the joint tenant who had first died. Kelly's Estate, 501.

JUDGMENT. Where the plaintiff in a scire facias upon a mechanics' lien has obtained a verdict within five years from the issuing of the writ, but is prevented from entering judgment until after the expiration of that period, by reason of the pending of a rule for a new trial, the judgment, upon the discharge of the rule or motion, relates to the date of the verdict and is valid. (Super. Ct.) Howes *v.* Dolan, 62.

The act of March 23, 1877, P. L. 34, is a remedial law, and the well-settled principle is applicable, that where the object of the act is to cure a defect in the old law, it is to be supposed that the legislature intended to do so as effectually, broadly and completely as the language used, when understood in any fair and reasonable sense, would indicate. Id.

The act of June 9, 1897, P. L. 237, gives a general creditor a standing to inquire into the bona fides of a judgment confessed by his debtor such as he would have had if he had had a lien before the passage of the act, and to facilitate his inquiry into an alleged fraud; it does not change the settled rule that a judgment fraudulent as to creditors is nevertheless good between the parties. Page *v.* Williamsport Suspender Co., 153.

A., one of the firm of A. & B., to raise money to pay his share of the capital gave his note, with C. as endorser; he told C. that the firm was the borrower; this was believed by C. The proceeds of the note were paid by A. into the firm. C. was compelled to pay the note and the firm confessed judgment to C. for the amount: *held,* as against creditors the judgment was valid. Id.

A partner may, without the consent of the other partners, confess a judgment in the firm name for a firm debt, and, under such judgment, firm property may be taken in execution. This rule applies

JUDGMENT—*Continued.*
against the personal representatives of a deceased member in whom is vested the right to elect whether the partnership shall be continued and who have expressly or impliedly elected to continue the partnership. Evans *v.* Watts, 185.

One who purchases a judgment against a corporation does not take with it any collateral remedy which the plaintiff in the judgment may have had against third parties, e. g., if a plaintiff deal with a corporation on the faith of a statement made in the certificate of incorporation by the signers thereof, which statement turns out to be untrue, an assignee of the judgment cannot recover against the signers, unless his acquisition of the judgment was induced by a belief in and reliance upon the signers' statement. (U. S. C. C.) Haines *v.* Franklin, 420.

See MUNICIPAL LIEN; MECHANICS' LIEN.

JUDGMENT NON OBSTANTE VEREDICTO. Under the act of May 19, 1897, P. L. 68, where a party is not permitted to go to the jury but judgment is entered in his favor non obstante veredicto, the practice which will be followed where the attention of the appellate court is called to a desire for an appeal by the successful party below, in the event of a reversal, will be in such event to reverse the judgment and send the record back to the court below to enter such judgment as it should have entered in the first instance. Hughes *v.* Miller, 346.

JUROR. Unless a very clear abuse of discretion appear in the selection or rejection of jurors, the appellate court will not pass upon the exercise of this discretion by the court below, and the acceptance as a juror of one who was shown to have expressed an opinion of defendant's guilt, is not an abuse of this discretion, if he at the time of his examination declare he has formed no opinion in the case. Com'th *v.* Heidler, 310.

LACHES. There is no fixed rule as to the length of delay that will prevent plaintiff's proceeding. It is a question of discretion controlled by the facts of the particular case, and the decision of the court below will not be reversed unless there is a manifest abuse of discretion. (Super. Ct.) Susquehanna Mut. Fire Ins. Co. *v.* Clinger, 261.

A court with equity powers, having a fund in its custody, may require a claimant to proceed diligently to ascertain how much is due him. Hopper's Estate, 345.

LAND. Whether lots purchased at different times by the same owner become one lot or remain distinct, though contiguous, lots, depends upon the use made of them by the owner. Gibson *v.* Fifth Avenue & High Street Bridge Co., 236.

LANDLORD AND TENANT. A lease for a year with the privilege of an extension, is for a year only; if the tenant hold over without notice he will be held to have elected to extend the lease, but if the lease provide that notice of intention to quit shall be given at a time specified, then if the lessee, having given notice that he will not accept the extension, does not give the required notice of intention to quit at the end of the first year, he becomes a tenant from year to year, and liable for an additional year's rent. (Super. Ct.) Gardiner *v.* Bair, 83.

The right of a landlord to sell the chattels on the leased property, distrained for rent in arrears, is bestowed by the statute of March 21, 1772, which requires an appraisement of the goods before the sale. (Super. Ct.) Hazlett *v.* Mangel, 116.

A tenant for years cannot relieve himself from

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LANDLORD AND TENANT—*Continued.*
liability to pay rent by vacating the premises during the term and sending the key to his landlord; to make the giving up of a key a surrender, it must be accepted by the landlord with the intention of releasing the tenant from the liability. (Super. Ct.) Gardiner *v.* Bair, 83.

In an action to recover rent, an affidavit of defence, which denies liability for the whole period of the lease for which rent is averred to be in arrears, on the ground that lessor's title to part of the premises demised had been divested by the exercise, by the municipality, of the right of eminent domain, is sufficient to prevent judgment and to permit defendants to present the evidence on which they base their defence to a jury. Uhler *v.* Cowen, 397.

See LEASE.

LATERAL RAILROADS. The proviso to the act of July 5, 1883, P. L. 176, providing for the construction of lateral railroads from mines, viz., that said road "shall not . . . . pass through nor disturb or endanger the safety of any other mine," is not unconstitutional as not being embraced within the title of the act, viz.: "A supplement to an act entitled 'An act regulating lateral railroads,' approved the fifth day of May, A. D. 1832, authorizing the owners or lessees of iron ore or coal mines, to construct lateral railroads from said mines to any railroad, public road or navigable stream within the county in which such mines are situated." Rodgers's Appeal, 275.

LEASE. A parol contract, whereby one is employed by an owner of real estate to look after his property at a fixed yearly sum, has not the effect of a demise or parol lease of the land; a lease involves possession by the lessee. The employment as a superintendent or caretaker resembles that of a servant whose right of occupancy is merely derived from his employment. (Super. Ct.) Zinnel *v.* Bergdoll, 54.

Where the lessor endorses on his own copy of a written lease a writing extending the term thereof for a certain purpose, and signs the same, informing the lessee of his so doing, whereupon the lessee acts, and expends money in reliance thereon, the lessee is vested with an estate, for interference with which by the public authorities in the exercise of the right of eminent domain, he is entitled to recover damages. Witman *v.* Reading, 143; and see ASSIGNMENT, S. C.

See LANDLORD AND TENANT. (Super. Ct.) Gardiner *v.* Bair, 83; Uhler *v.* Cowen, 397.

LETTER. The receipt, not the mailing, of a letter constitutes notice, and there is no presumption of law that a letter mailed is received, except in the case of a notice of the dishonor of commercial paper. Fairfield Packing Co. *v.* Southern Mutual Fire Ins. Co., 533.

LIBEL. The publication in a newspaper, as an item of news, of something which imputes participation by a physician in a criminal abortion is a libel and subjects the paper to liability to damages, unless proof of the truth of the assertion is shown. Bryant *v.* Pittsburgh Times, 526.

The rule is that nothing but proof of the truth of a publication is a defence to a libel. That the publication was privileged because made on a proper occasion from a proper motive and upon probable cause, is the excepted case, and he who relies upon the exception must prove all the facts necessary to bring himself within it. Id.

LICENSE FEE. See MUNICIPALITY. (Super. Ct.) Borough of Lansdowne *v.* Del. Co. & Phila. Electric Ry. Co., 546.

LIENS. In the absence of countervailing equities, a debtor whose land has been taken in execution has a right to insist on the regular process of law, with its regular and usual result, the discharge of liens and their payment out of the proceeds of a sheriff's sale, according to their legal priority, and of this right he cannot be deprived at the will of the first lien holder. Fisler *v.* Stewart, 121.

An order that a sheriff's sale of land be made as though the land were clear of liens, and that whatever encumbrances shall be found not to be discharged shall be taken as part of the purchase money, is irregular and without authority. Kreamer *v.* Fleming, 201.

A lien upon real estate may be acquired by a levy under an execution issued upon a judgment more than five years old, notwithstanding the fact that no revival by scire facias has taken place; such lien will prevail over that of a subsequent levy made under execution upon a judgment less than five years old, but which was not a lien on the particular real estate prior to the levy; and can be set aside only upon the motion of the execution defendant. Sherrard's Ex'rs *v.* Johnston, 517.

See MARSHALING EQUITIES. Assigned Estate of Fritch, 140.

See JUDGMENT; MECHANICS' LIENS; MUNICIPAL LIENS.

LIEN OF DECEDENT'S DEBTS. In order to continue the lien of debts not of record against real estate of a decedent who died prior to the act of June 8, 1893, P. L. 392, suit must be brought within five years from his death, and duly prosecuted to judgment. Com'th *v.* Cooper, 318.

LIFE ESTATE. The fact that a devise is in trust is some evidence that it was not testator's intention to grant a fee, and when this is followed by the words, "It is my wish and desire that she shall live in this house free of rent," and there is a blending of the devise with a gift of personalty, which latter is manifestly for life only, and, further, a direction that the trustee shall pay taxes and insurance, a clear intent to grant a life estate only is established. Estate of Louisa Nevins, 297.

See JOINT LIFE ESTATE. Kelly's Estate, 501.

LIMITATION OF ACTIONS. A plaintiff in an action brought two years after the passage of the act of June 24, 1895, P. L. 236, for injuries received before the act was passed, cannot complain of interference by the act with his vested right. If the right of action had been cut off by the retroactive feature of the statute without a reasonable period for its enforcement, so that under the form of regulation there was really a deprivation of the right, a different question would be presented. Rodebaugh *v.* Traction Co., 105.

Under the second section of the act of June 24, 1895, a suit brought February 4, 1898, for injuries inflicted May 17, 1892, is too late. Peterson *v.* Delaware River Ferry Co., 107.

A saving from the operation of a statute for disability must be expressed or it does not exist; hence, as the act is general in its term, an infant is bound by the provisions of the statute. Id.

The fact that suit was brought, but not prosecuted, for the same cause of action against another party within the time prescribed by the statute, cannot avail to toll the statute. Id.

Where the widow of a decedent who was defendant

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LIMITATION OF ACTIONS—*Continued.*
in a judgment, has, by payments on account, reduced the judgment, subrogation to her rights in such judgment cannot be allowed to her creditor who is a defaulting bidder at a sheriff's sale, twelve years after the entry of the judgment, for her payments were voluntary and action therefor barred by the statute of limitations. Hughes *v.* Miller, 346.

The act of June 3, 1887, P. L. 332, conferring upon married women the right to sue and to be sued as if single, repeals the proviso in the act of March 27, 1713, which prevents the statute of limitations from running against married women until they become discovert, and as to claims of married women existing at the time of the passage of act, the statute of limitations began to run at the time of said passage. Nissley *v.* Brubaker, 425.

To take a debt out of the statute of limitations, it must be identified by the debtor at the time of the payment, promise or act relied on as tolling the statute; an identification by the jury by mere inference from collateral matters is not sufficient. Rosencrance *v.* Johnson, 177.

An admission by the debtor of indebtedness to a married woman, made within six years from the date of the act of 1887, if made in terms sufficiently definite to identify the debt, will toll the running of the statute of limitations. Nissley *v.* Brubaker, 425.

LIQUOR LAW. The act of assembly entitled "An act to restrain and regulate the sale of vinous and spirituous, malt or brewed liquors, or any admixture thereof," approved May 13, 1887, is constitutional. De Walt's Appeal, 79.

Upon an appeal from a decree of the court of Quarter Sessions granting a liquor license, the evidence given at the hearing in support, in denial or in rebuttal of an allegation of fact contained in a remonstrance, is not a part of the record and cannot be considered. (Super. Ct.) Re Donovan's License, 34.

If the record be free from irregularity and there appear to be no abuse of the discretion vested in the lower court in granting a license, it will be sustained. Id.

The Quarter Sessions on May 2, 1898, granted a license to H., to sell liquors at retail on certain premises. On May 14, H. left the state, without any intention to return and take charge of the business. On petition by U., the license was transferred to him upon payment of a proportionate part of the fee for a year. The Superior Court reversed the action of the court below on the ground that the word "licensed" in the act of April 20, 1858, § 7, P. L. 366, applied only in cases in which the preceding party had absolutely concluded all the things which it was necessary for him to do in order to obtain his license, and the license must have been actually issued, and license money paid, before it could be held that he was a "party licensed" within the meaning of the act: *held*, that this was too narrow a construction of the act, and that the license was properly transferred by the Quarter Sessions. In re License of Umholtz, 98.

The expression "party licensed" in the act of 1858 does not necessarily mean any more than the person to whom the court has awarded the right to have a license. When the court has acted by granting to the applicant the right to have the license, it has performed its whole function. There is nothing more to be done by the court, hence this action of the court is always considered and spoken of as granting the license. Id.

It is the clear purpose of the act of 1858 to protect

LIQUOR LAW—*Continued.*
the owner of the house for which a license is issued from the loss of business which would result from the lapse of the license by the death or default of the licensee. Id.

LUNACY. The committee of a lunatic is the proper party to proceed in equity for the recovery of possession of the lunatic's personalty, and may maintain such bill against the lunatic's husband, where he denies her title or there is reason to apprehend that he will deal with the property adversely to her interest. Equitable Trust Co. *v.* Garis, 41.

A trust company, under the act of May 9, 1889, P. L. 159, has, in the absence of specific restriction in its charter, corporate capacity to act as committee of a lunatic. Id.

A committee of a lunatic may file a bill on behalf of the lunatic's estate, although the record of the lunacy proceedings has been removed to the Supreme Court, and this notwithstanding the bill is entitled of the same term and number and is in the same court as the lunacy proceedings, for the proceedings are really distinct, notwithstanding the rule of the courts of Common Pleas requiring them to be entitled as of the same case. Id.

It is error to make a general order allowing a committee to apply not only the income of a lunatic's estate, but "so much of the principal as may be necessary after the income is exhausted," to the support of the principal; the court has no right to delegate its discretion to any other tribunal and especially not to the committee, by a general order; the necessity of applying the principal must be determined in each specific instance by the court itself. Id.

MAILING. See LETTER. Fairfield Packing Co. *v.* Southern Mutual Fire Ins. Co., 533.

MALICIOUS USE OF CIVIL PROCESS. Where there is no proof of malice or malicious use of process, but the actual facts and circumstances, which were plainly present, entirely dispel any inference of malice, there can be no recovery of damages for the issuing of a writ. Humphreys *v.* Sutcliffe, 266.

MARRIAGE. Reputation and cohabitation are not marriage, but they are facts from which marriage is presumed. Where the facts, coupled with the repeated declarations of the parties, and their actions, which were equivalent thereto, have the additional effect of corroborating testimony as to the contract of marriage and of showing the sense in which words were used, that they intended a present marriage, a court is justified in finding that a marriage has taken place. (Super. Ct.) Hine's Estate, 109.

MARRIED WOMEN. See HUSBAND AND WIFE.

MARSHALING EQUITIES. The principle of tacking has never been recognized in this state. Assigned Estates of Fritch, 140.

A. held a judgment against X., Y. and Z., Z. being a surety only; B. a judgment against X. and Y.; C. a judgment against Z.; the legal priority of the liens being in the order given. The assignee for the benefit of creditors of X., Y. and Z. sold four pieces of real estate, one the joint property of all the debtors, one the joint property of X. and Y., one the individual property of X., and the other the individual property of Y.: *held*, that as against A., B. had an equity to compel a resort to individual property before the joint property, and C. an equity to compel a resort to the joint property before the individual, and that, therefore, the equities being

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MARSHALING EQUITIES—*Continued.*
counter-balanced, the fund as a whole should be distributed to the judgments in order of legal priority; *held*, further, that a purchase by B. of the lien of A. could not give to B. any additional rights or deprive C. of her equity. Id.

See PRINCIPAL AND SURETY, S. C.

MASTER AND SERVANT. Where the plaintiff, a machinist working on a machine, leaves a place of absolute safety, and goes to one where he is struck and injured by chips thrown from a machine, which is in a defective condition through the negligence of his employer, the defendant, but it does not appear that the machine has previously thrown chips to the place to which the plaintiff goes, and he is injured, he cannot be declared guilty of contributory negligence, as a matter of law, although he has known that the machine occasionally threw chips. Denning *v.* Midvale Steel Co., 399.

While it is the duty of a master to procure proper implements for the performance of his servants' work, yet he may entrust the actual supply of such tools to one of his servants; therefore, in an action by an employé against his employer for damages received in the course of his employment, if the evidence discloses the cause of the accident to have been a worn-out tool, the replacing of which with a new one is shown to have been the duty of a fellow-servant of the plaintiff, it is not error to give binding instructions in defendant's favor. Devlin *v.* Phoenix Iron Co., 429.

M. was riding on the car of a passenger railway company, which from some defect in the electricity, became stalled upon an up grade. After some efforts made by the motorman and the conductor to start the car, V., who had been assisting them, told the motorman that he would go to the car barn near at hand, and bring another car to which the passengers could be transferred. The motorman acquiesced, and as V. approached with the second car he lost control of it and a collision resulted, in which M. was injured. In an action by M. against the railway company, the defendant claimed that V. acted without any authority from the railway company, but offered no evidence to establish this fact: *held*, that it was a question for the jury upon the evidence whether V. acted with authority or as an intruder. Madara *v.* Shamokin & Mt. Carmel Electric Ry. Co., 520.

MEASURE OF DAMAGES. A plaintiff who has expended labor and money on faith of a parol contract for the sale of land, may recover the value thereof as damages for a breach of that contract. (Super. Ct.) Fry *v.* Flick, 198.

Damages, caused by injury to property, caused by a change of grade, must be estimated as of the time the injury is complete, and the injury to be valued is that to the property, without reference to the person of the owner or the actual state of his business. Phila. Ball Club *v.* Philadelphia, 442.

In no event can there be a recovery for estimated loss of business profits occurring or to occur after the injury is complete. Id.

These rules cannot be evaded, when damages are claimed by the owner of a leasehold, by estimating the probable loss of business profits during the time the lease has to run, due to the altered condition of property on account of the change of grade, and treating that sum as the damage done to the leasehold. Id.

When, some years after a change of grade is made, alterations are made in the buildings upon the injured premises, there can be no recovery from the municipality of any part of the expense thereof, on the ground that had it not been for the change a different kind of alterations, costing less, would have been made. Id.

Damages for detention of the sum which should have been paid by the municipality to the owner of injured property upon a change of grade are not payable in all events, but only under proper circumstances, and where the settlement of damages has been delayed by inordinate demands on the part of the plaintiff, damages for detention should not be allowed. Id.

Where a contract stipulates that one party shall furnish to the other certain quantities of a certain commodity, and he fails to furnish as contracted, the other party has a right to go to the general market and buy sufficient of the commodity to meet the requirements of his business, and he may recover for any excess he has to pay over the price named in the contract. Tapper *v.* Sunlight Oil & Gasoline Co., 469.

In an action of trespass to recover damages for injuries received, a charge which does not explicitly instruct the jury what are proper items of expense incurred by plaintiff in the illness caused by the accident from which the action arose, is inadequate; and an instruction that the plaintiff is "entitled to what the jury consider a reasonable and proper allowance for the pain and suffering which he has already endured and is likely to endure in the future," is erroneous. Todd *v.* Traction Co., 523.

MECHANICS' LIEN. Where the plaintiff in a scire facias upon a mechanics' lien has obtained a verdict within five years from the issuing of the writ, but is prevented from entering judgment until after the expiration of that period, by reason of the pending of a rule for a new trial, the judgment upon the discharge of the rule or motion relates to the date of the verdict and the lien is valid. (Super. Ct.) Howes *v.* Dolan, 62.

Under the act of June 26, 1895, P. L. 369, providing that an owner of property may protect himself against mechanics' liens by filing a stipulation that such lien shall not be filed, it is sufficient if the separate stipulation filed is an original document and not a copy, furnishing record notice to all subcontractors of the existence and terms of the covenant against liens contained in the original contract. (Super. Ct.) Blaisdell *v.* Dean, 81.

Semble, that it is better practice if the separate stipulation be a separate and distinct agreement, with provisions of the original contract repeated, and not merely a stipulation reciting that the original contract contains a clause providing that no liens shall be filed. Id.

D. entered into a written contract with G. for the erection of a building, in which contract was contained a stipulation that no liens should be filed. He did not file with the prothonotary the whole contract, but a separate writing signed and sealed by him and by the contractor. In the writing filed, the original contract was recited to have been executed and to contain the necessary agreement against liens. By the stipulation it was further agreed that the contract, together with the stipulation, was executed before work was authorized to commence under the contract. B., a sub-contractor, filed a mechanics' lien against the building, and D. took a rule to have the lien stricken off, which the court made absolute: *held*, not to be error. Id.

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MECHANICS' LIEN—*Continued.*

A clause in a building contract which provides that no liens shall be entered by "any sub-contractors or any other persons" will prevent the filing of a lien by the contractor, notwithstanding the earlier clause in the contract providing that payment to the contractor shall not become due until the contractor shall deliver "a satisfactory release of all liens on the part of all persons who have delivered materials for use in or performed work on the said premises." Commonwealth T. I. & T. Co. *v.* Ellis, 427.

MERGER. When a dowress purchases the fee, although as between herself and the heir it is intended that there shall be no merger of the dower, yet as to third parties such intention cannot prevent the legal effect of the conveyance; hence a purchaser of the land at sheriff's sale on execution against the grantee (dowress) takes the land discharged of the dower. Kreamer *v.* Fleming, 201.

MONUMENT. A monument is not such a building as is contemplated by the provisions of the act of April 19, 1895, P. L. 38. It may take the shape of a memorial hall or other architectural construction, but that is not the general use of the word, and will not be presumed. Van Baman *v.* Leithiser, 389.

MORTGAGE. It is not necessary that a purchase money mortgage, in order to be entitled to precedence as such, should disclose on its face that it is for purchase money, if in fact such is the case. Commonwealth T. I. & T. Co. *v.* Ellis, 427.

Where the defence to a scire facias sur mortgage is that the defendant received but a part of the face of the mortgage and that the balance of the fund was, without the defendant's authority or knowledge, applied to the liquidation of the debt of another to the plaintiff, the question whether information was imparted to the defendant to the effect as above described, at the time of the execution of the mortgage or prior thereto, is a question of fact to be determined, under proper submission, by the jury. Carey *v.* Buckley, 358.

In an action of ejectment, it appeared that S., owner of a tract of land, permitted a school district to use one-half acre of it for school purposes. The school district never claimed title to this half acre, and in subsequently selling the school building it had erected thereon, expressly restricted the sale to the building. The purchaser did not remove the building, and the defendants were in possession of it under the purchaser. The grantees of S., prior to the abandonment of the half acre for school purposes, had executed a mortgage of all their right, title and interest, "the said right being the fee simple in all the coal and other minerals contained therein . . . . together with all and singular the buildings and improvements," etc. Plaintiff claimed under a purchaser at a sheriff's sale under the mortgage: *held*, the plaintiff was entitled to the half-acre lot without any restriction. Waits *v.* Bailey, 561.

Taxes paid by mortgagee. See TAXES. (C. P.) Landreth *v.* McCaffrey, 184.

MUNICIPAL ASSESSMENT. The confirmation of the viewers' report is conclusive of an assessment, there being no fraud or collusion, if made with legal authority and the property owner had notice. (Super. Ct.) City of Philadelphia *v.* Nock, 557.

The purpose of the act of May 22, 1895, to enlarge the occasions on which the power to assess property owners for improvements which benefit their property, is within the constitutional power of the legislature, and is in harmony with the settled policy of

MUNICIPAL ASSESSMENT—*Continued.*

the state that certain improvements incident to the growth and extension of cities, shall be paid for, in part at least, by those who are specially benefited thereby. Greenfield Avenue, 249.

In adjusting the burden of municipal improvements, each property owner is to be credited with his contribution, in property injured, taken or destroyed, and charged with the benefits to his property from the contributions of others. The measure of liability, between each owner and the public, is based on the difference between his contribution and the benefit he receives between the value of his property previous to the improvement and its value afterward, as affected by the improvement. If its value be made less, he is to be compensated for the loss; if made greater, he is to be assessed for the increase. (Super. Ct.) Hays *v.* Borough of South Easton, 432.

See MUNICIPAL LIEN. (Super. Ct.) City of Philadelphia *v.* Nock, 537.

MUNICIPAL IMPROVEMENTS. See MUNICIPAL ASSESSMENT; MUNICIPAL LIEN.

MUNICIPAL INDEBTEDNESS. Art. IX., §§ 8 and 10, of the constitution, and the act of April 20, 1874, P. L. 65, are not violated where it is shown that the annual taxes levied by the commissioners for the year, together with the cash on hand in the county treasury, are in excess of the county's liability including an expense it is proposed to incur. Van Baman *v.* Leithiser, 389.

And see MUNICIPALITY. Houston *v.* City of Lancaster, 217.

MUNICIPALITY. A municipality cannot, by ordinance, provide a new remedy in the nature of an attachment, lien or trust of any kind, whereby subcontractors may enforce payment of their claim out of money due the principal contractor. Lesley *v.* Kite, 537.

It is beyond the authority of councils of a municipality to empower the director of public works to retain money due a city contractor or to withhold the warrant therefor, in order that his creditors who are not parties to the contract may proceed by bill in equity or otherwise against him, and thus have the money due by the city applied to their claims. Id.

Where trolley poles exist within the boundaries of a municipality, the fact that they were erected before the incorporation of the municipality does not deprive the latter of the right to impose a reasonable license fee for the maintenance of said poles. (Super. Ct.) Borough of Lansdowne *v.* Del. Co. & Phila. Electric Ry. Co., 546.

The license fee in such case is not confined to the amount of a reasonable sum to cover the expense of supervision and inspection of the poles. Id.

Where a municipality, in the exercise of its judgment, connects two grades of a sidewalk by steps, it is not, if the steps are properly constructed, chargeable with negligence if a person make a misstep at the steps and is hurt. (Super. Ct.) Rotsell *v.* Warren Borough, 569.

A municipal corporation is not responsible for an injury occasioned by the neglect of a contractor who has in charge the repair of a street, the reason being that the principle of respondeat superior applies to the contractor alone, and in such case, there cannot be two superiors severally responsible. (Super. Ct.) Hookey *v.* Oakdale Borough, 372.

While equally liable to third persons for the same cause, a land owner and a municipality may not be equally liable one to the other. Liability grows out

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MUNICIPALITY—*Continued.*
of neglect of duty and duty may be subordinate to power. (Super. Ct.) Dutton *v.* Lansdowne, 290.

Whenever, owing to the existence of embankments or excavations alongside a public street or highway, it would be reasonably prudent and necessary to erect and maintain railings or other suitable barriers to prevent accidents to passengers traveling along, or coming into or leaving the public street or highway at customary and proper points, it becomes the duty of the municipality to provide such guards or barriers, and its neglect to do so will render it liable to those who, in the exercise of ordinary and reasonable care themselves, sustain injury in consequence of such neglect. O'Malley *v.* Borough of Parsons, 307.

Where damages have been recovered from a municipality for injuries received by a citizen by reason of a defective sidewalk, the corporation may bring suit against the owner of the land abutting the sidewalk, to recover the amount of damages paid in former suit. (Super. Ct.) City of Chester *v.* First Nat. Bank, 180.

Where a borough diverts water, for the purposes of distribution among its citizens, to the injury of a lower riparian owner, it is liable to be made to account therefor in a common law action. (Super. Ct.) Irving's Ex'rs *v.* Borough of Media, 131.

The increase of municipal indebtedness of 2 per cent. on the rateable value of taxable property within a municipality, authorized to be made by the second clause of the 8th section of Art. IX. of the constitution, may not be made except by authority of a popular vote, and this is true whether the increase has been made by successive additions, each less than 2 per cent., or at one time and by one municipal act alone. Houston *v.* City of Lancaster, 217.

Where the 2 per cent. limit has been more than reached by previous additions, though by subsequent reductions the aggregate of the additions may be slightly below the limit, an ordinance creating an additional loan will be invalid. Id.

MUNICIPAL LIEN. Where, at the time the report of viewers, assessing sewer benefits, is filed, a tract is divided into many separate lots, owned in severalty by various registered owners, a lien filed against the entire tract, with all the registered owners as defendants, is sustainable, if, when the sewer was constructed, the land was not subdivided, and abutted on the sewer, though the latter was constructed through private property, and notwithstanding the divided lots have paid for the cost of other sewers in other streets on which they abut. (Super. Ct.) City of Philadelphia *v.* Nock, 557.

In such a case, the city need not apportion the lien among the several owners; it is sufficient if it conform to the viewers' assessment. Id.

Though an abutting owner cannot be assessed save for such proportion of the cost of a main sewer as would pay for a branch sewer sufficient to give the benefits of sewerage to his property, he must raise the question by appeal from or exceptions to the viewers' report. He cannot, after report confirmed, raise the question as a defence to a lien for benefits, filed pursuant to the viewers' report. Id.

MURDER. In a trial for murder, where there is evidence of threats of violence having been made by the deceased against the defendant, in his absence, and not communicated to him, it is sufficient for the purposes of the jury that the court should inform them as to the effect of the evidence as indicating the condition of feeling between the defendant and the

MURDER—*Continued.*
decedent when they approached each other. It is on this ground that testimony as to such threats is admissible. Com'th *v.* Keller, 273.

While it is the duty of the district attorney, in a capital case, to present all the testimony on the material facts, whether adverse or favorable to the defendant, the court may, in its discretion, limit the number of witnesses to be called, and while it is the right of the defendant to have all of the facts connected with the killing fully and fairly disclosed by the prosecution, it is not his right to have them reiterated indefinitely by all the persons who saw the occurrence, and where sixteen eye-witnesses to the killing have been examined, the district attorney may omit to call another witness, although his name is endorsed as a witness on the bill of indictment. Id.

To convict of murder in the first degree the commonwealth must prove beyond reasonable doubt the unlawful killing and the fully-formed purpose to kill; no evidence of the sanity of the defendant need be adduced; the law presumes that, and the presumption is conclusive in the absence of evidence to rebut it. If insanity is the defence, it must be established, like any other fact, by fairly preponderating evidence. Com'th *v.* Heidler, 310.

NEGLIGENCE. Where the alleged cause of an accident is a mere conjecture, unsupported by proved facts exclusively applicable to it, there can be no recovery of damages therefor. (Super. Ct.) Rotsell *v.* Warren Borough, 569; East End Oil Co. *v.* Penna. Torpedo Co., 33.

The exception to the general rule that negligence is not to be inferred, but to be affirmatively proved, is in general limited to case of an absolute duty, or an obligation practically amounting to that of an insurer. East End Oil Co. *v.* Pa. Torpedo Co., 33.

Cases not coming under one or both of these heads must be those in which the circumstances are free from dispute, and show not only that they were under the exclusive control of the defendant, but that in the ordinary course of experience no such result follows, as that complained of. Id.

The mere fact that an oil well becomes inoperative and valueless after an attempt is made to "shoot" it by means of a torpedo, which was misplaced, is not evidence per se of negligence. Id.

Where, in an action for damages for personal injuries caused by the negligence of defendant, there is no positive proof of contributory negligence on the part of the plaintiff, the trial judge must refuse to direct a verdict for the defendant, and must submit the question to the jury to be determined from all the evidence. O'Malley *v.* Scranton Traction Co., 339.

Two actions of trespass were brought, one in the name of a minor by next friend and the other by her father and mother, to recover damages for injuries sustained by the minor's coming in contact with a live electric wire negligently left upon the sidewalk by defendant's employés, and upon the trial the plaintiffs were non-suited because "the plaintiff either saw the dangerous wire and trod upon it, or was negligent in failing to see it, and in either case, having contributed to the accident, we must direct an entry of a compulsory non-suit": *held*, that while there was some evidence on the subject of contributory negligence, it was not of such a character as would justify the court in holding as a matter of law that the plaintiff was guilty of contributory negligence, that conclusion being reached only by inference of fact, such as could be legally drawn only by a jury. Devlin *v.* Beacon Light Co., 340.

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NEGLIGENCE—*Continued.*

Where a rule requires a flag to be placed in a certain position as a signal, and a custom has long prevailed to make the same signal by placing the flag in a different position, then if a flag is placed in the second position it is as effectual in giving notice as if it were placed where required by the rules; one who disregards it when so placed is guilty of negligence. (Super. Ct.) Kunsman *v.* Lehigh Valley R. R. Co., 14.

When a person has been put in sudden peril by the negligent act of another, and, in an instinctive effort to escape from that peril, falls upon another peril, it is immaterial whether, under different circumstances, he might and ought to have seen and avoided the latter danger. (Super. Ct.) Hookey *v.* Oakdale Borough, 372.

Whether or not the actions of the plaintiff, at the time of an accident, constitute contributory negligence, is a question of fact, to be determined by the jury, unless the evidence distinctly shows that plaintiff was either not looking at the impending danger or claimed to have looked and not seen what was manifestly and unavoidably visible, or sees the danger and accepts the risk, believing that he can escape. McGovern *v.* Union Traction Co., 353.

In an action of trespass brought by a father to recover from a railroad company damages for the killing, by one of its trains, of two sons who were at the time of the accident in a wagon accompanied by an employé of the father, it appearing that the said employé was guilty of contributory negligence and it also appearing that the plaintiff, while he had permitted his children on former occasions to go with the employé, had no knowledge that they had so gone on the day of the accident, it is for the jury to say whether at the time of the accident, the children were in the driver's charge by the consent, express or implied, of the plaintiff, and only in the event of its so finding can the negligence of the driver be attributed to the plaintiff. Faust *v.* Phila. & Reading Ry. Co., 354.

Where a municipality, in the exercise of its judgment, connects two grades of a sidewalk by steps, it is not, if the steps are properly constructed, chargeable with negligence if a person make a misstep at the steps and is hurt. (Super. Ct.) Rotsell *v.* Warren Borough, 569.

Whenever, owing to the existence of embankments or excavations alongside a public street or highway, it would be reasonably prudent and necessary to erect and maintain railings or other suitable barriers to prevent accidents to passengers traveling along, coming into or leaving the public street or highway at customary and proper points, it becomes the duty of the municipality to provide such guards or barriers; and its neglect to do so will render it liable to those who, in the exercise of ordinary and reasonable care themselves, sustain injury in consequence of such neglect. O'Malley *v.* Borough of Parsons, 307.

Whether the township authorities are guilty of negligence in leaving a declivity on the side of a road on which an accident occurs without a guard rail, and whether that negligence is the proximate cause of the accident, are for the jury to determine. Boone *v.* East Norwegian Township, 284.

The supervisors of a township are not bound to foresee and guard against accidents happening on their roads through the breaking of harness. (Super. Ct.) Habecker *v.* Lancaster Township, 51.

When the dangerous character of a public highway is manifest, it is the duty of a traveler, who has knowledge of its condition, to use due care to avoid possible injury. Bailey *v.* Brown Twp., 148.

A., who was driving a buggy and leading two horses on a dark and rainy night, attempted to pass over a narrow place having no guard rail or obstruction on the side next the precipice and was dragged over said precipice by the horses which he was leading, thereby receiving injuries from which he subsequently died. In an action against the township in behalf of his children for damages, it appearing that the character of the road was known to A.: *held*, that A. was guilty of contributory negligence and there could be no recovery. Id.

It is not error to charge, in answer to one of defendant's points, that "if the place of the accident was so dangerous that an ordinarily prudent person would not have atempted to pass it, but would have taken another road under the circumstances, then the plaintiff cannot recover in this case and your verdict should be for the defendant," unless it be shown that the remarks are injurious to appellant. Beardslee *v.* Columbia Township, 337.

A person who uses a street or highway which is thrown open for public travel, knowing at the time that there is a safer route which he may take to reach his destination, is not necessarily guilty of negligence because he does not take the safer route. If the alternative route has dangers of its own and the dangers of the route actually taken are not too great and obvious as to deter the general public and ordinarily prudent and careful people from using it, the question of the contributory negligence of a person using it is for the jury. Mellor *v.* Bridgeport, 305.

A railroad company owes no duty to a trespasser upon its right of way, other than that of abstaining from wantonly injuring him, and is not bound to assume that anyone will be on its track at any place other than a crossing; when, therefore, it appears that a person upon the track at a place other than a crossing is run down by a train, the fact that no warning of the approach was given is not evidence of negligence. Brague *v.* Northern Central Ry. Co., 415.

Two railroads used the same track in a yard. The plaintiff, a car inspector of one company, went under a car for the purpose of inspection, and placed in a proper place on the track the proper signal that he was at work under the car; the train of another (the defendant) company, without any notice to plaintiff, ran over the signal and struck the car, injuring the plaintiff: *held*, (1) that the defendant was liable for the negligence of those in charge of its train; (2) that the act of April 4, 1868, P. L. 58, did not apply. (Super. Ct.) Kunsman *v.* Lehigh Valley R. R. Co., 14.

To warrant binding instructions for defendant on the ground of contributory negligence, in an action for damages by being run down by a train, there must be no doubt or uncertainty about the facts attending the accident, and when there is a doubt raised by the evidence as to the necessary facts or the inference to be drawn from them, the case is for the jury and not for the court. (Super. Ct.) Becker *v.* Penna. R. R. Co., 343.

Where the evidence as to the speed of the car by which the plaintiff is injured, its distance from the plaintiff at the time it could have first been seen, and the action of the plaintiff thereafter up to the time of the accident is conflicting, it is error to en-

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NEGLIGENCE—*Continued.*
ter a compulsory non-suit. McGovern *v.* Union Traction Co., 353.

When the plaintiff testifies that he had complied with the mandate to stop, look and listen, and met with the accident as he was leaving and not approaching the crossing, and those in charge of the train testified that they did not see him until close upon him, the question of negligence must be passed on by the jury. Becker *v.* Penna. R. R. Co., 343.

When a railroad company has adopted a rule for the government of its servants in charge of passenger trains that "Any train approaching a station where a passenger train is receiving or discharging passengers must be stopped before reaching the station, and must not proceed until the passenger train moves away or a signal has been given to come on," a passenger intending to get on a train standing at a station is relieved from the application of "stop, look and listen," even though to take the train he must needs cross intervening tracks. But the question whether his actions preceding the accident were negligent or not, must be submitted, under proper instruction, to the jury. Betts *v.* Lehigh Valley R. R. Co., 302.

Plaintiff was driving along a street which crossed a street railway, the view of which was obstructed by an awning at a corner store, and by articles hanging therefrom; he stooped to look, but not low enough to command a view of the street on which the railway was, and drove on, and when his horse's head was at the track, saw an electric car of the defendant some 115 feet off; he made no attempt to stop, but tried to cross the track; his wagon was struck on the hind wheel by the electric car, which approached at an unusually rapid rate, endeavoring to make up time, without slowing up and without having given warning. The plaintiff was thrown out and very seriously injured. There was evidence that had the plaintiff stooped low enough to have looked when he reached the house line, he would have seen the car considerably more than 115 feet away, and that from the house line to the track of the defendant was some twenty-two feet: *held*, that the plaintiff was guilty of contributory negligence, and that a verdict was properly directed for the defendant. Darwood *v.* Union Traction Co., 253.

It is contributory negligence on the part of a passenger to alight from a moving train, even though it be done at the instance of one whom he believes to be a train-man, and although it be done to correct the error on the passenger's part of having got on the wrong train. Rothstein *v.* Penna. R. R. Co., 555.

Where an owner of a lot surrounded by a low wall, habitually places thereon hot coals or cinders, he is not responsible to a child of tender years, who, accompanied by an elder brother, climbs over the wall from the highway and, deceived by the appearance of ashes on top of a pile of coals, goes thereupon and is burned by the underlying hot coals. (Super. Ct.) Feehan *v.* Dobson, 65.

A municipality and the owner of land, both of whom are liable to a third person for negligence, are not necessarily equally liable as between themselves. Dutton *v.* Lansdowne Borough, 290.

Where the evidence shows that defendants were employed by the municipality to construct a sewer along the street upon which plaintiff's house fronted, and used dynamite to make excavations, and there is a conflict of evidence as to whether the use of the dynamite injured plaintiff's house, and the plaintiff's evidence is further to the effect that the trench, necessarily dug by the defendants, was not closed up within a reasonable time after the work was done, in consequence of which, water collected therein and caused the plaintiff's soil to slip down, which allegation is denied by the defendants, the questions of negligence and injury thereby are for the jury. (Super. Ct.) Eardley *v.* Keeling, 437.

Where the plaintiff, a machinist working on a machine, leaves a place of absolute safety, and goes to one where he is struck and injured by chips thrown from a machine, which is in a defective condition through the negligence of his employer, the defendant, but it does not appear that the machine has previously thrown chips to the place to which the plaintiff goes, and where he is injured, he cannot be declared guilty of contributory negligence, as a matter of law, although he has known that the machine occasionally threw chips. Denning *v.* Midvale Steel Co., 399.

Where the throwing of chips is not the result of the regular action of a machine, but only an occasional occurrence, of which the machine gives notice by an irregular action, a workman near the same is not bound, as matter of law, to anticipate and provide against the throwing, and, if injured by being struck by a chip, the question of contributory negligence is for the jury. Id.

Where there is a conflict of testimony as to the relative danger of two positions near a machine, in one of which the plaintiff has been struck by a chip from a machine, the question whether it was negligence to be in such a position is for the jury. Id.

A. agreed to purchase from B. a show case, and upon B.'s asking for a financial reference, A. replied that he was dealing with C., and directed B. to ship the case to C., or in his care. B., without further inquiry, shipped the case to C., and when the carrier refused to deliver to A., the latter secured from C. a writing directed to the agent of the carrier as follows: "Upon A.'s paying all charges you may have on one show case from Rochester, N. Y., and signing receipt for same, you can deliver the case to him." Signed, C. In a suit by B. against C. for the price of said case: *held*, (1) that B. was negligent in failing to inform C. of the arrangement prior to the shipping, if he intended to hold the latter responsible; (2) that under the circumstances the giving of the writing to A. was not such negligence, nor did it constitute such a receipt of the case, as to render C. liable for the price of the same. (Super. Ct.) Farley *v.* Kline, 39.

NEW TRIAL. The action of the court, where the verdict is for the plaintiff, in directing a release or modification thereof, with the alternative of a new trial if the direction be not heeded, has more than once been held a proper exercise of discretion. Where, however, the jury find a verdict for the defendant, in flat disobedience to the direction of the court, it is an abuse of discretion to refuse a new trial unless the plaintiff accept a smaller sum than, under the law as held by the court, he is on the evidence entitled to. Lehr *v.* Brodbeck, 411.

Any condition to the granting of a new trial which deprives a suitor of a legal right, is outside the discretion of the judge. Id.

In an action for damages, where a verdict was rendered for the defendant contrary to the instructions, the court imposed terms as a condition of a new trial, unless the defendant tendered a sum smaller than that claimed in full settlement of the claim: *held*, that such condition deprived the plain-

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NEW TRIAL—*Continued.*
tiff of the right to have the law, as set forth by the court as to the full claim, reviewed, and, therefore, was error. Id.

A suitor has a right to the opinion of the jury upon the evidence, and the court cannot deprive him of this right by refusing to grant a new trial unless he will accept a smaller sum than he claims. Id.

NOTARY PUBLIC. The acts, protests and attestations of notaries public, are, by statute, prima facie evidence, but the power of a notary cannot be extended by the language of the official protest. (Super. Ct.) Farmers' Nat. Bank *v.* Marshall, 68.

NOTICE. Notice is knowledge or information legally equivalent thereto, brought home to the party notified, in immediate connection with the subject to which the notice relates. Fairfield Packing Co. *v.* Southern Mutual Fire Ins. Co., 533.

Where a tract abutting on a sewer is cut up into lots pending proceedings before viewers, one taking a lot, which does not abut on the sewer, takes with record notice of lis pendens and subject to contribution to the total benefits thereafter assessed against the original tract. If he make no defence pending the proceedings before the viewers, he is concluded by the confirmation of their report. (Super. Ct.) City of Philadelphia *v.* Nock, 557.

The receipt, not the mailing, of a letter constitutes notice, and there is no presumption of law that a letter mailed is received, except in the case of notice of dishonor of commercial paper. Fairfield Packing Co. *v.* Southern Mutual Fire Ins. Co., 533.

Where a fire policy requires that additional insurance shall be endorsed on it, or the policy shall be void, notice of additional insurance sent before a fire, but not received till after the fire, is not sufficient to save the forfeiture of the policy. Id.

Where notice of protest is mailed to an endorser, it is necessary that the notary allege, in the certificate or in parol testimony, that the letter enclosing the note of protest was "a prepaid letter" and properly stamped for transmission and delivery, in order to raise any presumption of delivery. A denial of the averment of notice contained in the certificate, by the endorser, is sufficient to carry the question to the jury. (Super. Ct.) Farmers' Nat. Bank *v.* Marshall, 68.

A notice of protest is prima facie evidence that it was received by the person to whom it was addressed, but that prima facie proof may be rebutted by evidence showing that it was not received. Id.

That a partner, who states that he is borrowing money for his firm, gives as the evidence of the indebtedness his own note, does not put the lender on inquiry as to whether the loan is not really for the partner in an individual capacity; it only puts upon him the burden of showing that he believed the money was for the firm and that it actually reached it. Page *v.* Williamsport Suspender Co., 153.

Where a street is plotted of a width of 78 feet, 48 feet of which is the right of way of a railroad, a property owner whose property abuts on the street has such notice that the 48 feet is already subjected to a public servitude, which would probably conflict with any attempted physical opening beyond the 30 feet, as to prevent his recovering damages for the narrowing of the street by the width of the occupation of the railroad. (Super. Ct.) Re Narrowing of Cresson Street, 295.

The superintendent of public printing is not authorized to issue an order for printing, unless the same shall be directed in writing by the executive or

NOTICE—*Continued.*
head of the proper department; but the printer, receiving an order from the superintendent, has a right to assume that the superintendent has been duly authorized to issue it, and this right is not destroyed by the fact that a few days before receiving such an order, the printer received a direction to do the same work from subordinates in an executive department, with which order he did not comply. Com'th *v.* Jones, 377.

ORPHANS' COURT. Where the assets of an estate are claimed by the executor of the testator, and also by the executor of one to whom, it is claimed, they have passed under the same will, the Orphans' Court has jurisdiction to determine which of the two is entitled to possession and control, and its jurisdiction to enforce the right of the proper party is not ousted by the fact that a portion of said assets is realty. Tyson's Estate, 123.

As to jurisdiction in matter of specific performance. See SPECIFIC PERFORMANCE. Reighard's Estate, 239.

ORPHANS' COURT PRACTICE. Where the language of a petition for the dismissal of a trustee follows the act of June 3, 1893, preceded by a preliminary request for a detailed statement of the nature and character of the securities, as required by the act, and contains an averment that the trust fund was in part "badly invested so as to be likely to result in a loss to the trust," the exact words of the act, the court commits no error in treating the petition as having been filed under the act of June 3, 1893, P. L. 273. Appeals of Roland and Halberstadt, 31.

PARENT AND CHILD. Though it is presumed a mother gratuitously maintains her child, especially where she sustains no fiduciary relation to his estate, yet this presumption is rebutted by her declarations, made when the family, including the minor, are present, that she intended to charge for his board. (O. C.) Marschall's Estate, 407.

See NEGLIGENCE. Faust *v.* Phila. & Reading Ry. Co., 355.

PARTNERSHIP. That a partner who states that he is borrowing money for his firm, gives as the evidence of the indebtedness, his own note, does not put the lender on inquiry as to whether the loan is not really for the partner in an individual capacity; it only puts upon him the burden of showing that he believed the money was for the firm and that it actually reached it. Page *v.* Williamsport Suspender Co., 153.

Land held by partners as partnership assets is to be treated as if it were personalty to the extent demanded by the purpose with which it is put into the common stock, but no further. How far that shall go is largely a matter of intention, but the presumption is that it shall extend to all the regular and legitimate uses of the business, and it may be that as to creditors this presumption must be held conclusive. Robinson's Estate, 174.

Where articles of partnership provide that, on the death of a partner, it shall be within the election of his representatives whether the partnership shall continue for the term for which it was made, and that, in the event of no election being made, the partnership shall continue until an agreed date, the death of a partner does not necessarily dissolve the firm. Evans *v.* Watts, 185.

A partner may, without the consent of the other partners, confess a judgment in the firm name for a firm debt, and under such judgment firm property

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PARTNERSHIP—*Continued.*
may be taken in execution. This rule applies against the personal representatives of a deceased member in whom is vested the right to elect whether the partnership shall be continued, and who have expressly or impliedly elected to continue the partnership. Id.

While, ordinarily, an assignment by one partner of his interest in the partnership works a dissolution, yet the articles of co-partnership may provide otherwise. (Super. Ct.) Swoope *v.* Wakefield, 209.

Where the terms of a partnership, or the by-laws of an unincorporated trading association, require its members to be also members of a certain other body, and provide for the division of the interest in the firm into shares, and that in case of a voluntary withdrawal or expulsion of a member, his interest shall be ascertained in a certain way, the assignee of the interest of a member will be entitled to receive the value of the assignor's interest as fixed by the articles of partnership; he cannot require the partnership to be wound up. Id.

PASSENGER. An electric railway company owned and operated two lines running out of a city, S., the termini being about a block apart. A passenger on one line was entitled to receive a transfer from the conductor, good for a ride on the other within a limited time. A. got on a car on one line with the intention of going to a point on the other, and was given a transfer ticket when she reached the terminus of the first line, and, while walking from the curb to the second car. was struck by the trolley pole, which broke while being changed from one end of the car to the other. In an action for damages for the injury thus received: *held*, that A. was, at the time of the injury, a passenger of the railway in the legal sense, which makes it the duty of said company to exercise extraordinary care over its appliances. Keator *v.* Scranton Traction Co., 128.

The acts of a conductor in charge of a train, so far as concerns the recognition of the status of a person, presenting a ticket, as a passenger, are the acts of the railroad company, and are binding upon it. Case *v.* D. L. & W. R. R. Co., 137.

See NEGLIGENCE. Rothstein *v.* Penna. R. R. Co., 555.

PAYMENT. An acceptance, from the maker, of a new note for the same debt will not operate as a payment of the old note, unless it is so intended by the parties, and this is a question for the jury; nor will it operate as giving time to the drawer and so discharge the endorser. (Super. Ct.) Farmers' National Bank *v.* Marshall, 68.

Payments upon building association stock, pledged to secure a loan also secured by a mortgage, will not be applied to the mortgage debt, in the absence of an appropriation thereto by the debtor or by the association, if the right to make such application is delegated to it by the debtor; such appropriation cannot be compelled by a purchaser at sheriff's sale. (Super. Ct.) Erthal *v.* Glueck, 563.

PENSION MONEY. The provision of the U. S. R. S. § 4747 that pension money due or to become due to a pensioner "shall enure wholly to the benefit of such pensioner," does not exempt from execution land in the purchase of which the pensioner has used such money. (Super. Ct.) Aubrey *v.* McIntosh, 164.

PEDDLING. The act of April 17, 1846, P. L. 364, (extended by act of April 13, 1854, P. L. 328, to the county of Lycoming), prohibiting in certain counties the peddling and hawking of any foreign or domestic goods under penalty of $50 for each offence, is constitutional as an exercise of the police power of the state. Com'th *v.* Dunham, 101.

PEDDLING—*Continued.*
The proviso in the act of 1854, "that the manufacture of tin and copperware, hats and confectioneries shall not be embraced within the provisions of this act," refers to the manufacture of the articles mentioned; it is not an authorization of their sale in violation of the act of 1846. Id.

Whilst a prohibition of unlicensed peddling which operates impartially and without distinction between classes, or residents of different civil subdivisions, or of different states, is a proper exercise of the police power of the state, yet a prohibition which arbitrarily excepts certain classes, or residents of certain localities, from its operation, is invalid, as a denial of the equal rights of others. (Super. Ct.) Brownback *v.* North Wales, 258.

PHOTOGRAPH. A photograph of the deceased may be admitted in rebuttal of testimony that the defendant in a murder case was a smaller man than the deceased, but before it is admitted, there should always be proof of care and accuracy in taking the picture and of its relevancy to the issue before the jury; that is to say, where the size of the original of the picture is the object of its introduction, this accuracy can be secured, if the witness identifying the picture is included in the photograph and in such an attitude that his own size relative to that of the deceased is shown. Com'th *v.* Keller, 273.

While photographs are competent evidence and, when properly taken, are judicially recognized as of a high order of accuracy, it is requisite that there should always be preliminary proof of care and accuracy in the taking of them, and of their relevancy to the issue before the jury, before they are permitted to be used in the trial. Beardslee *v.* Columbia Township, 336.

PLEADING. The act of May 1, 1876, § 56, P. L. 68, providing that on the filing of an affidavit denying the necessity of an assessment by a mutual insurance company, or setting up fraud, the certificate of assessment shall not be evidence, applies to evidence, not to pleading; when, therefore, a mutual insurance company sets up a contract of insurance, the necessity for an assessment thereon, and the amount assessed, and attaches copies of its by-laws and of the policies, it presents a case which must be answered by affidavit, under the ordinary rules governing the same. (Super. Ct.) Sparks *v.* Vitale, 150.

Where the plaintiff has complied with a rule of court requiring a specific averment of facts, sufficient to support the claim, to be filed with the statement, and providing that where these averments are not denied by the defendant they shall be taken as true, an affidavit denying liability to plaintiff by reason of fraud and false statements but not denying specifically the facts set out in the averment, will not put the plaintiff to proof of the facts alleged in the averment. Thus, on an action on a fire insurance policy, where the loss and notice of the same and compliance with the terms of the policy and adjustment of loss are averred, an affidavit of defence which alleges false statement of value and destruction by plaintiff of their own property, will not bind the plaintiff to prove any of the facts alleged in the averment which have not been denied. (Super. Ct.) Jacoby *v.* West Chester Fire Ins. Co., 219.

Where a statement relies upon an instrument as the ground of recovery, the copy of the instrument set forth in the statement must show affirmatively

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PLEADING—*Continued.*
that the instrument is one which, if offered in evidence, would be admitted. (C. P.) Dornenhower *v.* Stevens, 264.

The answer of a garnishee to interrogatories filed in support of an attachment execution are not construed with the same strictness as an affidavit of defence. (Super. Ct.) Bell *v.* Phila. Binding & Mfg. Co., 48.

POINTS FOR CHARGE. Where the trial judge at the close of the general charge returns points submitted by counsel, stating he believes that he has answered them in his general charge, it is the privilege, as well as the duty, of counsel to except thereto and have them made part of the record, if the points were not covered by the general charge, or were insufficiently answered. Ensminger *v.* Hess, 366.

When, at the trial of the cause, a point is put as a matter of law, and is refused by the judge without reason therefor being given, it will be presumed that it was refused because as a matter of law it was not good, and not because there was no evidence to support it. (Super. Ct.) Hookey *v.* Oakdale Borough, 372.

POINT RESERVED. See PRACTICE. (Super. Ct.) Zinnel *v.* Bergdoll, 54.

PRACTICE. Where a plaintiff has distinct interests in the same thing he may recover in the same action for an injury affecting both. (Super. Ct.) Irving's Executors *v.* Borough of Media, 131.

I. owned a mill and the land on which it stood. His executors brought action to recover for the diversion of a stream, and were allowed to recover on the basis of the cost of supplying power to the mill to take the place of that of which he was deprived during the time covered by the action: *held*, the fact that W., a son of I. and one of his executors, had an interest in the profits of the mill business, was no bar to a recovery, in view of the fact that W. was an executor of I., and that he, at the end of the trial, renounced all claim to recover for himself. Id.

Where the trial of an issue to determine what, if anything, is due on a judgment, will necessarily involve collateral matters of such a nature and so complicated that they cannot be satisfactorily determined by the verdict of a jury, the proper practice is to file a bill for an account, and to ask for an order restraining proceedings to collect the judgment until such account has been settled and the amount due thus ascertained. Loughlin *v.* Conn, 235.

Where a suit is pending in one court of Common Pleas to determine the rights of the parties thereto as to certain property, including choses in action, and an action is brought in another court by one of the said parties, to recover property affected by said contract, and the defendant does not deny liability, but sets up the pendency of the first suit and that a bill has been filed against him by the other party thereto to prevent his payment of said debt to the first party, the action, on such facts being made to appear, will be transferred to the court in which the first suit is pending. (C P.) De Rustafjaell *v.* Nat. Bank of Commerce, 572.

There is no fixed rule as to the length of delay that will prevent plaintiff's proceeding. It is a question of discretion controlled by the facts of the particular case, and the decision of the court below will not be reversed unless there is a manifest abuse of discretion. (Super. Ct.) Susquehanna Mutual Fire Ins. Co. *v.* Clinger, 261.

Where a defendant files an affidavit of defence to a statement, even if it be a defective one, he cannot

PRACTICE—*Continued.*
afterwards treat it as no statement and enter a judgment of non pros. for want of a statement. Id.

Where it is desired to question the sufficiency of a statement, the defendant should do so either by his affidavit of defence or by demurrer. It cannot be raised upon a motion for a non pros. on the ground that no statement at all has been filed. Id.

After general issue pleaded, it is too late to object to an amendment which brings the record in accordance with the pleadings. Such objections should be raised by demurrer, before plea entered. Madara *v.* Shamokin & Mt. Carmel Electric Ry. Co., 520.

A request to permit the jury to be taken to the place of accident and inspect the pavement which has caused an injury, is an appeal to the sound discretion of the court, and a refusal will not justify the finding that such discretion has been improperly exercised. Mintzer *v.* Hogg, 484.

Where, on the trial, no objection is raised to the admission of evidence, and no request is made for instructions, no error is committed in submitting the issue of fact raised by the evidence as given, to the jury for their determination. (Super. Ct.) Fry *v.* Flick, 198.

Where only two questions are raised by the pleadings in an action on a fire insurance policy, neither one of which is to allegations in the proofs of loss, the rule will be enforced that no evidence is admissible to defeat the recovery which the issues of fact do not require. (Super. Ct.) Jacoby *v.* West Chester Fire Ins. Co., 219.

When a question of law is reserved by the court, it must be of controlling effect, and the facts upon which it arises must be set forth as part of the reservation, or must distinctly and specifically appear on the record and be particularly referred to in the reserved point; it is error to enter judgment on a point reserved which touches one aspect of the case only, and which could have been correctly disposed of without touching other material aspects of the case. (Super. Ct.) Zinnel *v.* Bergdoll, 54.

Practice—Appellate courts. The granting of a new trial is in the discretion of the court of first instance, and will not be reviewed except in a clear case of an abuse of that discretion. Lehr *v.* Brodbeck, 411.

Where the specifications of error do not conform to the rules of court, an appeal may be dismissed. (Super. Ct.) Fry *v.* Flick, 198.

An objection to the confirmation of a report of a jury of view in a proceeding to open streets which, if it had been presented in the original court, would have avoided the entire proceeding, will not be considered as an assignment of error by the appellate court. (Super. Ct.) In re Troubat Avenue, 53.

Where the bond required by the act of 1897, in a proceeding to impeach a confessed judgment, is filed nunc pro tunc, by leave of the court, before the appeal reaches the appellate court, and without objection, an objection that the proceedings were irregular for want of a bond, when made upon the argument of the appeal, is too late. Page *v.* Williamsport Suspender Co., 153.

Conclusions of facts upon which the action of the lower court is based in discharging a rule to open a judgment will not be disturbed by the appellate court. Harrisburg *v.* Guiles, 404.

Where exceptions depend almost wholly on questions of fact passed upon by the court below, and these facts are found against the appellant, the ap-

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PRACTICE—*Continued.*
pellate court assumes them to be as found, and will not reverse. Nelson *v.* Steen, 480.

Where a point is refused without reason being given therefor, it will be assumed on appeal that it was refused because it was not good as matter of law and not because unsupported by evidence. (Super. Ct.) Hookey *v.* Oakdale Borough, 372.

When the referee's finding of facts has been reversed by the court, the Supreme Court will adopt the facts as found by the court, in the absence of a clear conviction that the court has erred, especially where its finding agrees with a finding of the facts by a jury in another proceeding in which the same questions were raised. Merchants' & Manufacturers' Nat. Bank *v.* Kern, 462.

The findings of fact by a judge, sitting as chancellor, under the new equity rules, while not binding on the appellate tribunal, will not be disturbed except for clear error. Mere preponderence of testimony against them is not sufficient to lead to a reversal if there is testimony which, if believed, will warrant them. Steinmeyer *v.* Siebert, 61.

Under the act of May 19, 1897, P. L. 68, where a party is deprived of going to the jury, but judgment is entered in his favor, non obstante veredicto, the practice which will be followed in future, where the attention of the appellate court is called to a desire for appeal by the successful party below in the event of a reversal, will be merely to reverse the judgment and send the record back to the court below to enter such judgment as it should have entered in the first instance. Hughes *v.* Miller, 346.

Where the statement shows a good cause of action, and the defendant has not on the trial asked for binding instructions in his favor, although the evidence for plaintiff does not make such a case as should be submitted to the jury, the court in reversing a judgment for plaintiff may grant a new venire. (Super. Ct.) Feehan *v.* Dobson, 65.

PRESCRIPTION. Where a claim to take water rests upon prescription, the extent of the claim is the amount of water taken for twenty-one years before action was brought. (Super. Ct.) Irving's Executors *v.* Borough of Media, 131.

PRINCIPAL AND AGENT. See GUARANTEE. Crawford *v.* Pyle, 1.

PRINCIPAL AND INCOME. Premium paid for investments is chargeable to the principal of the trust estate and not to the income from them; therefore, a trustee may not withhold a part of the income to meet a possible diminution of principal. So much the more is this true when the trust instrument directs "the net income" to be paid to the life tenant. (O. C.) Boyer's Estate, 528.

PRINCIPAL AND SURETY. The right of a surety to have the property of the principal applied in his relief accrues the moment his position as surety is established; he does not have to wait until he has actually paid the principal's debt. Assigned Estate of Fritch, 140.

In an action against a surety, the obligation of a bond cannot be extended beyond the plain import of the words used. City of Lancaster *v.* Frescoln, 288.

Where a judgment is entered on an official bond, conditioned for the faithful performance of the duties of the office, the fact that the official had been negligent prior to the execution of the bond, that the city officials had knowledge of said negligence and did not inform the bondsmen thereof, is not sufficient cause for the opening of the judgment as against the sureties, in the absence of proof of willful concealment on the part of the officials. Harrisburg *v.* Guiles, 404.

See SURETY.

PROMISSORY NOTE. The president of a corporation has no authority virtute officii to bind it by an endorsement of a note of a third party for which the corporation receives no consideration. (Super. Ct.) Worthington *v.* Schuylkill Electric Ry. Co., 118.

A note not due may be attached, but if it passes into the hands of a bona fide purchaser before maturity, and without notice of the attachments, the attaching creditor will take nothing. (Super. Ct.) Bell *v.* Phila. Binding & Mfg. Co., 48.

Semble, in such a case, the court has power to prevent the negotiation of the notes by defendant by requiring that the same be placed in such custody as will prevent their misappplication. But until it appears by the record that the notes are so deposited, judgment cannot be entered on the answers, although the execution be restricted until the notes are deposited with the prothonotary. Id.

An acceptance from the maker of a new note for the same debt will not operate as a payment of the old note, unless it is so intended by the parties, and this is a question for the jury; nor will it operate as a giving time to the drawer and so discharge the endorser. (Super. Ct.) Farmers' National Bank *v.* Marshall, 68.

It is not required of the bank, holding a note and at the same time funds of the maker sufficient to meet the said note, to apply the said fund in payment, or, failing to do so, lose the right of recovery against the endorser; such requirement exists only when at maturity of the note the bank has sufficient funds of the maker. Id.

Demand on the maker of a promissory note and notice of non-payment are not equivalents in legal effect. The principal and distinctive purpose of a demand on the maker is not merely to lay ground for notice of dishonor to endorsers, but to obtain payment from the principal debtor as required by the contract. It is reasonable to suppose, in the absence of averment to the contrary, that this is the object of a demand where the maker is the executor of the endorser, as the holder has a right to look to the maker alone. Where a defendant, who is both the maker and the executor of an endorser, is held in the latter capacity, and denies notice as such, the question of intent of the demand is for the jury. (Super. Ct.) Deacon *v.* Smaltz, 245.

A statement set up that the defendant was the maker of a promissory note upon which his sister was endorser, and by whose will he was appointed executor of her estate. The note fell due after her decease, was presented to the maker, and payment demanded, which was refused, and answer made "It will be attended to." Thereupon the note was duly protested and the defendant, as executor of the estate of his sister, the first endorser, was duly notified. The affidavit of defence denied the averment that the executor was notified, and averred that "no notice of the non-payment of said note was in fact given to or received by the said T. W. Smaltz, executor of the said Mary E. Smaltz, deceased, endorser of said note as aforesaid": *held*, the case was one for the jury. Id. (RICE, P. J., and ORLADY, J., dissent.)

Semble, an action commenced on a promissory note on the day of its maturity is not premature if the note is payable at a bank, or if payment is refused

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PROMISSORY NOTE—*Continued.*
after demand on that day. Humphreys *v.* Sutcliffe, 266.

PROXIMATE AND REMOTE CAUSE. The backing strap of a wagon in which the plaintiff was traveling on a township road broke, causing the horse to veer to one side, and, going over a low row of stones at the side of the road, he fell into a quarry hole, the plaintiff being injured: *held*, the proximate cause of the plaintiff's injury was the breaking of the strap and not the lack of a sufficient guard at the side of the road in front of the quarry hole, and consequently that the township was not liable to the plaintiff. (Super. Ct.) Habecker *v.* Lancaster Township, 51; and see Boone *v.* East Norwegian Twp., 284.

PUBLIC PRINTING. The public printer is a contractor, subject to the direction of the superintendent of printing and bound to obey the legal orders of that officer; and, on receipt of an order from the superintendent, the printer is not bound to inquire whether that officer was duly authorized to issue the said order. Com'th *v.* Jones, 377.

The superintendent is not authorized to issue an order for printing, unless the same shall be directed in writing by the executive or head of the proper department; but the printer receiving an order from the superintendent has a right to assume that the superintendent has been duly authorized to issue it, and this right is not destroyed by the fact that a few days before receiving such an order, the printer received a direction to do the same work, from subordinates in an executive department, with which order he did not comply. Id.

QUESTIONS OF LAW AND FACT. Improbability that a fact alleged could occur in a certain way is an argument addressed to the jury; it is not the province of the court to reject the testimony upon the ground that it is too improbable to be believed. (Super. Ct.) Collins *v.* Insurance Co., 230.

K. alleged that he was employed by R. to sell a railroad and power plant for $160,000, for which he was to receive, in case of success, $1000; that he reported that he could sell it for $150,000, whereupon R. accepted the offer for $150,000, and promised to pay K. $1000, and the sale was consummated. R. maintained that at the time of the sale, as well as afterwards, K. was in his employ, and whatever services he rendered, including those in connection with the sale, were within the scope of his employment, and that the alleged special contract, assuming it to have been made, was without consideration. The case was submitted to the jury under the following instructions: "The plaintiff's claim is based upon an alleged special promise to pay him $1000, to effect the sale of this railroad and power plant, and that is the thing you have to consider. If that promise was made by the defendant, he will have to live up to it, because the property was sold; and if he did not make the promise, the verdict ought to be for the defendant. If, after considering what has been said, you honestly believe R. made that promise to K. of $1000, your verdict ought to be for the plaintiff for $1000, with interest. If you believe he did not make that promise, your verdict ought to be a clear verdict for the defendant": *held*, that the case was properly left to the jury. Keyser *v.* Reilly, 240.

Whether or not notice of a defect in the sidewalk has been brought home to the authorities of a municipality, is a question of fact for the jury. (Super. Ct.) Dutton *v.* Lansdowne, 290.

QUESTIONS OF LAW AND FACT—*Continued.*
Where a given state of facts is such that reasonable men may fairly differ upon the question whether there was negligence or not, the determination of the matter is for the jury. Betts *v.* Lehigh Valley R. R. Co., 302.

Plaintiff undertook to deliver 800,000 feet of lumber on cars, to be paid for as each carload was delivered; he delivered 284,000 feet and sued to recover the price thereof, and excused his failure to deliver the full quantity on the ground that the defendant had failed to pay for the lumber as it was loaded on the cars: *held*, a case for the jury. Easton *v.* Jones, 490.

Where an explanation of a contradiction is given, it is error for the judge to assume that it is true; that is for the jury. Fairfield Packing Co. *v.* Southern Mutual Fire Ins. Co., 533.

The defendant asked the court to instruct the jury as follows: "A clause in a policy of insurance providing that the assured shall, if required, furnish verified plans and specifications of any building destroyed, is reasonable, and it is the duty of the insured to comply, and the burden of proof is on him to show that he is unable to furnish the same, and that he made a reasonable effort to do so and was unsuccessful, and if his own evidence show that he made no effort to comply with the demand of the company or that he could have obtained with reasonable diligence the information required, he cannot recover on this policy." The court in the general charge practically affirmed this point, but formally negatived it at the close: *held*, that the verbal inconsistency was well calculated to mislead the jury, and the defendant would have the right to complain thereof if the question had been one for the jury, but as it was a question for the court it should have been decided without submission to the jury. Cummins *v.* German American Ins. Co., 549.

Proofs of loss made out by the insured cannot be received in evidence for the jury or be read by them; they are only evidence for the court that it may determine whether a condition precedent to recover has been sufficiently complied with to warrant the institution of suit. As the stipulation in the policy requiring them is in writing and the proofs are in writing, the interpretation of the contract and the alleged writing claiming to be a compliance with it, are for the court. Id.

When a beneficial society, against which an action is brought to recover a sum due on the death of a member, sets up as a defence that the deceased in his application falsely asserted that he had not been attended by a physician for one year prior to application, and gave false answers as to hereditary disease in the family, which defence is supported by the testimony of a physician that he had attended the member within a year, and by that of other witnesses as to the hereditary disease, credibility of the witnesses for the defence, and the weight to be given them against the testimony produced in rebuttal, are for the jury. Wall *v.* Royal Society of Good Fellows, 562.

RAILROAD. Where an intending passenger applies to the ticket agent of a railroad company for a ticket to A., via the agent's road and a connecting railroad, and is told that such ticket cannot be sold, but that one to B., on the same connecting road, and more distant than A., can be sold, whereupon she purchases a ticket to B., and is carried to the point of connection between the two roads and proceeds by a train of the second road to C., a station on the

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RAILROAD—*Continued.*
way to A. and B., the train going no further, and, after waiting at C., takes the next train for A., presents her ticket and informs the conductor that, although it reads to B., she wishes to go to A., and asks to have her trunk put off there, whereupon the conductor takes her ticket, punches and returns it to her and, later, takes from her her trunk check and ticket, assuring her that it is all right, the company cannot contend that, having broken her journey at C., she could not be considered as lawfully riding on the ticket presented, and is bound to treat her in all respects as a passenger; and hence, if the train overrun A., and is then stopped and the passenger, on being told to get off and walk back to the station at A., does so and, it being night, falls, through not being able to distinguish obstructions in the way, and is injured on her way to the station, the company is liable in damages. Case *v.* D. L. & W. R. R. Co., 137.

A railroad corporation cannot appropriate land previously appropriated by a gas and water corporation, and essential to its present or future needs, unless the necessity is so absolute that without it the railroad company's franchise will be defeated. No considerations of expense or inconvenience, in the absence of such necessity, will warrant such taking, under the claim of eminent domain. Scranton Gas & Water Co. *v.* Northern Coal & Iron Co., 281.

RE-ARGUMENT. On appeal, a decision was reversed upon one question presented and order made that the account should be restated and executors surcharged to the extent of the claim. When the record went back to the Orphans' Court, an auditor was appointed, who reported that "the relief sought by W. and S., and to which the Supreme Court decides them entitled, would be effected by simply in this proceeding surcharging the executors with the amount of money in controversy," but, without stopping there, inferred that the intention of the appellate court was to subordinate "mere questions of procedure to the larger effort of carrying out the real purpose and intention of the testator," and proceeded to settle the whole matter in accordance with equity: *held*, that this action on the part of the auditor, while laudable in intention, was founded on a mistake, but as investigation brought forth facts of which had the appellate court been informed, it would have considered all the rights involved in the estate, which consideration might have affected the appellant's rights, the interests of justice would be best served by a re-argument of the original case, upon which the rights of all parties interested might be settled; re-argument ordered accordingly. Lefevre's Estate, 553.

REFEREE. The award of the referee, under the act of June 16, 1836, can be excepted to only on the grounds, (1) that the referee misbehaved; (2) that he has committed a plain mistake of fact or law; (3) that the award was procured by corruption or undue means; and the corrective power of the court is limited to a reference back. Merchants' & Manufacturers' Nat. Bank *v.* Kern, 462.

Under the act of 1889, where a reference is made in accordance with the provisions of the act of 1874, the court has power to confirm, alter, amend or reverse the referee's report or send it back for further proceedings; this includes the power to alter his findings of fact, and find the facts in accordance with the court's view of the evidence. Id.

When the referee's finding of facts has been reversed by the court, the Supreme Court will adopt

REFEREE—*Continued.*
the facts as found by the court in the absence of a clear conviction that the court has erred, especially where its finding agrees with a finding of the facts by a jury in another proceeding in which the same questions were raised. Id.

RELEASE. A release is a matter of contract, and cannot be forced upon an unwilling debtor, and while its acceptance may ordinarily be presumed, yet a refusal to accept deprives it of all effect. Fisler *v.* Stewart, 121.

A. held a judgment which was a first lien on land of B., on which A. also held a mortgage; this land was taken in execution on a third lien held by C. A. filed a release of his judgment as to said lot; B. on the same day filed a refusal to accept the release: *held*, the mere filing of the release did not render the mortgage the first lien on the land and save it from discharge by the sheriff's sale. Id.

REMARKS OF JUDGE. Exceptions to remarks of the judge at nisi prius, which are taken only under the act of May 24, 1887, will not be favored, and the rule that the error assigned must appear to have been injurious to the appellant, will be most rigidly applied to such cases. Beardslee *v.* Columbia Township, 336.

RESCISSION. Where a transaction is merely contrary to good faith and fair dealing, upon the discovery of the fraud it is within the power of the defendant to either ratify or rescind the contract, but it is his duty to act promptly and, in case he elect to rescind, to notify the plaintiff without delay. Omission to repudiate within a reasonable time is evidence, and may be conclusive evidence, of an election to affirm the contract. (Super. Ct.) Acetylene Light Co. *v.* Smith, 86.

RES ADJUDICATA. The rule that what has once been judicially determined shall not again be made the subject of litigation, extends to every question in the proceeding which was legally cognizable. City of Lancaster *v.* Frescoln, 288.

A municipality entered into a contract with defendant for the construction by the latter of a reservoir, which provided that defendant should pay the wages of labor and the price of material used, and give bond to do so. He failed to pay for certain material and action was brought upon the bond in the name of the municipality to the use of those who furnished the material. The defendant had, in a prior action against the municipality, recovered a balance found to be due him on the contract: *held*, the prior action by the contractor to recover the balance claimed to be due him under the contract necessarily included every matter touching the present right; that the claims for labor and materials were unpaid was a proper ground of defence in that action, and all of these matters must be considered as conclusively adjudicated; that the municipality could not maintain this action, and as the use plaintiffs have no standing here except upon its rights, it follows that they cannot recover. Id.

ROAD LAW. Properties abutting on the first-opened part of a street which had but one outlet at the only cross street, cannot be assessed benefits for converting the cul-de-sac into a through street extended to meet another cross street and outlet. (Super. Ct.) Re Opening of Orkney Street, 9.

An objection to the confirmation of a report of a jury of view in a proceeding to open streets which, if it had been presented in the original court, would have avoided the entire proceeding, will not be con-

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ROAD LAW—*Continued.*
sidered as an assignment of error by the appellate court. (Super. Ct.) In re Troubat Avenue, 53.

In proceedings to lay out a private road, substantial conformity between the petition and report is all that is required. (Super. Ct.) Re Private Road of Roche, 166.

Where the report of viewers and a draft attached and referred to in the report fix one terminus and the courses and distances of the entire route, so that the other terminus is easily ascertainable and the whole road located with certainty, the report is sufficient. Id.

It is to be taken for granted that every objection made to a road report and overruled by the Quarter Sessions, which is in its nature capable of being proved, is untrue in point of fact, unless the contrary appears from the record. Id.

The mere plotting of a street, less than thirty feet in width, which has been previously a private way, and the placing of the same upon the plan of the city of Philadelphia by the board of surveyors, does not make such way a public street. (Super. Ct.) MacKellar *v.* Seeds, 182.

The mere revision of street lines on the plans of the city streets whereby "on paper" the street is narrowed, does not give rise to a cause of action. (Super. Ct.) Re Narrowing of Cresson Street, 295.

The plotting of a street upon the city plan is not a guaranty of future performance, and is nothing more than a notice of a present intention. Id.

When a portion of a street has been stricken from the confirmed plans of the city of Philadelphia, by the revision of the plan embracing such street, under authority of an ordinance of councils, and thereafter the portion of such street so stricken from such plan is occupied by the abutting property owners with the knowledge and acquiescence of the city, and permanent improvements are thereon erected whereby the general public and the owners of property having a special property right in such portion of such street are deprived of the use of such portion, it is too late for the city to suggest that such a street has never been legally vacated; and it will be estopped from asserting that such a vacation was unauthorized and illegal. Melon Street, 361.

The method to be pursued for the collection of damages by reason of such a vacation is by proceedings in the court of Quarter Sessions under the act of April 21, 1858, P. L. 385. Id.

SALE. A. was in the habit of stopping at the store of B. whenever the latter had a new selection of prints, and after looking over them would select certain of them and say, "Put them away for me," "I will take this," or "I will take that," and the prints were thereupon put away in a drawer to which the salesman and A. alone had access. The prices were marked on the prints, either by A. or the salesman in his presence. A. was in the habit of making mats and making short notes about his pictures, and when he had done this, he would take them to his home, catalogue them and put them away in portfolios. No bills were sent to A. until he took away the prints, and then only for those thus removed; the others were charged up against A. and were not thereafter included in B.'s stock. After A.'s death, B. presented a claim against his estate for the value of a large number of prints still in the drawers: *held*, that the circumstances above recited constituted an absolute sale. Cope's Estate, 191.

While there is no fraud, per se, in a sale of personal property to a creditor, simply to prefer him,

SALE—*Continued.*
unless there is some change of possession as to the property, either actual or symbolical, so as, in some public manner, to manifest the change of ownership, the sale is constructively fraudulent as to creditors. Lehr *v.* Brodbeck, 411.

See VENDOR AND VENDEE.

SCHOOL DISTRICTS. An act providing that where a borough, which is also a school district, is divided, the rights of the two divisions in the school property, etc., may be ascertained and adjusted in a certain way, is not unconstitutional as regulating the affairs of a certain school district to the exclusion of others. In re Sugar Notch Borough, 473.

SET-OFF. When improvements have been put upon the land by the defendants while they were in possession, but subsequent to the entry of judgment in the court below, no allowance can be made for these expenditures by way of abatement from the amount to which the plaintiff in the suit is entitled. Gleeson's Estate, 321.

When the defence relied on in an affidavit of defence is set-off, the claim must be alleged with exactness not only as to source and character, but also as to amount. (Super. Ct.) Anderson *v.* Williams, 418.

SHERIFF'S SALE. The purchaser at a sheriff's sale of land charged with a ground rent, takes the land free from the lien of arrears; and a judgment subsequently obtained against the covenantor for arrears of ground rent, acquires no lien on the property which will support a sheriff's sale and carry the title; and such a purchaser is entitled to an extinguishment of the rent under a covenant (in the deed reserving the same) that the rent should be extinguished upon payment of the principal and arrearages, by paying the principal and arrearages from the time he took title to the land. (Super. Ct.) Sergeant *v.* Fleckenstein, 115.

In the absence of countervailing equities, a debtor whose land has been taken in execution has a right to insist on the regular process of law, with its regular and usual result, the discharge of liens and their payment out of the proceeds of a sheriff's sale, according to their legal priority, and of this right he cannot be deprived at the will of the first lien holder. Fisler *v.* Stewart, 121.

An order that a sheriff's sale of land be made as though the land were clear of liens, and that whatever encumbrances shall be found not to be discharged shall be taken as part of the purchase money, is irregular and without authority. Kreamer *v.* Fleming, 201.

Inadequacy of price is not sufficient ground for setting aside a sheriff's sale where there has been no irregularity and misapprehension as to material facts. Myers's Appeal, 329.

There is no material difference in the direction as to advertising sales of real estate, between the act of March 27, 1824, and the act of June 16, 1836, the former directing the sheriff to advertise "once a week *for* three successive weeks," and the other to advertise "once a week *during* three successive weeks;" in either case it is sufficient if the advertisement be inserted in three successive periods of a week each, although the insertions be not on the same day of the week and they may not cover twenty-one days between the first advertisement and the sheriff's sale. McKee *v.* Kerr, 541.

SIDEWALK. The duty to keep the sidewalks in a municipality in order, is imposed by law on the land owner and municipality equally, and when neither performs this duty there is a concurrent

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SIDEWALK—*Continued.*
negligence for which they are equally liable to third persons, and for which they may be sued in one action. (Super. Ct.) Dutton *v.* Lansdowne, 290.

A plaintiff in an action for damages for injuries received by the turning of a grating in the sidewalk, cannot maintain the suit without proof of the negligence charged in the statement of his claim, and if the evidence falls short of being such as would authorize a jury in finding the material facts as alleged, the court must enter a non-suit. Rushton *v.* City of Allegheny, 492.

Where the sidewalks of a city contain coal shutes duly authorized by the municipality, compliance with the regulations relating to them is all that is required. Id.

SOLDIERS' HOME. A regulation, legally adopted by the governing board of a soldiers' home, providing for turning into the treasury of the home the excess of pension beyond a fixed sum received by an inmate, is not in conflict with the act of congress of February 28, 1883, 22 U. S. Stat. 432. Brooks *v.* Hastings, 333.

SPECIFIC PERFORMANCE. A decree for specific performance of a contract to buy land will not be made where the title tendered is one which will expose the person holding it to litigation, or where the equities are against such a decree. Reighard's Estate, 239.

A. died, seised of a farm and mountain land, to which he thus referred in his will: "My farm on which I now reside, and the mountain land belonging to the same I wish could be rented for say five years and then sold, or should a good opportunity offer, then the same shall be sold sooner, and I desire that Charles buy the same." His executors entered into a contract with P., by which they sold to him the land for $6500, payable in instalments, he to have possession of the property on April 1, 1896, "with the privilege to store goods on the premises by consent of the tenant and even to move sooner if arrangement" could be made with him. Such arrangement was made, and P. and his family entered upon the premises shortly before the first of March, 1896. A few days thereafter, he died, leaving a widow and two daughters, one of whom was a minor. Letters of administration were granted to his daughter, and the executors of A. tendered a deed of the land described in their contract with her father and demanded that $3000, due by the terms of said contract, be paid. This the administratrix declined to do, on the ground that the estate of her father was insufficient to pay the debt created by it; that his widow and daughters had no estate of their own with which to discharge the debt; and that they were not qualified to operate the farm. The executors then filed a petition in the Orphans' Court for a decree for specific performance. The court refused the decree on the grounds that it was exceedingly doubtful whether the deed tendered would have conveyed a marketable title, and that no legislation pertaining to the Orphans' Court expressly authorized a decree of specific performance where the conditions were such as appeared in the case at bar: *held*, no error was committed. Id.

STATUTE OF FRAUDS. Where a guarantor is interested in the debt guaranteed, an oral guarantee will bind him. Crawford *v.* Pyle, 1.

One who holds a mortgage, with a blank assignment, signed by the mortgagee, and who sells it to a third person, may make a binding guarantee of the payment of said mortgage by parol. Id.

STATUTE OF FRAUDS—*Continued.*
The statute of frauds is satisfied by a note in writing, not under seal, signed by the party called on to fulfill it, if the other has accepted it. Witman *v.* Reading, 143.

There need not be a physical delivery of a writing if what was done clearly appear to have been intended as a delivery, e. g., where the grantee, with the knowledge and consent of the grantor, makes expenditures on the faith of the writing. Id.

The mere fact that it is intended to execute a more formal writing to the same effect does not prevent a writing which is definite as to the terms of a bargain, when acted upon by one party, from taking effect as a contract until the execution of a more formal writing. Id.

STOCK. A corporation, to which by its charter is given no express authority to issue capital stock, and the purpose of whose creation can be fulfilled without such issue, has no right to issue capital stock. Cooke *v.* Marshall, 159.

Where the charter of a corporation provides that the stock shall not be assessable by any authority of the company, but shall be assessable "only in the event of the insolvency of the company and upon the legal demand of outside creditors," the insolvency meant is an insolvency legally determined by a court of competent jurisdiction; and where the receiver is directed to collect from stockholders the unpaid amounts due upon their shares, the amount so due is not a debt payable to the company and liable to attachment as such by a creditor, but payable to the receiver, to be administered as part of the trust fund for all creditors alike; hence, where an attachment has been issued by a creditor of the company against shareholders as garnishees, and a receiver is afterwards appointed and directed to collect, the amount will be taken by the receiver and not by the attaching creditor. (Super. Ct.) Jagode *v.* Smalley, 543.

STOCK GAMBLING. Dealing in stock, even upon margin, is not, in itself, gambling. The test of the legitimacy of a stock transaction is, whether there was or was not, under any circumstances, an intended delivery of the stock, and if not, then the transaction becomes a mere wager on the rise and fall of prices; but if there was, in good faith, a purchase, then the delivery may be postponed or made to depend on a future condition, and the stock carried on margin or otherwise in the meanwhile, without affecting the legality of the operation. Taylor's Estate, Howard's Appeal, 513.

Delivery is not in itself a material fact; its only value is as evidence of the intent to make a bona fide sale. Id.

Where the auditor of an account of an assignee of an insolvent finds as a fact that the transactions between the broker and a customer were, so far as the broker was concerned, actual purchase and sale of stock, this should be fairly persuasive evidence that, on the part of the customer, the transaction was not a gaming one. Id.

A man may speculate by buying and selling upon expectation of the rise and fall of the market and he is not thereby gambling. Whether he dealt for that purpose or for investment, and whether he held his purchase for an hour or a day or a year, are not material except as evidence. The test is whether he bought and sold, and not merely settled the differences with no intention at any time of taking his purchases or delivering his sales. That, and that

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STOCK GAMBLING—*Continued.*
only, is gambling. Taylor's Estate, Austin's Appeal, 514.

Evidence must be clear that in the transactions between customer and broker no actual delivery of the stock was intended, to warrant a finding that it was a wagering transaction. Taylor's Estate, Lex's Appeal, 516.

When the customer of a broker elects to treat a transaction as a purchase of stock, by tendering the balance due on a running account and demanding a delivery of the stock and the return of the collateral deposited to cover his dealing with the broker, the transaction becomes legal no matter what the evidence may show other and prior transactions to have been. Id.

SUBROGATION. Where the widow of a decedent who was defendant in a judgment, has by payments on account reduced the judgment, subrogation to her rights in such judgment cannot be allowed to her creditor, who is a defaulting bidder at a sheriff's sale, twelve years after the entry of the judgment, for her payments were voluntary and action therefor barred by the statute of limitations. Hughes *v.* Miller, 346.

SUPERIOR COURT. The provisions of the act of June 24, 1895, P. L. 212, creating the Superior Court, which declare that "the said court shall have no original jurisdiction, except that it may issue writs of habeas corpus," give the right to issue a habeas corpus to annul an order, decree or judgment of a lower court only in cases where revisory jurisdiction is given the Superior Court over such lower court. (Super. Ct.) Com'th *v.* McAleese, 207.

A. applied to the Superior Court for a writ of habeas corpus, complaining that he was illegally held in custody under a commitment issued after a hearing in the Common Pleas on a warrant of arrest under the act of July 12, 1842, based upon debts exceeding in amount $50,000, claiming that the proceedings were void because the statutory proceedings under which they were issued were superseded by the bankrupt law of 1898: *held*, that as the proceedings attacked were in the Common Pleas court, and by reason of the amount in controversy were not reviewable in the Superior Court, the latter court had no authority to discharge the relator under habeas corpus. Id.

SURETY. J. was cashier of a bank which made an assignment to plaintiff for benefit of creditors. The assignee brought suit upon his official bond to recover six items of alleged loss to the bank by reason of the defalcation and other misconduct of the cashier. The bond was in the penal sum of $25,000, but the sureties claimed that they had paid money to a much larger amount and that the whole amount of the money thus paid came to the assignee: *held*, that while it did not appear that there was any specific appropriation of any particular payments made by the bondsmen, it was clear that those made were largely in excess of the whole penalty of the bond, and were actually applied to the extinguishment of the cashier's indebtedness; and that the jury having decided in favor of the defendants upon these facts, the court committed no error in submitting to the jury for decision, the question whether the bond had been paid or not. Gunster *v.* Jessup, 269.

SURRENDER. A tenant for years cannot relieve himself from liability to pay rent by vacating the premises during the term and sending the key to his landlord; to make the giving up of a key a

SURRENDER—*Continued.*
surrender, it must be accepted by the landlord with the intention of releasing the tenant from the liability. (Super. Ct.) Gardiner *v.* Bair, 83.

SURVIVAL OF ACTIONS. Sec. 1 of the act of June 24, 1895, does not bestow a new right of action; it merely sustains the plaintiff's right after the death of the defendant, the words of the act are general, and there is nothing to indicate that they were not intended to establish a general rule, applicable to all cases within their terms, to wit: "every suit to recover damages for injury wrongfully done to the person." Rodebaugh *v.* Traction Co., 105.

The second section of the act merely limits the time within which such action must be brought. Neither the subject nor the title of the act can itself constitutionally be attacked. It has but one subject, creates no new right, but provides for the regulation of a class of rights which existed before, and the title is, grammatically as well as to the general intent, neither inadequate nor misleading. Id.

TACKING. The principle of tacking has never been recognized in this state. Assigned Estates of Fritch, 140.

TAXATION. The act of May 12, 1897, is an act imposing taxes on the personal property therein specified; and as such it must comply with the fundamental principles of taxation, and the provisions of the constitution relating thereto. It is of the very essence of taxation that it should be relatively equal and uniform. This right to equality is insured to the people by the constitution, Art. IX., §§ 1 and 2, which provides that, "All taxes shall be uniform upon the same class of subjects;" and prohibits the exemption of any property from taxation, except as therein set forth. Cope's Estate, 89; Hagy's Estate, 94; Graff's Estate, 94; D'Aimbert's Estate, 95; Lacey's Estate, 95; Smith's Estate, 95; Bell's Estate, 95; Eshleman's Estate, 96.

While the constitution recognizes the authority of the legislature to classify the subjects of taxation, a classification that is based solely on a difference in quantity of precisely the same kind of property, is necessarily unjust, arbitrary and illegal. Id.

Even if the act were one imposing a bonus on the devolution of decedents' estates it would, in its present form, still be unconstitutional as violating Art. III., § 7, of the constitution. Id.

The exemption in the collateral inheritance tax law is not a precedent, as the statute making that exemption was enacted in 1826, when the constitution did not impose the present limitations, as to exemptions, on the power of the legislature. Id.

The act of May 12, 1897, is unconstitutional as violating the provisions of the constitution of Pennsylvania, requiring uniformity in taxation. Portuondo's Estate, 94.

A piece of land near a church, upon which is built a house, for the use of the janitor, which is no part of the church structure, and has no direct or physical connection therewith, is not exempt from taxation under the act of May 14, 1874, P. L. 158. (Super. Ct.) City of Pittsburgh *v.* Third Presbyterian Church, 215.

TAXES. One who holds title to land in trust, is not personally liable for the amount of taxes thereon which have accrued while he holds said title, and which the mortgagee of said property has been compelled to pay; this is the case although the deed by which the land is held in trust is on its face absolute. (C. P.) Landreth *v.* McCaffrey, 184.

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TIME. There is no material difference in the direction as to advertising sheriff's sales of real estate, between the act of March 27, 1824, and the act of June 16, 1836, the former directing the sheriff to advertise "once a week *for* three successive weeks," and the other to advertise "once a week *during* three successive weeks;" in either case it is sufficient if the advertisement be inserted in three successive periods of a week each, although the insertions may not be on the same day of the week and they may not cover twenty-one full days between the first advertisement and the sheriff's sale. McKee *v.* Kerr, 541.

TOWNSHIP. The supervisors of a township are not bound to foresee and guard against accidents happening on their roads through the breaking of harness. (Super. Ct.) Habecker *v.* Lancaster Township, 51; and see Boone *v.* East Norwegian Twp., 284.

See MUNICIPALITY; NEGLIGENCE.

TRESPASS. Trespass is not the proper action to recover damages for the taking of private property in the widening of a city street, and a plaintiff in such an action cannot attack the legality of proceedings of viewers to which he had been party, after they had proceeded to final decree. (Super. Ct.) Smith *v.* City of Lebanon, 247.

Where, without appraisement, goods distrained by a constable are sold by him, he is liable in trespass to the tenant. (Super. Ct.) Hazlett *v.* Mangel, 116.

TRESPASSER. A child of tender years may be a trespasser and subject to the consequences of his trespass if injured in the course of his trespass. (Super. Ct.) Feehan *v.* Dobson, 65.

Where an owner of a lot surrounded by a low wall, habitually places thereon hot coals or cinders, he is not responsible to a child of tender years, who, accompanied by an elder brother, climbs over the wall from the highway and, deceived by the appearance of ashes on top of a pile of coals, goes thereupon and is burned by the underlying hot coals. Id.

A railroad company owes no greater duty to an infant trespassing upon its tracks than to an adult. Brague *v.* Northern Central Ry. Co., 415.

TRUST COMPANY. A trust company, under the act of May 9, 1889, P. L. 159, has, in the absence of specific restriction in its charter, corporate capacity to act as committee of a lunatic. Equitable Trust Co. *v.* Garis, 41.

TRUSTS AND TRUSTEES. A trust which provides for future contingent interests, which are not represented by anyone competent to act, cannot be set aside by any form of transfer or agreement. Eshleman's Estate, 96.

A., by her will, gave one-half of her estate to her executor in trust for her son D., to be invested by the trustee and applied to the support of D. and his family, during D.'s life. In the event of destitution on the part of D., the trustee was given a discretion to use so much of the principal as he, the trustee, saw fit, for D.'s benefit; on D.'s death the trustee to pay the income for the support of D.'s widow and children; if D. should leave only a widow then to pay her maintenance, not exceeding $200 per annum during widowhood; on death or marriage of widow, the principal to be given to D.'s children, in default of such children or issue then to testatrix's daughter M. M. and D.'s wife executed releases to D., who then (being thirty-nine years of age, and having no children, his wife being thirty-five) demanded that the corpus of the one-half of the estate be paid to him and not to the trustee: *held*, that on account of

TRUSTS AND TRUSTEES—*Continued.*

the possibility of children, the trust must be maintained. Id.

While the act of April 9, 1868, P. L. 785, does not require the Orphans' Court to remove a trustee upon a petition dictated by the mere caprice of the life tenant, cestui que trust, yet wherever there is a feeling of hostility on the part of such cestui que trust towards the trustee, which is not a mere caprice, and is deep-seated and destructive of mutual confidence between the parties, the trustee should be removed, although his personal integrity and business qualifications are not questioned. Nathans's Estate, 169.

Testator bequeathed securities to trustees in trust for sole and separate use of S. for life, with remainder to the heirs of her body. A. and B., sons of S., were made trustees. On September 26, 1887, they executed a blank power of attorney to transfer certain of these securities, and delivered them to X., a firm of which A. was a member, taking the firm's receipt therefor; the cestuis que trustent assented to this. On March 19, 1890, X. pledged these securities to C. to secure a loan of $24,000, warranting in writing the title to same. Later A. was removed from the trust, and C. petitioned the Orphans' Court to require B., the remaining trustee, to file an account and show cause why he should not be removed: *held*, that the petition should be dismissed, as C. did not have such a present interest as is required by the act of April 17, 1869, to maintain the same. Wagoner's Estate, 265.

B. confessed judgment for $15,500 to D. as trustee, to secure D. for $1400, which B. owed him, and for $14,100, which B. owed the plaintiff bank. Sale was made and the stock of B.'s goods purchased by D. as trustee for the bank, with its full knowledge and consent, and the business was carried on by D. as such trustee for more than a year. Action was then brought by the bank upon a promissory note of B., defendant: *held*, the defendant should have been allowed to show what the stock of goods purchased under the execution was worth, what it was sold for, what was done with the proceeds, and that the bank had received or ought to have received satisfaction for the note in suit out of the subsequent management and disposition of the goods by the trustee. Quaker City Nat. Bank *v.* Hepworth, 271.

One who holds title to land in trust is not personally liable for the amount of taxes thereon which have accrued while he holds said title, and which the mortgagee of said property has been compelled to pay; this is the case although the deed by which the land is held in trust is on its face absolute. (C. P.) Landreth *v.* McCaffrey, 184.

UNDUE INFLUENCE. Where it appears that a sole beneficiary under a will had a controlling agency in procuring its execution, and that the alleged testatrix, although possessed of testamentary capacity, was eighty-eight years old, and had the bodily infirmities incident to such age, a presumption of undue influence is raised, and the burden is upon such beneficiary to rebut the same by showing affirmatively that the testatrix understood the nature of the paper she signed and that the beneficiary used no undue influence over her. Scattergood *v.* Kirk, 313.

VENDOR AND VENDEE. Where goods capable of delivery are allowed by a vendee to remain in the possession of the vendor, no lease being executed and the vendor not being in the relation of agent or servant of the vendee, the mere fact that

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VENDOR AND VENDEE—*Continued.*
the vendee has a power to assume control of the property, which power she does not exercise, will not make the sale a valid one as against the creditors of the vendor. (Super. Ct.) Hastings *v.* Sproul, 37.

A. agreed to purchase from B. a show case, and, upon B.'s asking for a financial reference, A. replied that he was dealing with C., and directed B. to ship the case to C., or in his care. B., without further inquiry, shipped the case to C., and when the carrier refused to deliver to A., the latter secured from C. a writing directed to the agent of the carrier, as follows: "Upon A.'s paying all charges you may have on one show case from R., N. Y., and signing receipt for same, you can deliver the case to him." Signed, C. In a suit by B. against C. for the price of said case: *held*, (1) that B. was negligent in failing to inform C. of the arrangement prior to the shipping, if he intended to hold the latter responsible; (2) that under the circumstances the giving of the writing to A. was not such negligence, nor did it constitute such a receipt of the case, as to render C. liable for the price of the same. (Super. Ct.) Farley *v.* Kline, 39.

Upon a contract for the sale of any article upon terms therein set forth, vendee's title to the article only vests upon his performance of his part of the contract. Woolsey *v.* Axton, 299.

In a sale of personal property, regard must be had, not only to the character of the property, but to the nature of the transaction, the position of the parties and the intended use of the property. No such change of possession as will defeat the fair and honest object of the parties is required. A transfer of personal property void as to existing creditors is not necessarily void as to subsequent creditors. It is fraudulent only as to those it was intended to defraud. McCullough *v.* Willey, 364.

VERDICT. Relation of judgment to date of, under act of March 23, 1877, P. L. 84. See JUDGMENT. (Super. Ct.) Howes *v.* Dolan, 62.

VIEW. It is for the jury to determine what was the condition of the street at the point where and when an accident took place, and, as a personal view is valuable in aiding the jury to form an intelligible conclusion, it is proper to permit the jury to visit the premises as a part of the trial. O'Malley *v.* Borough of Parsons, 307.

WAIVER. A waiver of the debtor's exemption, under the act of April 9, 1849, as to any lien enures to the benefit of all prior liens. (Super. Ct.) Hoerner *v.* Cordell, 213.

The holder of a first mortgage, given to secure a bond in which there was a waiver of exemption, may by agreement in writing give priority of lien to judgments sebsequently entered, which do not contain a waiver, and if he do so and, thereafter, enter judgment on the bond containing such waiver, the said waiver will enure to the benefit of the holders of the judgment given priority. Id.

As to waiver of tort, see (U. S. C. C.) Haines *v.* Franklin, 420.

WARRANTY. The subscribers to the certificate required by the corporation act of the legislature of Pennsylvania of April 29, 1874, as a preliminary to incorporation, certified under oath and seal that $50,000 had been paid in in cash; this statement was untrue: *held*, that it could not be treated, by a person dealing with the corporation, as a warranty that $50,000 had been paid in, so as to sustain an action of assumpsit, but was a fraudulent misstatement for which the remedy was in tort. (U. S. C. C.) Haines *v.* Franklin, 420.

WARRANTY—*Continued.*

WAR REVENUE ACT. A promissory note, which has not been stamped in accordance with the act of congress of June 13, 1898, is not admissible in evidence in the courts of Pennsylvania. (C. P.) Dornenhower *v.* Stevens, 264.

WATER AND WATER-COURSES. It is the right of a riparian owner to have the water flow as it was wont, without material diminution or alteration. (Super. Ct.) Irving's Executors *v.* Borough of Media, 131.

The ownership of riparian land does not include ownership of the water which flows over a part of it; the owner has, however, for certain purposes connected with the land, a right to divert and consume water, but this gives him no right to divert or consume it for purposes unconnected with the land; a borough or company, authorized to carry on the business of the distribution and sale of water, cannot, therefore, draw water from a stream for such purposes, to the injury of a lower riparian owner, without liability to make compensation for the same. Id.

Where a claim to take water rests upon prescription, the extent of the claim is the amount of water taken for twenty-one years before action was brought. Id.

Where a borough diverts water, for the purposes of distribution among its citizens, to the injury of a lower riparian owner, it is liable to be made to account therefor in a common law action. Id.

WILL. Where there are two competent witnesses to a will, the fact that a third signature was added, of a person not present at the time the will was signed, does not of itself affect the validity of the instrument. Scattergood *v.* Kirk, 313.

Declarations of a testator as to his intentions are admissible when the will is disputed on the ground of fraud or forgery, but proof of such declarations is not of itself sufficient to establish a will or overcome the testimony of subscribing witnesses. Swope *v.* Donnelly, 57.

The testator bequeathed to his daughter M. $1000 to be invested in property two years after his death; to his daughter P. $1000, to be paid to her two years after M.'s dowry became due, and to his daughter A. $1000, to be paid to her two years after P.'s dowry became due. In the paragraph relating to his bequest to M., he said: "If she should die before her husband J., the above legacy is to go to her second son J." In the sixth paragraph of his will he devised the farm he lived on to his son J., with the instruction that he should not sell or dispose of it while his sisters P. and A. "remain single or unmarried." In the same paragraph, he devised to J. a house and lot, "which he, J., has the privilege to sell for the payment of the within legacies which he is to pay." The seventh paragraph of the will is as follows: "Should any of my said daughters die before they receive their dowries, in such case J. shall be exempted from the payment thereof." The testator died in March, 1891, and his daughter M. in May, 1891: *held*, that the legacies did not vest in the daughters previous to the time fixed for the payment of them, it being the intention of the testator that they should not receive the legacies bequeathed to them except on the condition of their surviving the period designated for payment. Thompson's Appeal, 315.

A testator directed that on the death of his wife

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WILL—*Continued.*
his estate should be divided into as many shares as he should leave children or issue of deceased children; the will then provided: "I direct my trustees to pay to each of my sons as they respectively attain twenty-one years of age five thousand dollars; and on their attaining twenty-five years of age I empower my trustees to pay or transfer to them respectively such further sum or property as shall, together with the amount theretofore received by them from myself as an advancement or under this will, amount to the half of their share in my estate; the same being divided into as many shares as there are children or the issue of deceased children. This power is to be exercised either in the whole or partially and from time to time as my trustees shall deem proper looking to the habits, condition and circumstances of my said sons respectively. The residue of the share of my sons shall be retained by my trustees and the income paid to the said sons" upon a spendthrift trust, with remainder over: *held*, the effect of the will was to divide the share of each son into three parts, one part, $5000, to be paid absolutely at twenty-one; a second, not less than one-half, to be put into strict trust, and the third, of indeterminate amount, to go into or to be exempted from the trust according to the exercise of the discretion of the trustees; *held*, further, that the trustees must actually exercise this discretion in order to impress unpaid money with the trust; if they simply failed to pay over, the amount unpaid would on the death of a son pass as part of his estate, but if there was an active exercise of discretion not to pay over to any son, then the amount concerning which discretion had been so exercised would not be held to have passed to the said son, even in favor of a creditor. Baeder's Estate, 73.

The rule that bequests of a life estate in personalty, with a power to consume, give an absolute estate, is subject to the rule that the real intent of the testator, ascertainable from the will, is to be carried out. Tyson's Estate, 123.

A bequest to M., testator's wife, of personalty, "to have the same and use it at pleasure for her sole use as fully, largely and amply to all intents and purposes as I myself could or might have done in my lifetime, with full power at any time to sell or dispose of any part or the whole of the same, and also power and authority to collect all outstanding moneys of whatsoever nature or kind and to be exclusively for her use and disposal," with a provision that on the death of M., the executors shall sell "all my personal property if any shall remain" and distribute the proceeds thereof, together with the proceeds of testator's realty, among his brothers and sisters, and the brothers and sisters of M., does not give to M. an absolute estate in the personalty, but a life estate with the right to consume the principal for herself, but not the right to transfer the estate with the purpose to defeat the intent of the testator as to the distribution of the residuum after M.'s death. The power to consume is ample, but it must be exercised in good faith in accordance with testator's purpose in giving it. Id.

A. by his will gave to his daughter Sarah certain lots of ground "for her own use and profit during her natural life and provided she leaves no heirs, in that case said property to be sold and the proceeds divided amongst her brothers and sisters and their heirs." A. also gave to his daughter Caroline certain other lots of ground, "the said lots for her sole use and benefit during her natural life and for her heirs; if dying she leaves no heirs, then the said property to be sold and divided amongst her brothers and sisters and their heirs": *held*, that under the above devises, Sarah and Caroline each took an estate in fee simple. Reimer *v.* Reimer, 453.

The testator, by a codicil to his will, directed that out of the shares of his daughters, as fixed by the will, there should be paid to them respectively, on their arrival at the age of twenty-one years, a sum of $20,000. He then directed his executors to divide all the residue of his estate into as many parts or shares as there might be children or issue of a deceased child or children living at the time of his death, and the share or shares respectively of any child or children so living at the time of his death to grant, assign and pay over to a trustee to invest the same and hold such share or shares in trust for such child or children severally and respectively: *held*, (*a*) that the words "share" and "shares" as thus used in the will clearly imported share or shares in the residue of the estate, and the $20,000 should be paid out of the principal; (*b*) the provision for accumulations in the will was void under the act of April 18, 1853, and the whole amount of unlawful accumulations belonged to the cestui que trust, and must be paid to her absolutely. Farnum's Estate, 192.

A. made a will by which he left to C. $1000, and recited that his wife B. had given him her estate. B. three days later made a deed of all her property to A., reciting that out of the sum given, A.'s executors were to pay "the C. legacy of $1000 mentioned in my husband's will." After B.'s death, A. made a will revoking all prior wills and giving C. $500. This coming to C.'s ears, A. confessed to C. a judgment note for $1000, which recited the prior will and that the judgment note was to secure the payment of the $1000. After A.'s death, C. claimed both the $1000 and the $500. There was evidence that A., after the execution of the judgment note, frequently said that C. would now get the $1000 instead of the $500: *held*, that C. was entitled to the $1000 only, and that it was not the intention of A. that she should receive both the amount of the judgment and the $500 legacy. (Super. Ct.) Ritter's Estate, 194.

A. died, leaving a carefully prepared formal will in writing, which was admitted to probate; subsequently, there was offered for probate as A.'s last will, two tin boxes and their contents. Upon one of the boxes was affixed the following writing: "In case of my death I want this box given to my attorney, A. K. Stevenson, 439 Grant street. G. T. Jacoby." No date was affixed to this writing; inside of this box were sixteen envelopes containing certificates of stock, deeds, receipts, etc., constituting the bulk of A.'s estate. No. 1 was endorsed "G. T. Jacoby" and contained the securities of the greatest value. No. 2 was endorsed "Tax receipts from 1866 to 1887. Geo. T. Jacoby," and contained receipts only. No. 3 was endorsed in A.'s writing, "This goes to Miss Mary Gross, 223 42nd street, Pittsburgh, Pa., twenty Tarentum bonds," and contained twenty bonds of $500 each, payable to bearer. No. 4 was endorsed, "Roselia Maternity Hospital, Pittsburgh," and contained 854 shares of mining stock, and the transfer on back of same was signed by G. T. Jacoby. No. 5 was endorsed, "Home for the Friendless, Allegheny City," and contained mining shares with blank transfer signed by G. T. Jacoby. No. 7 was endorsed, "This is to go to Mrs. Mary Downs and her family, Greenville, Mercer county, Pa.," and

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WILL—*Continued.*
contained certificates for large amounts of stock. No. 9 was endorsed the same as No. 7, and contained securities. The other envelopes had endorsements of a name or a description of the contents: *held*, that the box and contents, together with the signed direction to deliver the same to his attorney, did not constitute a testamentary act. *Semble*, that the direction on the other box, viz.: "This box belongs to Mrs. Mary Downs—must be opened only by her, children this is my will, Dr. G. T. Jacoby," together with the paper inside containing the written words, "Mary, I want you to divide the contents of this box between your children that is just living when it falls into your hands. I hope you will carry it out to the letter. Dr. G. T. Jacoby," was not his will "because the box contained nothing but a few old daguerreotypes, some silverware and a very little jewelry." Estate of George T. Jacoby, 17.

WILL—*Continued.*
A. by his will devised land to his two sons, also naming them as executors, but desired them "to pay to each of my daughters, Jane, Malinda, Elizabeth, and Anna Crossland a sum of money equal to the sixth part of the value of the coal under all my lands; my executors to have power to carry out this provision of this my will, by selling if necessary the whole part or any part of the said coal if they should consider that the best way to carry the same into effect, but this does not require them to sell the same unless they wish to do so": *held*, that this provision was not to give the daughters any estate or interest in the coal, but merely a money legacy the amount of which was to be determined by the value of the coal, and when that was liquidated in any valid way the coal ceased to be a factor in the matter. Brownfield's Appeal, 466.

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